Removal from Public Forum:

Sexual Harassment Through the Rhetoric of the **Faragher-Ellerth** *Defense*

Tenzing Briggs

Introduction

When it comes to understanding today's laws and legal realities, one must look to the past. Legal precedent determines current laws to a great extent. However, laws are always open to judicial interpretation; while precedent factors, judges can also evolve law by clarifying or reinterpreting it. Reinterpretation of law is essential for our legal system. If judges couldn't question or reinterpret precedent, America likely wouldn't have black, female, or immigrant voters and citizens. Neither of these key processes necessarily involve throwing away precedent. Rather, precedent should be studied and understood, so as to see what is flawed and what is valid within it. In short, to correct the legal system's flaws, one must thoroughly understand the bias and history within precedent. This is especially true for sexual harassment law. For hundreds of years, misogyny has been incorporated into various laws and societal practices, and the *Faragher-Ellerth* defense—a sexual harassment defense for corporations formulated in the 1990s—comes with these biases. Rhetorical analysis of the different judicial opinions in *Ellerth v. Burlington*, one half of this defense, reveals how gender bias can create contradictory or confusing policy, even when the intention behind such decisions was to clarify and simplify progressive inroads for civil rights law.

The case of *Ellerth v. Burlington* was one of two different decisions decided by the Supreme Court on July 26th of 1998 which together changed the way courts assigned liability to state or private employers for sexual harassment. From these two cases, the *Faragher-Ellerth* defense was formed. This defense outlined guidelines for how, in any sexual harassment case, an employer should seek to defend against liability. Kimberly Ellerth's case primarily contributed to aspects of the defense relating to private employers; she had been sexually harassed by Thomas

Slowik, the Vice President of her sales division at Burlington Industries, Incorporated (Wood par. 1). The harassment had been a consistent feature of her relationship with this supervisor; since her job interview with Slowik, Ellerth's interaction with him had been "characterized by a constant barrage of sexual comments, innuendo, and occasionally more" (Wood par. 1). The 'more', specifically, was threats such as "'I could make your job very hard or very easy at Burlington'" (Wood par. 4) and instances where he "refused to give Ellerth special permission to do something for a customer until she described her clothing to him" (Wood par. 5). Yet, these threats never became an issue of firing or promotion; Ellerth quit shortly after being promoted despite Slowik's threats. Thus, a defining aspect of the context of the case was whether the company could still be held liable even though the harassment did not involve her being fired.

In *Ellerth v. Burlington*, the United States Supreme Court sustained the 7th US Circuit Court of Appeal's decision to rule in favor of Ellerth, but with the additional facet that the company would be allowed an affirmative defense, allowing the introduction for more evidence by the defense. However, the Supreme Court and Circuit Court's reasoning differed, in ways that at first seemed minor but which reflected a major difference between the two court's legal interpretation of involved terminology; each court focused on the relevancy of the term *quid pro quo* sexual harassment, with each defining it in the same way. However, the two did not agree on whether it actually existed in the case, with the Circuit Court claiming *quid pro quo* sexual harassment had taken place and the Supreme Court claiming it had not.

The political landscape of the time also contributed context to the facts of the case. The decade involved a political redefinition of liability and discrimination procedures, beginning with the Civil Rights Act of 1991, passed with the intention of strengthening the procedure in civil

rights harassment cases. The majority decision issued by the Supreme Court for *Ellerth* also came a few months on the heels of the dismissal of *Clinton v. Jones*, an Arkansas state sexual harassment case against President Bill Clinton. At the time, many considered Ellerth's case would set precedent that may help the plaintiff Paula Jones reopen her case against the President; this further makes the case historically notable. Once Ellerth's case was decided, the successful reopening of *Jones* led to the impeachment of Bill Clinton when he and one of the witnesses in that case, his mistress Monica Lewinsky, committed perjury on instruction by his lawyers (Pound & Johnson).

