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Ensuring the Laws Barring Sexual Harassment Protect the Reticent Victim

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ENSURING THE LAWS BARRING SEXUAL HARASSMENT PROTECT THE RETICENT VICTIM

JOSEPH M. SELLERS & ANIKO R. SCHWARCZ*

I.Introduction	215
II.The Beginning: Courts Recognize Sexual Harassment Is About Power	216
III.A Description of the Problem: Barriers to Reporting Sexual Harassment	218
IV.Despite Well-known Barriers to Reporting Sexual Harassment, Enforcement Is Predicated on Victims Coming Forward.....	220
V.How to Reconcile the Reticence to Complain About Sexual Harassment with the <i>Faragher-Ellerth</i> Framework	220
VI.Conclusion.....	225

I. INTRODUCTION

According to multiple employee surveys, sexual harassment is one of the most underreported forms of abuse in the workplace. There are a number of reasons that reportedly account for this reluctance to complain about sexual harassment. They include the potential shame, embarrassment, and fear that may accompany reports of sexual harassment and the blame and heightened scrutiny of the victim that may be prompted by these complaints. Unlike most other forms of discrimination, where their presence may be inferred from patterns observed in workforce data, sexual harassment is typically undetectable and certainly not actionable unless it is the subject of a legally

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cognizable complaint. This brief Article poses whether, and if so to what extent, the legal framework for addressing sexual harassment imposes unrealistic obligations on victims of this misconduct and, if so, whether there are strategies that practitioners can employ to help overcome these obstacles.

II. THE BEGINNING: COURTS RECOGNIZE SEXUAL HARASSMENT IS ABOUT POWER

Following the passage of the Civil Rights Act of 1964 and throughout the following two decades, courts routinely dismissed claims of sexual harassment on the grounds that the challenged conduct simply stemmed from interpersonal discord between men and women in the workplace. For example, in *Barnes v. Train*, the plaintiff complained that her supervisor retaliated against her after she refused his request for an “after hours affair.”¹ The trial court dismissed her claim, finding that she was not the subject of sex discrimination. Instead, the court found the victim’s claim that her supervisor harassed her stemmed from a “controversy underpinned by the subtleties of an inharmonious personal relationship.”² Similarly, in *Corne v. Bausch & Lomb, Inc.*, the court held that female employees terminated after being subject to verbal and physical sexual advances from their supervisor were not entitled to relief under Title VII because the supervisor’s harassing conduct was simply his satisfaction of a personal “urge.”³

It was only 35 years ago, with the decision issued in *Meritor Savings Bank, FSB v. Vinson*, that the Supreme Court recognized the lawfulness of sexual conduct in the workplace had to be assessed within the dynamics of the workplace.⁴ In that case, the plaintiff brought a sexual harassment suit against her employer and supervisor, alleging she was subject to a sexually hostile work environment and *quid pro quo* sexual harassment. Ms. Vinson claimed that though she had voluntarily engaged in sexual relations with a vice-president and branch manager of the bank who hired and supervised her, she was prompted by fear of losing her job. Writing for a unanimous Court, Justice Rehnquist wrote that acceding to sexual overtures does not necessarily defeat a later claim of sexual harassment. Instead, “[t]he correct inquiry is whether respondent by her conduct indicated that the alleged

1. *Barnes v. Train*, No. 1828-73, 1974 WL 10628, at *1 (D.C. Cir. Aug. 9, 1974), *rev’d sub nom.* *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

2. *Id.*

3. 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977). See similar reasoning for the denial of Title VII claims in *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976), *rev’d*, 600 F.2d 211 (9th Cir. 1979) (holding that Title VII could not be used to hold an employer liable for the “natural sex phenomenon” of men’s attraction to women).

