

For docket see [05-1258](#)

United States Court of Appeals,
Fourth Circuit.
Stephanie HOWARD, Appellant,
v.
Gordon R. ENGLAND, Appellee.
No. 05-1258.
October 17, 2005.

On Appeal from the District Court for the Eastern District of Virginia

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

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*1 I. The District Court's Decision

We agree with the Navy that trial court appears to have applied some type of negligence standard. Navy Brief at 23. However, the real problem with the lower court's decision is that the trial judge did not correctly apply the *Farragher-Ellerth* doctrine [FN1] or the law of the Circuit. Instead, the district court found that the Navy's policy was not "'perfect'" but a "'fair and adequate'" policy *under the law as it existed back then in the mid-1990s.*' JA 569-570 (emphasis added). This is legal error because there has been no change in the statutory law governing sexual harassment and other courts of appeal have not hesitated to apply *Farragher* and *Ellerth* to events *2 occurring prior to or around the same time as McCall sexually harassed Howard. [FN2]

FN1. The Supreme Court established the defense in [Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 752 \(1998\)](#) and [Farager v. Boca Raton, 524 U.S. 775, 782](#)

(1998).

FN2. *E.g.*, *McCombs v. Meijer, Inc.*, 395 F.3d 346, 355 n. 9 (6th Cir. 2005) (harassment occurred from October, 1999 until January, 1998); *Petrosino v. Bell Atlantic*, 385 F.3d 210, 225-226 (2d Cir. 2004) (harassment occurred from 1990 to 1997). We note the Navy did not address either of these cases in its Brief.

There is no justifiable basis for giving the Navy a free pass for McCall's actions, particularly since the Navy did not even bother to comply with the EEOC's 1990 Guidelines. [FN3] In 1990, the Equal Employment Opportunity Commission (EEOC) issued a policy statement "enjoining employers to establish a complaint procedure "designed to encourage victims of harassment to come forward [without requiring] a victim to complain first to the offending supervisor." ' ' *Faragher*, 524 U.S. at 806 (citation omitted) (alteration in original). [FN4] There is no serious dispute that the Navy's *3 1993 policy fails this test. Howard Brief at 19-21.

FN3. Certainly, if the Navy "obviously intended not only to send a message about its disdain for sexually harassing behavior and to provide a mechanism for aggrieved employees to be heard ..., see Navy Brief at 48, the Navy would have promulgated a policy consistent with the EEOC's 1990 Guidelines prior to 1997. See JA 457 *et seq.* The Navy offers no explanation for the failure to comply with the 1990 Guidelines prior to 1997.

FN4. The Navy's 1997 policies adopted *after* the events at issue in this litigation effectively concede the inadequacy of the 1993 sexual harassment policy in place at the time of McCall's sexual harassment of Howard. JA 457-474. The Navy's contention that the 1990 policy was better than that of *Ocheltree v. Scollon Productions Inc.*, 335 F.3d 325, 333-335 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 1411 (2004), Navy Brief at 42-43, certainly does not mean that its policy was adequate as a matter of law. In fact, the Navy describes its sexual harassment policy as "comprehensive," but never claims it is adequate as a matter of law. Navy Brief at 19.

Second, Judge Brinkema focused on "reaction or the action taken in November," and characterized it as "about the fastest I've seen an employer do in a long time in these cases." JA 569. This Court should not be swayed by this observation because the Navy did not move quickly and did not investigate Howard's claims until many months later.

Even if this Court finds the extended delay in conducting the investigation was adequate as a matter of law, the trial court nevertheless erred in refusing to consider the legal consequences of the events in March 6, 1996. Judge Brinkema did not address in her decision Howard's argument that the Navy was on actual and constructive notice of the McCall problem prior to November, 1996, that the investigation was inadequate, and that the failure to take disciplinary action against McCall rendered the Navy's policy ineffective. JA 569-570.

The trial court erred in applying her own subjective notion of what was an adequate policy "in the mid-1990s," JA 570, by failing to apply the legal standards articulated in *Faragher* and *Ellerth*, and by ruling that the Navy's response was adequate as a matter of law. As the Supreme Court observed, "although the court should review the record as a whole, it *must disregard* all evidence favorable to the moving party that the jury is not required to believe." *4*Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151 (2000) (citation omitted) (emphasis added). Accordingly, the Court should reverse.