Before *Ellerth v. Burlington*, lower courts generally accepted that vicarious liability followed in most cases of proven *quid pro quo* sexual harassment. The Supreme Court's decision overturned this, claiming that Ellerth's account was not one of *quid pro quo* harassment as per their definition *and* that *"quid pro quo* sexual harassment" was not a relevent term for issuing vicarious liability to an employer. By their logic, Burlington could still incur vicarious liability, despite the lack of *quid pro quo* sexual harassment, if their affirmative defense was found lacking. What would become the *Faragher-Ellerth* defense focused on assigning vicarious liability depending on a "tangible employment action." The defense the Supreme Court puts forward is as follows:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. *When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages*, subject to proof by a preponderance of the evidence...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...*No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or*

undesirable reassignment. (Kennedy 20, emphasis added)

There are three notable aspects to the defense. First, because the Supreme Court ruled that "*quid pro quo* sexual harassement" was not a relevant term in the case, it seems at first to be absent in the defense; analysis later on will show how the Supreme Court has incorporated their own definition of *quid pro quo* sexual harassment, without naming it such, into the defense. Second, we see this replacement for *quid pro quo* sexual harassment with "tangible employment action"; like how lower courts used "*quid pro quo* sexual harassment" as a controlling term for liability, here the Supreme Court uses "tangible employment actions" as a controlling term related to vicarious liability, particularly whether an affirmative defense is allowed. Finally, the phrasing of the defense makes clear what exactly constitutes a "tangible employment action," when it specifies with the examples of "discharge, demotion, or undesirable reassignment."

Rhetorical Differences Between Supreme and Circuit Courts

When the Supreme Court released their decision, it was informally hailed as a major step in improving the language and legal interpretation for dealing with sexual harassment. Particularly, this was because the Supreme Court decision appeared to unify the elements that caused a split in the Circuit Court decision it sustained. The Circuit Court decision for *Ellerth v. Burlington* was particularly fraught with differences in legal interpretation, as, along with the majority decision, there were 5 concurring opinions and 2 dissenting ones. These concurring or dissenting opinions were marked by two common themes that either expounded or deviated from the logic of the majority: 1) the subject of whether or not the sexual harassment Ellerth experienced could be termed as *quid pro quo* sexual harassment, and 2) the subject of whether

quid pro quo sexual harassment implied automatically holding the employer as vicariously liable. In the Supreme Court's decision, these were the two major subjects which they sought to clarify.

The Supreme Court made it clear it did not agree with the conclusions of the Circuit Court majority decision on either of these two subjects. The Circuit Court court majority not only considered that the discrimination Ellerth suffered fell under the label of *quid pro quo* harassment, but also considered this fact controlling for the application of vicarious liability. Conversely, the Supreme Court had the opposite conclusion on both fronts, stating flatout that Ellerth's case was *not* one of *quid pro quo* harassment and denouncing the meaningfulness of whether or not the case actually was such, as far as deciding vicarious liability went. The Circuit Court decision states,"[A]llegations...[the appellant] presented...raised a genuine issue of fact on her quid pro quo theory" (Wood par. 23); moreover, the decision cited as evidence for the validity of Ellerth's claim to having suffered *quid pro quo* harassment the fact that there were "[t]he numerous incidents in which [the appellee] withheld permission for work assignments until [the appellant] satisfied his demands" (Wood par. 23); in other words, the Circuit Court majority believed that Ellerth's case involved *fulfilled* threats (namely in how her work assignments were affected), making her case one of *quid pro quo* sexual harassment. On the other end of the spectrum, the Supreme Court claimed the opposite, saying the threats made by her harasser were "*unfulfilled* threats to deny her *tangible job benefits*" (Kennedy 4, emphasis added). Here, because the Supreme Court said no threats had been fulfilled, they subtly referenced Ellerth's promotion despite Slowick's threats as an unaffected "tangible job benefit" and further implied Slowik's threats of firing or denying her promotion as his only relevant threats; never did the Supreme Court consider his denying her work assignments, if she refused

his sexual demands, a fulfilled threat. By this process, the Supreme Court implied their definition of "tangible job benefits" by their usage.