4. 477 U.S. 57, 66 (1986).

sexual advances were unwelcome, not whether the actual participation in sexual intercourse was voluntary.”⁵

More than a decade after *Meritor*, the Supreme Court elaborated on the circumstances under which an employer may be held vicariously liable for workplace sexual harassment. In June 1998, the Court issued a pair of decisions that identified affirmative defenses employers may raise to insulate themselves from vicarious liability for hostile work environment harassment. Pursuant to *Faragher v. City of Boca Raton*⁶ and *Burlington Industries, Inc. v. Ellerth*,⁷ employers may only be held liable for harassing conduct committed by a supervisor with immediate or successively higher authority over the employee when—among other things—they fail to exercise “reasonable care to prevent” and promptly correct sexual harassment.⁸

In these decisions, the Court placed a corresponding obligation on the victims of sexual harassment to take advantage of policies in place to protect against sexual harassment, including participation in effective complaint procedures.⁹ As the Court observed, an employee’s “unreasonable failure to use any complaint procedure provided by the employer” may immunize the employer from vicarious liability for the sexual harassment.¹⁰ Whether an employee’s failure to use the complaint procedure was “unreasonable” will, of course, depend on the circumstances of the case.¹¹ In many cases, the *Faragher-Ellerth* paradigm burdens the victims to report the harassment as prescribed by the employer or risk waiving their claims. This system, of course, was designed to put an employer on notice of the harassment so that it could curb the conduct and redress any harm caused. However, it fails to account for the very dynamics in the workplace recognized in *Meritor Savings Bank* and the nature of sexual harassment, both of which may inhibit a victim’s compliance with the requirements of an employer’s complaint process.

5. See *id.* at 68 (The Court went on to find that “the fact that sex-related conduct was ‘voluntary,’ in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’”).

6. 524 U.S. 775, 807 (1998).

7. 524 U.S. 742, 745 (1998).

8. *Faragher*, 524 U.S. at 805; *Ellerth*, 524 U.S. at 745.

9. See *Faragher*, 524 U.S. at 778 (“[W]hile proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer’s burden under the second element of the defense”); *Ellerth*, 524 U.S. at 745.

10. *Faragher*, 524 U.S. at 778.

11. See, e.g., *Clark v. United Parcel Serv. Inc.*, 400 F.3d 341 (6th Cir. 2005).

III. A DESCRIPTION OF THE PROBLEM: BARRIERS TO REPORTING SEXUAL HARASSMENT

In the wake of *Meritor*, courts recognized that the act of acceding to sexual advances does not preclude the pursuit of a claim of harassment as long as the victim shows that the conduct was unwelcome. But the process of identifying and remedying workplace sexual harassment is not self-executing. Self-reporting is still a prerequisite for relief, and enforcement of federal laws prohibiting sexual harassment depends mainly on victims coming forward to lodge complaints. At the same time, reticence to complain about sexual harassment has led to underreporting and, ultimately, failure to redress the harm it causes. As a result, the extent of—and reasons for—underreporting sexual harassment have been scrutinized in recent years.

Studies have found evidence of significant underreporting of workplace sexual harassment. According to the June 2016 Report of the EEOC Select Task Force on the Study of Harassment in the Workplace (“EEOC Task Force Report”),¹² the extent to which victims of sexual harassment fail to report it is “striking.” According to two studies cited in the report, approximately 70% of employees who report experiencing sexual harassment failed to discuss it with a supervisor.¹³ And the incidence of reporting sexual harassment varies with the type of harassment; about 30% of the survey respondents stated they reported verbally harassing behavior, while only about 8% of employees reported harassment that included unwanted physical touching.¹⁴ That only a fraction of those who said they had been subject to sexual harassment ultimately lodged a formal complaint confirms that most behavior believed to be sexual harassment is never reported to enforcement agencies, made the subject of an actionable complaint, or even made a matter of public record.¹⁵

Several explanations have been advanced for the reticence to complain about sexual harassment. Some of these explanations have been gleaned from interviews and treatment of victims of sexual harassment. For example, Dr. Susan Fiester, a clinical psychiatrist who specializes in treating women with mood disorders, including symptoms associated with sexual

12. See Chai R. Feldblum & Victoria A. Lipnic, EEOC, *SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE* 1, 15 (2016).