II. The Holding in *Mikels*

In a rhetorical flourish, the Navy's Brief refers to Howard "attempt to obfuscate the true nature of the *Mikels [v. City of Durham]*, 183 F.3d 323, 331 (4th Cir. 1999) holding." Navy Brief at 29. This accusation is based on the inaccurate representation that *Mikels* presented a "virtually identical factual record." Navy Brief at 18. We respectfully disagree and suggest the Navy simply misconstrues *Mikels*.

First, *Mikels* involved a corporal with limited authority and a private, both employed at a city police department. Here the disparity in power is manifest; Howard was more like a private and McCall's rank was closer to that of a captain who had substantial authority in the organization.

In *Mikels*, the plaintiff had immediate access to her supervisor for filing a complaint. *Mikels, supra*, at 331. Here, on the other hand, the Navy's policy required Howard to approach the harasser first. The *Mikels* Court ruled: "The fundamental determinant of this form of vicarious liability is ... whether the particular conduct was "aided by the agency relation." *Id.* at 331-332 (citation omitted). "The determinant is whether as a practical matter his employment relation to the victim was such as to constitute a continuing threat to her employment conditions that made her *5 vulnerable to and defenseless against the particular conduct in ways that comparable conduct by a mere co-worker would not." *Id.* at 333. The court must examine the facts presented by each case, as the "most powerful indicator of such a threat-induced vulnerability deriving from the supervisor's agency relation lies in his authority, though not exercised in the particular situation,..." *Id.* There is a dispute of material fact as to whether McCall's harassment was "aided by" his place in the Navy hierarchy many levels above Howard. [FN5]

FN5. The 1999 EEOC guidelines provide:

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

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

Viewed in this light, Howard's characterization of McCall as a "co-worker" before she had counsel and many years before the Supreme Court issued its decision in *Farragher* and *Ellerth* is only marginally irrelevant. The issue for the court [and *6 ultimately for the jury] to decide is whether McCall's conduct was "aided by the agency relation." Contrary to the Navy's view, Brief at 34, there is no genuine "sham declaration" issue in this case and the jury should be allowed to decide whether McCall was "aided by" his place in the Navy for the purposes of *Fanrragher* and *Ellerth*. [FN6]

FN6. The Navy asserts "there is a complete absence of any record evidence to the effect that McCall's harassing behavior differed at all-let alone become palpably worse-upon Howard's transfer to McCall's section," Navy Brief at 32-33 (footnote omitted). This representation appears to suggest that McCall's thrusting his fingers into Howard's vagina is not "palpably worse," a remarkable statement for a government agency to make.

III. Relevant Factors for Determining Liability for Co-Worker Harassment

Even if the Court affirms the ruling that there is no factual dispute as to whether McCall's sexual harassment of Howard was "aided by" his much higher rank, the trial court still erred in entering summary judgment against Howard. There are, at the very least, disputes of material fact as to whether the Navy was negligent.

The Navy complains that Howard is: "Treating jurisprudence developed under each individual standard as interchangeable and is attempting to import concepts from the supervisory arena to the co-worker domain where they are patently irrelevant." Navy Brief at 21 (footnote omitted). Later in its Brief, the Navy accuses Howard of "importing supervisory jurisprudence into the coworker context." Navy Brief at 42, *7 n. 13. The Navy cites no case to support its rhetorical excesses claiming that: "Howard's brief veers wildly off course, improperly attempting to borrow concepts

developed in, and unique to, the court's supervisor jurisprudence in to the co-worker arena.'" Navy Brief at 36.

The Navy advances no policy reason why the definition of an effective sexual harassment policy should be different, depending on whether the harasser is a coworker, or a supervisor. The Navy fails to explain why the concepts in the "court's supervisory jurisprudence" are or should be "unique" to that jurisprudence. Navy Brief at 36. The Navy advances no policy reason why a sexual harassment policy that is inadequate for the purposes of the application for the *Faragher-Ellerth* defense differs from a policy that is inadequate for the purposes of determining employer liability for sexual harassment by a co-worker. See Navy Brief at 42, n. 13. The Navy advances no policy reason why the standard for assessing the adequacy of the employer's investigation or remediation should be different for co-worker harassment.

Despite the Navy's rhetoric, there is no serious dispute regarding facts to be considered in analyzing liability for harassment by co-worker as there appears to be no case law or other authority to support the Navy's argument. [FN7] The EEOC's position *8 [and the standard for negligence] is clear, "an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.'" [29 C.F.R. § 1604.11\(d\)](#). The EEOC's regulations require analysis of whether the employer had actual and constructive knowledge of the harassment. The EEOC's regulations also require the court to consider when the Navy took action and whether the action taken is appropriate corrective action.