Importantly, in this difference between the two courts, the Supreme Court struggles to portray accurately the Circuit Court's majority opinion. Namely, the Supreme Court translates the Circuit Court's opinion on *quid pro quo* sexual harsassment of the Circuit Court either in contradicting and dismissive ways. For example, when describing the flaws in the Circuit Court majority, the Supreme Court majority simply alleges "The judges [of the circuit court] seemed to agree Ellerth could recover if Slowik's unfulfilled threats to deny her tangible job benefits were sufficient to impose vicarious liability on Burlington" (Kennedy 4). This contradicts the Supreme Court's recognition that "[w]ith the exception of Judges Coffey and Easterbrook, the [Circuit Court] judges...*agreed* Ellerth's claim could be categorized as one of quid pro quo harassment" (Kennedy 4, emphasis added). The Supreme Court recuperates this by again alleging that these opinions were despite the fact that "she had received the promotion and had suffered no other tangible retaliation" (Kennedy 4). In other words, the Supreme Court construes promotion as a tangible employment effect, ignoring the counter-argument of the assignments he denied her as fulfilled "tangible" retaliation. Thus the Supreme Court paints a picture of the Circuit Court which ignores the validity of their argument that there *were* fulfilled, tangible threats in the form of the "numerous incidents in which [the appellee] withheld permission for work assignments" (Wood par. 23).

Stasis Analysis and Definitional Ruptures

Stasis theory is one tool for rhetorical analysis that clarifies the basis of disagreement in a given topic. The Supreme Court's decision presents the case differently than the Circuit Courts;

stasis theory can help elucidate how these two courts come to differ. In particular, stasis theory outlines four ways of understanding one's *stasis*—one's stance—in comparison to others. These are:

> 1. CONJECTURE (stasis stochasmos) — "Is there an act to be considered?"
> 2. DEFINITION (stasis horos) — "How can the act be defined?"
> 3. QUALITY (stasis poiotes) — "How serious is the act?"
> 4. POLICY (stasis metalepsis) — "Should this act be submitted to some formal procedure? (Crowley & Hawhee 63)

In the third chapter of *Ancient Rhetorics for Contemporary Students*, Sharon Crowley and Debra Hawhee outline how to approach the four types of stasis. Notably, they assign a hierarchy to understanding the four questions of stasis, where if the one stasis is agreed upon by all parties, then the next is approached for discovering the root of issue between parties. For example, they describe "the first stasis, conjecture, [where] the rhetor determines whether or not he and his audience agree about the existence of some being or thing or act or idea" (64), and say that, if all parties agree on the Conjecture stasis, "this stasis is no longer relevant or useful, having been…waived…by both parties (64). Similarly, they describe "the second stasis, definition, [where] the rhetor determines whether or not her and his audience agree about the classification of the being or thing or idea or the act; if so, the stasis of definition may be passed by" (64). Likewise, quality is the third stasis (Crowley & Hawhee 64) and policy is the fourth (Crowley & Hawhee 65), less important for analysis here because, clearly, the arguments of the Circuit and Supreme court are not the same in terms of Conjecture and Definition stases: neither agrees on whether *quid pro quo* sexual harassment exists in Ellerth's case nor how exactly to define it. Thus, following such a hierarchy, no quality or policy could be agreed upon between Circuit and

Supreme courts, because they already differ at the fundamental level on whether there's even a sexual harassment act defined as *quid pro quo* to be considered in terms of quality or policy.

When one inspects how the two courts differ in Conjecture and Definition, this hierarchy is broken. Normally, Conjecture would be the first stasis to be defined and dealt with by two parties: is there an act to consider, or has an act been recognized? Then, if Conjecture were agreed upon, the parties would address Definition: how do we define this act? In the case of *Ellerth*, the Circuit and Supreme court disagree on Conjecture—the lower believes there was *quid pro quo* harassment, while the upper does not—but *does* agree on Definition. Both courts defined *quid pro quo* harassment as 'tangible' economic effects (positive or negative) precluded by threats of the harasser. The Circuit Court's definition of *quid pro quo* sexual harassment as "situations where submission to sexual demands is made a condition of *tangible employment benefits*" (Wood par. 23, emphasis added) is mirrored almost exactly in the Supreme Court's definition of *quid pro quo* sexual harassment as fulfilled "threats to deny...*tangible job benefits*" (Kennedy 4, emphasis added). When expanding on what questions form a stasis of Conjecture, Crowley and Hawhee meaningfully mention that this stasis comes not only from asking questions like "Does it exist?" (67) but also "Where did it come from?" (67) "How did it begin?" (67) and "What is its cause?" (67).