13. *Id.* at 16.

14. U.S. EQUAL EMP. OPPORTUNITY COMM’N, *Written Testimony of Lilia M. Cortina, Ph.D., Professor of Psychology and Women’s Studies, University of Michigan* (June 15, 2015) [hereinafter *Written Testimony of Lilia M. Cortina*], <https://www.eeoc.gov/written-testimony-lilia-m-cortina-phd-professor-psychology-and-womens-studies-university-michigan>.

15. See EEOC Task Force Report, *supra* note 12 (on average, anywhere from 87% to 94% of individuals did *not* file a formal complaint).

harassment, testified in the class action sexual harassment trial where women correctional officers accused senior officials at the D.C. Department of Corrections of engaging in a pattern of sexual harassment against them.¹⁶ Relying on interviews and research in this field, Dr. Fiester gave the court a report about the low incidence of complaints made to the Department. In the report, Dr. Fiester explained that the paucity of complaints of sexual harassment was attributed to the fear of reprisal, the inadequacy of the complaint process, as well as the shame and embarrassment suffered by victims of the harassment and the fear that, by complaining, corrections officers might appear weak.¹⁷ Drawing upon an array of studies and survey results, the EEOC Task Force similarly found that the reticence of victims to complain about sexual harassment was largely due to fear that others would doubt the accuracy of their claims. The Task Force also concluded that victims felt others would suspect them of fostering or contributing to the challenged conduct and fear of humiliation, embarrassment, social ostracism, reprisal, and damage to their careers.¹⁸

These findings are hardly surprising. The sensitive nature of sexual harassment alone can create a heightened reluctance to complain about it. First, the harassment may involve sexually explicit language or conduct that the victim finds embarrassing to report or even repeat. Complicating matters, employers seeking to defend against complaints of sexual harassment may inquire about the attire and behavior of the complainant, ostensibly in pursuit of determining whether the overtures were unwelcome. These personal—and sometimes intimate—details implicated by sexual harassment complaints create a powerful headwind deterring many from lodging complaints rather than simply leaving their place of employment. Second, some forms of sexual harassment arise between colleagues and even workplace friends. Lodging complaints may make a continued presence in the workplace together uncomfortable, even while the complaints are investigated. On other occasions, sexual harassment may arise after one party attempted unsuccessfully to discontinue a relationship that began consensually. Complaints of sexual harassment arising in these settings may

16. See *Neal v. Dir.*, D.C. Dep't of Corr., No. 93-2420, 1995 WL 517248 (D.D.C. Aug. 9, 1995), *rev'd and remanded sub nom. Bonds v. District of Columbia*, 93 F.3d 801 (D.C. Cir. 1996).

17. Rule 26(a)(2) Report of Dr. Susan J. Fiester, *Neal v. Dir.*, D.C. Dep't of Corr. (No. 93-2420), 1995 WL 517248 (January 24, 1995).

18. *Written Testimony of Lilia M. Cortina*, Workplace Harassment: Examining the Scope of the Problem and Potential Solutions, Meeting of the E.E.O.C. Select Task Force on the Study of Harassment in the Workplace (June 15, 2015), <https://www.eeoc.gov/written-testimony-lilia-m-cortina-phd-professor-psychology-and-womens-studies-university-michigan> (citing Kimberly A. Lonsway *et al.*, *Sexual Harassment in Law Enforcement: Incidence, Impact and Perception*, 16 POLICE Q. 117 (2013)).

require the unpleasant disclosure of details about an intimate relationship and the events that led one party to attempt to end it.