FN7. The Supreme Court has expressed no views on the employer liability standard for co-worker harassment. [Pennsylvania State Police v. Suders, 124 S. Ct. 2342, 2352 n. 6. \(2004\)](#).

The D.C. Circuit stated: "While the reasonableness of an employer's response to sexual harassment is at issue under both standards, the plaintiff must clear a higher hurdle under the negligence standard, where she bears the burden of establishing her employer's negligence, than under the vicarious liability standard, where the burden shifts to the employer to prove its own reasonableness and the plaintiff's negligence. [Curry v. District of Columbia, 195 F.3d 654, 660 \(D.C. Cir. 1999\)](#). [FN8] In reaching this conclusion, the D.C. Circuit relied on [Shaw v. AutoZone, Inc., 180 F.3d 806, 812 n. 2 \(7th Cir. 1999\)](#) ("[T]he reasonableness of the *9 employer's actions in preventing and responding to sexual harassment is relevant under both standards, the difference being who bears the burden of proof.'").

FN8. In *Curry*, the District "had established an effective complaint procedure" and was therefore entitled to rely on its employees to bring problems with coworkers to its attention. *Id.* at 661. The Navy did not have such an effective complaint procedure because Howard was required to communicate with McCall first. Accordingly, the Navy may not rely on its inadequate policy to escape liability.

Thus, contrary to the position asserted by the Navy Brief at 37, Howard has "properly frame[d] the actual inquiry before this Court." This court should follow the EEOC and the other circuits addressing the issue in deciding that an employer must have an effective sexual harassment policy and an effective response to complaints of sexual harassment to avoid liability for sexual harassment by a co-worker. [FN9]

FN9. The Navy's citations to [Moore v. Virginia Transit Co., 50 S.E.2d 268 \(VA. 1948\)](#) and [Talley v. Daneky Med., Inc., 179 F.3d 154, 157-158 \(4th Cir. 1999\)](#) are puzzling; the first case involves a collision between an automobile and a bus and the second case involves a products liability claim arising out of an alleged defect in a medical device.

IV. Navy's Misplaced Reliance on *Spicer*

The Navy relies heavily on this Court's holding in *Spicer v. Virginia Department of Corrections*, 66 F.3d 705, 710 (4th Cir. 1995) and claims there is an absolute rule stating that "'liability must cease'" because there was no further harassment after November. Based on its cramped reading of *Spicer* and its failure to discuss later decisions from this Court analyzing *Spicer*, the Navy asks this court to ignore the Navy's untimely and deeply flawed response to Howard's complaint, reject persuasive case law from the 9th Circuit, [FN10] and create a split in the circuits.

FN10. *Nichols v. Azteca Rest. Enterprises*, 256 F3d 864, 876, n. 10 (9thCir. 2001).

*10 The Navy's analysis is based on a fundamental misunderstanding of the nature of employer liability for co-worker harassment until Title VII. "'The act of discrimination by the employer in such a case is not the harassment, but rather the inappropriate response to the charges of harassment.'" *McCombs, supra*, 395 F.3d at 353, citing *Blankenship v. Parke Care Ctrs., Inc.*, 123 F.3d 868, 872 (6th Cir. 1997).

Further, the result in *Spicer* is distinguishable because that employer had an effective sexual harassment policy. There are, at the very least, disputes of material fact as to whether the Navy had an effective policy in light of its failure to comply with the 1990 EEOC Guidelines and its constructive and actual knowledge of McCall's actions.

In *Mikels*, this Court analyzed the requirements of "'prompt and adequate remedial action to correct the harassing conduct.'" *Id.* at 329-330. The court found these requirements were met where the employer promptly reprimand[ed] and warn[ed] the harasser, first orally then formally in writing for the record, in quickly convening the entire squad to forbid further "'horseplay.'" The employer suspended the harasser for two-months and issue an official reprimand. The Navy took no such action here.