Thus, the two courts differ in stasis on when to consider *quid pro quo* harassment as having originated: when is a threat considered to have been carried out, causing what we term as *quid pro quo* sexual harassment? At root here is how each court defines a "fulfilled threat"; that is, what exactly constitutes that thing a harasser threatens to deny, a "tangible job benefit,", and when has it been denied? The Supreme Court implies in the *Faragher-Ellerth* defense that a

fulfilled threat against tangible job benefits involves firing or denying promotion, while the Circuit Court also considers denial of certain assignments or information needed to complete those assignments as affected tangible job benefits. In other words, the two courts agree on the Definition stasis for "*quid pro quo* sexual harassment" but differ on the Definition stasis for the subterms "tangible job benefit" or "tangible employment action." Moreover, this reveals an important aspect in how Conjecture and Definition stasis interrelate: Conjecture is, to some extent, determined by Definition, despite the normal stasis hierarchy. Definitions factor in how and if the court perceives an act. Thus, to understand how the courts each individually perceive an act of the case, one must break that stasis hierarchy and resolve or recognize any definitions used differently by the two courts.

This complication in Definition reveals a problem which can easily occur between any stases, when parties assume they understand each other: if rhetors aren't clear with their definitions, then they risk causing confusion, giving merit to close analysis of the process of definition. As Crowley and Hawhee describe when introducing stasis theory, "the act of putting [arguments] in stasis establishes that the participants in this argument are usually arguing right past each other" (59). Edward Shiappa, in his book *Defining Reality: Definitions and the Politics of Meaning*, looks at how definitions are generated and how, if unresolved or not discussed, assumptions of definitions between parties can cause issue when coming to agreement or clarifying language. Shiappa puts forward the idea of "definitional ruptures"—moments when "resolving certain kinds of definitional disputes…requires that we address the issue of how words are defined" (8). Schiappa uses a parable of his students using the word 'bad' to describe,

in terms of slang, something as ‘good’; here, he says, “the students reject the definition found in the dictionary as irrelevant to their usage” (9).

Before discussing definitional ruptures, however, Schippa investigates how definitions are formed, as one way of seeing how they can rupture. There are two different ways of understanding definition as a process, he says, where words represent either “facts of essence” or “facts of usage.” The former, a *fact of essence*, understands words as “attempts to describe what something ‘really is’” (Schiappa 6); the latter, a *fact of usage*, means that “[w]hen someone asks what a particular word means, typically she or he is asking how people use the word” (6). Schiappa describes how these two ways of seeing definition can clash, but also demonstrates how people usually incorporate both methods in their own definitions; this incorporation he calls the “natural attitude,” or the “unexamined belief that definitions unproblematically refer both to the *nature of X* and to *how the word X is used*” (7).

Because these two different approaches to definition clash, analyzing their differences helps for discovering a definitional rupture. Schiappa writes, “[W]e normally get by just fine assuming that definitions are ‘out there,’ specifically in dictionaries, and that dictionaries are reliable guides to the nature of the things they define” (7); in other words, the “natural attitude” combines *facts of essence* with *facts of usage* by assuming the common usage listed in a dictionary also reflects what the defined X is. Yet, close analysis shows the two *facts* are contradictory. For the *fact of essence*, Schiappa uses Plato’s parable of humanity “living their lives in caves, thinking that the shadows on the wall are ‘real’” (8), writing that, “For Plato, then, common usage of word X was in no way a reliable guide to the true nature of X” (8); moreover, Schiappa says, “anyone who seriously believes that he or she can provide a real definition has no

need of a lexical definition [from a dictionary]" (8). Counter to this, then, is the *fact of usage*, where meaning comes from common or empirical usage, such as from a dictionary. When describing how *facts of usage* differ from *facts of essence*, Shiappa writes, "That is, if you believe that the meaning of a word X is what the dictionary tells you it is, then someone claiming that the dictionary is wrong and that she or he knows what X really is will probably sound somewhat strange" (8). In either *fact*'s case, meaning and authority matter to what someone takes to be as an accurate definition. A definitional rupture, then, can be either a challenge to what a term means or to how it is used, but it is also related to a disrupted "natural attitude" towards a given definition; that is, it brings to the forefront how our definitions can be flawed, requiring reinterpretation or a challenge to the dominant lexical meaning. Shiappa writes about what a definitional rupture indicates, saying:

> The natural attitude has been disrupted [in a definitional rupture] because the assumption that dominant usage as recorded in dictionaries corresponds to what things are has been called into question in such a way that the participants in the conversation have to reconcile the difference. (8)

Namely, in a definitional rupture, where redefinition is required for resolution, each party must assert to why their definition is correct; they must, in other words, describe their definition either in terms of a *fact of essence* or of a *fact of usage*, since these are the two ways of formulating definition in the first place. They might argue for a changed description (a *fact of essence*) or to add a specific usage (a *fact of usage*), either because they don't think the dictionary definition is of an accurate essence or because they don't think the dictionary contains relevant usage. Definitional ruptures, then, as a form of definitional analysis, show how definitions can change and also how they can be used or mean differently between parties.

The merging of stasis theory with definitional ruptures or definitional analysis helps reveal the action happening behind the difference in Conjecture stasis between the two courts. The fact of a definitional rupture underlying some part of '*quid pro quo* sexual harassment' first appears through the differed usage that originally indicated a difference of Conjecture stasis. Namely, the Circuit and Supreme Court share a Defintional stasis on "*quid pro quo* sexual harassment" but have a different usage (and therefore meaning) when it comes to "tangible job benefits"; the impact of this interpretation of a relevant subterm, creating a difference in Conjecture between the two courts, reveals "tangible job benefits" as a ruptured definition.

However, what makes this difference unique, as far as definitional ruptures go, is that it's intricately hidden; neither court spends any significant time actually defining "tangible job benefits," which leaves the rupture not only unresolved, but unrecognized. This novel way of understanding the Definitional stases between the two courts—as based on definitional rupture—I call a "stasis rupture." Each court has used nearly the exact same definition of "*quid pro quo* sexual harassment," but due to the rupture of subterms, even with the same definition of *quid pro quo* sexual harassment, they have come to have very different Conjecture stances on the topic. In other words, the two courts appear to agree with each other—appear to share a Definitional stasis—but it is ruptured by the unrecognized ruptured subterm. Returning to how the two courts' stances break the normal hierarchy of stasis resolution—that is, appearing to agree in the second stasis Definition but not in the first stasis Conjecture—it becomes clear that a deeper level of subterm Definitional stasis is also in disagreement. The normal hierarchy ruptured, the two courts claim to be in agreement on definition of *quid pro quo* sexual harassment, even as those definitions are ruptured in such a subtle way that it is not obvious that

the two actually aren't using their key definitions in the same way, and ultimately aren't sharing a Definitional stasis, in their analysis. In other words, in a stasis rupture such as this, the very process of defining one's stance (especially in terms of others) is made an issue of clarity.

Definitional Ruptures Affect How Policy Translates

In developing and introducing the *Faragerh-Ellerth* defense policy, the Supreme Court has devoted much of the decision to discussing the meaningfulness of *quid pro quo* sexual harassment in these kinds of deliberations. Because the two Courts' shared Definition stasis of "*quid pro quo* sexual harassment" is ruptured, the validity of the Supreme Court's arguements is also disrupted, inviting confusion and obscuring the matter: if "*quid pro quo* sexual harassment" isn't a relevent term, why then does the defense incorporate "tangible employment actions" when that is the key element by which the Supreme Court defines "*quid pro quo* sexual harassment?" Namely, we see definitional disruption of "tangible job benefits" affect the 'downstream' term "*quid pro quo* sexual harassment." As a result, when the Supreme Court dismisses *quid pro quo* sexual harassment as relevant, it also dismisses and ignores the discussion of what a "tangible job benefit" actually is. This leaves the rupture unresolved, even as the Supreme Court tries to avoid it by refusing to use the term *quid pro quo* sexual harassment in the defense; seeing as the term "*quid pro quo* sexual harassment" is defined and focused on by the Court (in comparison to the little focus used on defining "tangible job benefits") dismissing "*quid pro quo* sexual harassment" makes it easier for the court to ignore the ruptured subterm "tangible job benefits" when it comes up in the defense.