IV. DESPITE WELL-KNOWN BARRIERS TO REPORTING SEXUAL HARASSMENT, ENFORCEMENT IS PREDICATED ON VICTIMS COMING FORWARD

While underreporting and the reticence of victims to report harassment are well-documented, the legal system still relies on survivors' complaints to detect the presence of harassment and enforce the laws prohibiting sexual harassment. This reliance exclusively on complaints to detect and challenge harassment is unique among the forms of discrimination prohibited by federal law. Most other forms of discrimination, such as denial of equal access to promotional opportunities, unjustified pay disparities, and disparities in termination, can usually be discerned from patterns observed in workforce data reported to enforcement agencies or disclosed in discovery.¹⁹ By contrast, the incidence of sexual harassment is not collected in any publicly reported data that could trigger further investigation. Instead, enforcement agencies must rely on complaints to identify allegations of sexual harassment.

Despite the barriers to reporting sexual harassment and the unique challenges associated with vindicating the rights of those affected by this peculiarly personal type of workplace harassment, features of existing jurisprudence may be invoked by victims to permit delays in lodging complaints and even to excuse the failure altogether to participate in employer-sponsored complaint processes.

V. HOW TO RECONCILE THE RETICENCE TO COMPLAIN ABOUT SEXUAL HARASSMENT WITH THE *FARAGHER-ELLERTH* FRAMEWORK

While the *Faragher-Ellerth* framework expresses an expectation that victims of sexual harassment participate in employer-sponsored complaint processes, that expectation is not absolute. Survivors must not "unreasonably" fail to avail themselves of an employer's complaint process. Certain features of a complaint process, its success or failure in serving its legitimate purposes, may affect whether a survivor's failure to comply with the complaint process was unreasonable. Likewise, the non-jurisdictional nature of the statutory filing requirements of the EEO laws may permit courts to exercise equity in excusing a reticent charging party's noncompliance with the statutory filing rules and proceed with an actionable claim.²⁰ While the

19. See 42 U.S.C. § 2000e-8(c); 29 C.F.R. § 160 2.7-.14; 41 C.F.R. § 60-1.7(a).

20. See *Dyson v. District of Columbia*, 710 F.3d 415, 421 (D.C. Cir. 2013), citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("[F]iling a timely charge

circumstances permitting reticent survivors to pursue actionable claims will depend heavily on the particular facts of each case, it is worth noting several principles that may have broader application here.

To begin, *Faragher* and *Ellerth* established reciprocating obligations of the employer and employee in assessing whether an employer may be liable vicariously for workplace harassment. Employers are required to exercise reasonable care to “prevent and correct promptly” sexual harassment.²¹ To overcome an employer’s immunity from vicarious liability, employees, for their part, must demonstrate that they acted reasonably by taking advantage of “preventive or corrective opportunities provided by the employer” and otherwise taking reasonable steps to avoid harm.²² Aggrieved employees are expected, for example, to participate in an employer’s complaint process.²³

But an employee’s obligation is to not “unreasonably” fail to participate in an employer-sponsored complaint process.²⁴ Although the Supreme Court has not defined circumstances that would excuse noncompliance with the complaint process, certainly some shortcomings of a complaint process might very well excuse a reticent survivor from making a timely claim or even a claim altogether.²⁵ While it is not possible to provide an exhaustive catalogue of grounds that might permit reasonable noncompliance with an employer complaint process, several hallmarks of a deficient complaint process are more likely to persuade a court to forgive a survivor’s failure to

of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.”).

21. *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 745 (1998).

22. *Faragher*, 524 U.S. at 778; *Ellerth*, 524 U.S. at 745.

23. *Faragher*, 524 U.S. at 778; *Ellerth*, 524 U.S. at 745.

24. *Faragher*, 524 U.S. at 778; *Ellerth*, 524 U.S. at 745.