The *Mikels* Court also acknowledged the continuing viability of this court's decision in *Paroline v. Unisys Corp.*, 879 F.2d 100, 106 (4th Cir.1989), which is *11 factually closer to the situation presented here. In *Paroline* the employer was already on notice of the harasser's propensities and of the demonstrated inadequacy of mere verbal and written reprimands and warnings to deter him. The *Mikels* Court agreed with *Paroline* that based on this prior history, a jury might reasonably find that the employer's response following Paroline's complaint, like those responses following earlier complaints, was equally ineffectual. Here, as in *Paroline*, there is a prior history of demonstrably ineffectual, hence possibly "'sham,'" responses to McCall that draws into question the adequacy of the overall remedial response to Howard's complaint. [FN11]

FN11. Since Howard saw the vagina screen-saver it appears that the Navy's previous "'remedial'" efforts were a sham. JA 288-292.

The Navy argues that there is no connection between the vagina screen-saver on McCall's computer and the sexually suggestive pictures he displayed in his work area. Navy Brief at 39-40. We submit that a reasonable jury could find there is an obvious connection between the constant sexual stimulation from the screen saver and other pornographic materials and McCall's harassment of Howard based on his heightened state of sexual arousal.

Any doubt about the proper interpretation of *Mikels* is resolved by this Court's opinion in *White v. BFI Waste Services, LLC*, 375 F.3d 288 (4th Cir. 2004). In *White*, this Court reversed because there were issues of material fact as to whether the policy was effectively enforced. *Id.* at 299. We submit there are in this case disputes of *12 material fact not only as to the adequacy of the policy, but also whether it was effectively enforced and whether the Navy took appropriate action against McCall.

Since the *White* Court also reaffirmed the continuing vitality of *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262 (4th Cir. 2001), Howard can rebut any presumption of "'reasonable care arising from the distribution of an anti-harassment policy

through proof that the policy was adopted or administered in bad faith or that the policy was otherwise defective or dysfunctional.'" *Id.* at 266.

The *White* Court's treatment of management's failure to take any action because the supervisors always denied making any racially derogatory remarks is also instructive. Rather than allowing BFI a free pass on the grounds of alleged "credibility disputes," like those asserted by the Navy, this Court ruled the jury could find "the company unreasonably failed to correct [the supervisors'] offending behavior by neglecting to enforce the policy. [The employer's] entitlement to the affirmative defense is therefore a triable issue.'" *Id.* at 300, citing [Spriggs v. Diamond Auto Glass, 242 F.3d 179, 188 \(4thCir. 2001\)](#).

When the holding of *Spicer* is considered in context of the *Mikel's* court's discussion of the continuing viability of *Paroline* and in light of this Court's ruling in *White*, the Navy's reliance on a single phrase taken out of context is misplaced.

*13 V. The Law of the Circuit

In *Ocheltree v. Scollon Productions, Inc., supra*, this court held "an employer may be charged with constructive knowledge of co-worker harassment when it fails to provide reasonable procedures for victims to register complaints.'" *Id.* at 345. Under the law of the Circuit, the trial court erred in focusing solely on the persons to whom Howard reported the harassment, not on whether the Navy provided "reasonable procedures for victims to register complaints.'" *Id.* Since Howard followed the policy by writing a letter to McCall and did report the incident to Pendleton and Willard, the Navy was placed on actual and constructive notice of the harassment.

The Navy argues that Pendleton was not a supervisor or manager or in chain of command. Navy Brief at 12. We submit his precise position is irrelevant because he was a management official of the Navy in the Human Relations office and held a position where he should have been expected to and/or was required to take action. When Pendleton had actual notice that a senior Navy employee "put his hands on me," The Navy had a duty to act. [FN12]

FN12. The Navy does not directly address whether Lt. Col. Willard had any duty to report the harassment.

Pendleton knew enough facts to recognize that Howard had been sexually harassed and the harassment was serious enough for Pendleton to advise Howard to *14 comply with the Navy's policy by writing a letter to the McCall. If Howard could not rely on the Human Relations Department to take action, then who in the Navy could she expect to respond? See [Williamson v. City of Houston, 148 F.3d 462, 466 \(5thCir. 1998\)](#) (discounting argument that the supervisor to whom plaintiff reported the harassment was not "upper management" because the issue of constructive notice "does not turn on labels attached to levels of hierarchy.').

Under *Ocheltree*, there is no merit to the Navy's argument that no "legally cognizable notice" prior to November, 1996. Navy Brief at 18. The Navy admits this is the holding in *Ocheltree*, but argues the "Court's analysis on this issue was "highly contextual and based on the circumstances presented to it.'" Navy Brief at 45. The court should reject this remarkable argument because there is no reason why this court sitting *en banc* would articulate legal principles limited to the facts of a single case.