25. The inquiry into whether a Plaintiff’s fear of retaliation or other reason for failing to complain is reasonable turns on the facts in each case. Whereas some courts have been skeptical of victims who cite fear of retaliation as the reason they failed to complain of harassment (*see Shaw v. AutoZone, Inc.*, 180 F.3d 806, 813 (7th Cir. 1999) (“[w]hile a victim of sexual harassment may legitimately feel uncomfortable discussing the harassment with an employer, that inevitable unpleasantness cannot excuse the employee from using the company’s complaint mechanisms . . . an employee’s subjective fears of confrontation, unpleasantness or retaliation do not alleviate the employee’s duty under *Ellerth* to alert the employer to the allegedly hostile environment.”)), others have found such reasons may excuse the failure to lodge timely complaints (*see, e.g.,* *Dise v. Henderson*, No. 99 C 1432, 2001 WL 11057, at *7 (N.D. Ill. Jan. 4, 2001) (failure to complain was not fatal to plaintiff’s claim where prior complaints against another supervisor were dismissed because of the perpetrator’s supervisory status, thereby forgiving the victim for reasonably concluding that her complaint would have been futile)).

participate in it. Among them are the failure to provide a means for the complaint to bypass the alleged perpetrator; failure to provide adequate protection against reprisal; failure of the employer to honor the terms of its own anti-harassment policy; the presence of ongoing threats in the workplace if a complaint is made; the imposition of heightened requirements to sustain an internal complaint of sexual harassment; and other similar shortcomings that may excuse the reluctance or failure to participate in an employer's complaint process.²⁶ In addition, an assessment of whether an employee reasonably declined to participate in an employer's complaint process, of course, must also account for the nature of the harassment and any features that may justify reticence from a reasonable person of the victim's circumstances in using the complaint process available.

The circumstances of the harassment may also warrant the exercise of equity by the judiciary. Equity may lead to an employer being estopped from challenging a survivor's failure to comply with the complaint process or their failure to lodge a timely charge. Similarly, equity may permit a court to toll the running of the provided limitations period to file an internal complaint or excuse the untimely filing of a charge.²⁷ While the two doctrines are

26. A limited body of case law addresses specific requirements of an employer's anti-discrimination policy. Some courts require the employer to demonstrate "reasonable steps in preventing, correcting and enforcing the policy," adopting the principle that simply forcing all new employees to sign a policy does not constitute "reasonable care" sufficient to support an affirmative defense. *See Lancaster v. Sheffler Enter.*, 19 F. Supp. 2d 1000, 1003 (W.D. Mo. 1998). Courts may also reject an employer's affirmative defense to a sexual harassment claim where the employer has an antidiscrimination policy but fails to follow it. *See Plaetzer v. Borton Auto., Inc.*, No. Civ. 02-3089, 2004 WL 2066770, at *8 (D. Minn. Aug. 13, 2004) (Plaintiff's complaints "were only rarely addressed, and arguably were never appropriately addressed under [the employer's policy] . . . no record of the complaints or their resolution was made despite the requirement in the policy that records be kept."). *See also Gordon v. S. Bells, Inc.*, 67 F. Supp. 2d 966, 983 (S.D. Ind. 1999) (Where an anti-harassment policy was printed in an employee handbook, but that handbook was not disseminated, and the employer had no anti-harassment training, the employer did not meet its burden), *and Elmasry v. Veith*, No. 98-696-JD, 2000 WL 1466104, at *7 (D.N.H. Jan. 7, 2000) (where "employees have limited education and awareness of such issues as sexual harassment, the mere distribution of a handbook . . . is inadequate to effectively prevent sexual harassment from taking place."). Broadly speaking, more detailed policies are favored (*compare Molnar v. Booth*, 229 F.3d 593, 601 (7th Cir. 2000) (general policy barring discrimination is not a sexual harassment policy, and is insufficient to establish first prong of defense), *with Shaw v. AutoZone, Inc.*, 180 F.3d 806, 811-12 (7th Cir. 1999) (defendant satisfied first prong where its anti-harassment policy had specific, detailed reporting procedures – including multiple mechanisms for reporting harassment – the policy was distributed to each employee, and it conducted anti-harassment trainings)).

27. *See* 42 U.S.C. § 2000e-8(c); 29 C.F.R. § 1602.7-.14 *and* 41 C.F.R. § 60-1.7(a); *see also Lawrence v. Cooper Communities, Inc.*, 132 F.3d 447, 452 (8th Cir. 1998) (The court equitably tolled the statute of limitations where plaintiff's failure to file a timely

functionally similar, the doctrine of estoppel focuses on the employer's actions, while equitable tolling focuses on the victim's circumstances and knowledge.²⁸ Equitable tolling "is meant to 'ensure[] that the plaintiff is not, by dint of circumstances beyond his control, deprived of a reasonable time in which to file suit.'"²⁹ On the other hand, an employee can invoke equitable estoppel when an employer takes steps to prevent, deter, or misdirect an aggrieved individual from lodging a timely complaint.³⁰ As a general proposition, the Supreme Court has explained that equitable tolling of a limitations period is permitted where the evidence shows the aggrieved

charge arose from the EEOC's misconduct); *Mercado v. Ritz-Carlton San Juan Hotel, Spa & Casino*, 410 F.3d 41, 49-50 (1st Cir. 2005) (holding that an employer's violation of EEOC notice posting requirements may provide a basis for equitable tolling of the limitations period); *Seitzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236, 240 (3d Cir. 1999) (equitable tolling is appropriate when the defendant has actively misled the plaintiff; the plaintiff received inadequate notice of his right to file suit or "in some extraordinary way" was prevented from asserting his rights); *see generally* *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232-33 (1959) (the Supreme Court held that the Plaintiff was entitled to equitable tolling of expired SOL because of defendants' misrepresentation, on the principle that "no man may take advantage of his own wrong.").

28. A detailed description of the two primary tolling doctrines is outlined in *Chung v. U.S. Dep't of Just.*, 333 F.3d 273, 278-79 (D.C. Cir. 2003): "'Equitable estoppel' precludes a defendant, because of his own inequitable conduct — such as promising not to raise the statute of limitations defense — from invoking the statute of limitations. *Currier v. Radio Free Eur./Radio Liberty, Inc.*, 159 F.3d 1363, 1367 (D.C. Cir. 1998); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-52 (7th Cir. 1990). The doctrine of 'equitable tolling,' on the other hand, applies most commonly when the plaintiff 'despite all due diligence. . . is unable to obtain vital information bearing on the existence of his claim.' *Currier*, 159 F.3d at 1367. . . . [In effect,] equitable estoppel takes the statute of limitations out of play for as long as is necessary to prevent the defendant from benefitting from his misconduct, whilst equitable tolling . . . ensures that the plaintiff is not, by dint of circumstances beyond his control, deprived of a 'reasonable time' in which to file suit. *Cada*, 920 F.2d at 452." *See also* *Phillips v. Heine*, 984 F.2d 489, 492 (D.C. Cir. 1993) ("The purposes of the doctrine [of equitable tolling] are fully achieved if the court extends the time for filing by a reasonable period after the tolling circumstance is mended").

29. *See* *Dyson v. District of Columbia*, 710 F.3d 415, 422 (D.C. Cir. 2013) (quoting *Chung v. U.S. Dep't of Justice*, 333 F.3d 273, 279 (D.C. Cir. 2003)).

30. For example, where an employer promises not to plead the statute of limitations to deter an aggrieved employee from filing a timely claim. *See* *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 580 (D.C. Cir. 1998). A claim of equitable estoppel requires a misrepresentation or concealment of material facts; these facts must be known at the time of the misrepresentation to the party being estopped, the party claiming the benefit of the estoppel must not know the truth concerning these facts at the time of the representation, the representation must be made with the intention or the expectation that it will be acted upon, the representation must be relied upon and acted upon, and the party acting upon the representation must do so to his or her detriment.

person “(1) has been pursuing [her] rights diligently, and (2) that some extraordinary circumstance stood in [her] way and prevented timely filing.”³¹