The Navy claims Howard has a "myopic view.'" Brief at 42. But we submit the Navy seeks to defeat liability by a circular argument that the Navy did not have notice until Howard complied with a policy that is inadequate as a matter of law because the policy required Howard to go to McCall first and did not require Willard or Pendleton or Gibson to take ally action. The Navy seeks to bootstrap its claim for exemption from its duty to have an adequate sexual harassment that complies with either of the EEOC's Guidelines by blaming the victim for failing to comply with an inadequate *15 policy.

We submit that this Court's decision in *Ocheltree* requires supervisors to report the alleged conduct up the chain of command and the absence of any requirement that Pendleton, Willard and Gibson forward complaints to any person "in a position to take action" renders the Navy liable. The Navy simply disagrees. Navy Brief at 45 n. 16.

The *Ocheltree* Court was also skeptical of the requirement that "Anyone having a complaint or problem should first try to resolve it with their immediate supervisor." *Id.*, [335 F.3d at 334](#). The Court ruled that: "If this amounts to a sexual harassment policy, a jury could reasonably find that it fails to provide reasonable avenues of complaint." *Id.* Under *Ocheltree*, a reasonable jury could find that the Navy had actual or constructive knowledge of McCall's harassment of Howard because the agency breached its duty to provide adequate complaint procedure.

A reasonable jury could make the basic finding that the Navy's sexual harassment policy did not provide Howard with reasonable avenues for voicing her sexual harassment complaints. *Ocheltree, supra*, [335 F.3d at 333-335](#). [FN13] In other words, the Navy "did not exercise reasonable care in setting out the channels by which *16 it could receive reports [of sexual harassment], and it is therefore in no position to rely on those inadequate channels to claim that it did not receive notice." *Id.* (citation omitted); See *Dees v. Johnson Controls World Services, Inc.*, [168 F.3d 417, 422 \(11th Cir. 1999\)](#) (employer can be held liable despite its immediate and appropriate corrective action in response to harassment complaint if it had knowledge of the harassment prior to the complaint and took no corrective action).

FN13. In *Ocheltree*, court discussed the employer's requirement that: "If a supervisor cannot or does not adequately resolve an employee's complaint, the employee has the responsibility of complaining to the company president or vice president." *Id.* The Fourth Circuit held that "This approach seems ill designed to ensure that upper management learns of harassment." *Id.*

An employer cannot avoid Title VII liability for coworker harassment by adopting a "see no evil, hear no evil" strategy. *Ocheltree*, [335 F.3d at 334](#). Knowledge of harassment can be imputed to an employer if a "reasonable [person], intent on complying with Title VII," would have known about the harassment. *Id. citing Spicer v. Virginia Department of Corrections*, [66 F.3d 705, 710 \(4th Cir. 1995\)](#). Under the law of the Circuit, there is at least a dispute of material fact as to whether the Navy was negligent because the Navy was on actual and/or constructive notice and failed to act.

VI. EEOC's Guidelines

The Navy also asks this Court to ignore the 1999 EEOC Guidelines, [FN14] perhaps *17 because these Guidelines are absolutely fatal to its position. See Navy Brief at 30, n. 8. The Navy correctly states that the EEOC Guidelines are not controlling on this Court. [FN15] However, as the Supreme Court noted in the portion of the sentence not quoted by the Navy's Brief, the EEOC Guidelines "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," *Meritor Sav. Bank v. Vinson*, [477 U.S. 57, 65 \(1986\)](#) (adopting the EEOC's analysis of Title VII).

FN14. The 1999 EEOC Guidelines state: "An employer's duty to exercise due care includes instructing all of its supervisors and managers to address or report appropriate officials complaints of harassment *regardless of whether they are officially designated to take complaints* and regardless of whether a complaint was framed in a way that conforms to the organization's particular complaint procedures." EEOC, "Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors," § V.C.2 at 15, which may be found at www.eeoc.gov/policy/docs/harassment (emphasis added) (June 18, 1999).

FN15. The Navy offers no authority to support the argument that the EEOC Guidelines are not binding on a federal government agency.