Equitable tolling may be warranted, for example, where an employer misleads the employee to forbear pursuit of a complaint on grounds the grievance would be resolved favorably for the employee³² or where the employer has falsely assured the aggrieved employee that the harassment would be promptly redressed.³³

Circumstances, such as the following, which are unique to sexual harassment, may also warrant a court’s exercise of equity to forgive noncompliance with either an employer-sponsored complaint process or statutory deadlines:

- a. Harassment by a direct manager or supervisor for whom the survivor continues to work might justify a delay in lodging an internal or statutory complaint until her proximity to the alleged harasser changes, especially where investigation of the complaint will require confronting the supervisor for whom the survivor must continue to work.
- b. Evidence that internal complaints lack confidential treatment and/or that the employer engaged in reprisal following similar complaints.

31. *Menominee Indian Tribe of Wisc. v. United States*, 577 U.S. 250, 255 (2016).

32. *See* *Currier v. Radio Free Eur./Radio Liberty, Inc.*, 159 F.3d 1363, 1368 (D.C. Cir. 1998) (after employee was terminated, one of the Employer’s officials misled him into believing that he would be rehired. An employer’s affirmatively misleading statement that a grievance will be resolved in the employee’s favor can establish an equitable estoppel that effectively tolls limitations period for filing Equal Employment Opportunity Commission charge.).

33. *See* *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1532 (11th Cir. 1992) (Plaintiff brought sex discrimination suit under Title VII and Equal Pay Act after shewas given ‘repeated assurances’ that her salary would be raised to the level that other workers were receiving. It does not appear that she was ever told that the pay disparity would go uncorrected. Tolling is appropriate where the trial court found that the plaintiff was led by the defendant to believe that the unfair treatment would be rectified.); *see also* *Coke v. Gen. Adjustment Bureau*, 640 F.2d 584, 595 (5th Cir. 1981) (Employer misrepresented its intent to reinstate plaintiff, knowing plaintiff would reasonably rely thereon and fail to file a timely ADEA age discrimination action. Court held that this precluded summary judgment in favor of the employer.). In cases where administrative agencies or agents of the court have failed to timely process inquiries or filings, especially where litigants are proceeding without counsel, the courts have found it appropriate to toll the statutory filing deadline. *See* *Washington v. Ball*, 890 F.2d 413, 414 (11th Cir. 1989) (Where plaintiff filed pro se and sought extension to file but did not receive a response until after initial filing deadline, the court found it appropriate to toll the filing deadline.); *see also* *Mondy v. Sec’y of the Army*, 845 F.2d 1051, 1057 (D.C. Cir. 1988) (A Walter Reed Medical Center employee alleged his dismissal was racially discriminatory in violation of Title VII. Proceeding in forma pauperis, he initially named the wrong defendant. US marshals charged with serving process for in forma pauperis plaintiffs delayed service for four months. Court held that fairness demanded that statutory time limit be tolled.).

c. The particular nature of the harassment alleged and circumstances of the survivor may warrant a psychological foundation for showing the aggrieved employee, in all other respects, faithfully followed the rules except for the failure to complain of sexual harassment. Evidence that the victim may be especially vulnerable to experiencing shame or embarrassment over the harassment might excuse noncompliance with a complaint process, especially where the employer has failed to take precautions others have taken to protect against sexual harassment.

VI. CONCLUSION

The *Faragher-Ellerth* paradigm reflects an expectation that employees aggrieved by sexual harassment comply with their employer's internal processes and the applicable statutory complaint deadlines. Limitations in an employer's complaint process may also provide grounds to excuse a victim's reluctance to pursue a complaint or her tardiness in doing so. Likewise, circumstances associated with an employer's handling of sexual harassment complaints or deterring the pursuit of a complaint may provide grounds on which a court may act in equity to excuse noncompliance with internal and statutory complaint protocols. In all events, the unique behavioral circumstances of sexual harassment may, and in some circumstances should provide a basis on which reticent victims who fail to make timely complaints may nonetheless be permitted to pursue an actionable complaint.