The Navy makes the remarkable argument that this Court *sub silentio* rejected the

application of the portion of the EEOC's Guidelines that looks to whether the alleged harasser could "direct another employee's day-to-day work activities." Navy Brief at 30, n. 8

The very idea that the Court rejected the EEOC's Guidelines *sub silentio* is preposterous because *Mikels* was argued on April 8, 1998 and the decision was issued on June 29, 1999. The employee did not even brief the applicability of *Farragher* and *Ellerth*, which came down while [Mikels was under consideration, 183 F.3d at 332.](#) There is no indication in the opinion that the panel ever considered the EEOC's *18 Guidelines. Since the Guidelines were issued on June 18, 1999 and the decision in *Mikels* was issued on June 29, 1999, it is misleading to state that this court rejected the EEOC Guidelines *sub silentio*

VII. Dissemination of Sexual Harassment Policy

In trying to escape liability, the Navy contends that its 1993 policy was adequately disseminated to Howard and that Howard's testimony is inconsistent. Navy Brief at 46-47. Review of the record demonstrates that is not correct, as the Navy provided only generalized EEO training to Howard in 1995. JA 365,476, 506-507. The materials distributed in 1995 may be found at JA 508-547. Howard's Certificate of Training for the "EEO Workshop for Employees" held in 1995 is also included in the Joint Appendix. JA 498.

Thus, there is no sham affidavit issue in this case because Howard's declaration clarifies the record in response to the Navy's effort to manufacture a fact not in the record. The Navy never presented any admissible evidence that Howard ever attended the July, 1996 sexual harassment class. The July, 1996 class does not provide sufficient dissemination of the policy as a matter of law because this class occurred many months after the harassment and was based on the inadequate 1993 policy in any event.

Accordingly, the trial court erred in granting summary judgment because there *19 is, at the very least, a dispute of material fact as to whether the policy was ever disseminated to Howard.

VIII. Inadequacy of Investigation and Absence of Remediation

The Navy does not directly address Howard's contention that the investigation was timely or adequate. The Navy never explains why its investigators chose not to interview key people, or ask important questions. The Navy cavalierly dismisses Howard's discussion of the inadequacy of its response as "other picayune challenges." Navy Brief at 53. Thus, it appears the Navy has no substantive response if this Court rules that it is required to conduct an adequate investigation and to remediate the McCall problem.

We submit these "picayune challenges" demonstrate that the Navy breached its duty to have an effective sexual harassment policy and its duty to properly investigate and remediate the sexual harassment. Where the Navy failed to search McCall's computer, failed to take statements from Pendleton, Capt Gibson and Lt Col. Willard and then claimed there was insufficient evidence to justify taking any action against McCall, see JA 476, there are disputes of material fact as to whether the Navy breached its duty to have an effective policy as evidenced by lack of appropriate action in response to Howard's complaints. See [Spriggs v. Diamond Auto Glass, 242 F.3d 179, 188 \(4th Cir. 2001\)](#) (jury could rationally conclude that by not enforcing the *20 policy, company unreasonably failed to correct offending behavior); [Loughman v. Malnati Organization, Inc., 395 F.3d 404, 407 \(7th Cir. 2005\)](#) ("when it comes to remedying a bad situation, greater vigor is necessary when the harassment is physically assaultive.")

Where the Navy failed to remedy the harassment and discipline those responsible, the Navy is liable for harassment, even if the Court concludes McCall is a co-worker. [Azteca, supra, 256 F.3d at 876](#) (footnote omitted). When the employer fails to implement a remedy, or where the remedy does not end the current harassment and deter future harassment, liability attaches for both the past harassment and any future harassment. [Fuller v. City of Oakland, 47 F.3d 1522, 1528-1529 \(9th Cir. 1995\)](#); See [Rowe v. Hussmann Corp., 381 F.3d 775, 781 \(8th Cir. 2004\)](#) (employer

cannot "avoid liability if it lacked knowledge of particular harassing acts that occurred during the charge period, irrespective of its knowledge or prior harassment.

CONCLUSION

WHEREFORE, Howard respectfully requests the Court reverse the entry of summary judgment and remand for trial because the Navy failed to present sufficient evidence under *Farcagher* and *Ellerth* to carry the burden of proving its affirmative defense.

Alternatively, we request the Court reverse and remand for trial because there *21 are also disputes of material fact as to whether the Navy was negligent in breaching its duty to have an effective anti-harassment policy. Further, there are disputes of material fact as to whether the Navy breached its duty to conduct a thorough investigation and to remediate the McCall problem. Since a reasonable jury could find that the Navy breached its duty to have an effective sexual harassment policy that complied with either of the EEOC's Guidelines and that its investigation and remedial steps were a "sham" insufficient to prevent sexual harassment in the future, the trial court erred in granting defendant's Motion for Summary Judgment.

Stephanie HOWARD, Appellant, v. Gordon R. ENGLAND, Appellee.

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