This has the unintended effect of implying that any kinds of 'tangible employment actions' that are on a smaller scale (such as Ellerth's being denied from work requests and

projects) than the three examples given in the *Faragher-Ellerth* defense are 'unreasonable' grounds for a plaintiff claiming reasons to distrust the HR complaint process; the court refuses to recognize them. In other words, short of the individual being fired, the company *almost always* gets an easy defense, even if the individual had valid reason to not want to go to company HR, which places the victimized employee continuously at a disadvantage; and even after doing this, the individual is still under the influence of biases that exist both in the corporate and legal spheres.

In essence, the Supreme Court's ignoral of definitional ruptures and of affected terms and stases incorporates oxymoronic logic into the stasis that defines their policy. Part of this is in the efforts to rationalize their stance on *quid pro quo* sexual harassment, such as saying "[The Circuit Court]...defined *quid quo pro* to include a supervisor's threat to inflict a tangible job injury whether or not it was completed" (Kennedy 5). Through this kind of rhetoric, the questioning of the 'reasonableness' of a victim, particularly a female one, and of the tangibility of effects of harassment on job duties, becomes an implicit act. By ignoring the impact of ruptures on the discussion of *quid pro quo* sexual harassment, the Supreme Court is not only able to easily dismiss the term, but replace it with subterm terminology that avoids discussing the assumptions of the court which underlie policy.

Conclusions on Overall Rhetoric Effect

From a purely rhetorically-focused vantage point, the Supreme Court decision's definitional usage reveals how definitions which are not entirely made to be the essence of argument, such as 'tangible', 'reasonable', and 'unwelcome', can become so intertwined with legal interpretation that the overall rhetorical effect of the decision is reductively influenced by

dated definitional preconceptions, even despite efforts to aid prosecution and resolution of sexual harassment situations. Due to the court's dismissal of *quid pro quo* as relevant and its inaccurate translation of the Circuit Court's stasis, the Supreme Court is also unable to aptly understand the sexist biases behind the law and inadvertently furthers those biases by the creation of policy that incorporates them.

This also reveals an intrinsic danger within definitional ruptures: as the "process of defining itself becomes an issue" (Schiappa 8), it becomes difficult to question definitions which are mired in each other without failed or ignored resolution, as a hierarchy of resolution is needed to resolve multiple definitional ruptures at once. But, from a practical standpoint, this is not necessarily always easily available; for each court to address *quid pro quo* harassment with the same set of definitions and come to the same conclusions, 'tangibility' is required to be defined *and* used similarly, but so too must loaded terms like 'harassment,' 'threat,' or 'unreasonable.' When more than one differs between parties, no amount of legal interpretation can easily resolve these disputes without first questioning the original subject positions and realities that allowed these biases; moreover, each definition rupture has the ability disrupt other related terms, which further requires a hierarchy of connection be established to solve ruptures.

When it comes to overreaching rhetorical effects of the Supreme Court's decision, the difference of 'tangibility' between courts also represents a disconnect between the high court and sexual harassment. Ellerth's employer was allowed an affirmative defense due to the Supreme Court's decision that no 'tangible employment action' took place. Thus, this interpretation of applicable 'tangible' actions as solely those of firing or reassignment is both confirmed in-case and rhetorically eased by the insistence on 'unreasonableness' under part (b) of the

Faragher-Ellerth defense; an implicit assumption here being that 'unreasonableness' may contain fear of being fired when it has not yet occurred, despite possible other fulfilled, smaller threats which the court may not consider as such. Additionally, while not mentioned in the outline of the *Faragher-Ellerth* defense, various parts of the decision describe workplace harassment as an "'impose[d] unwelcome sexual conduct'" (Kennedy 18), which echoes Frances J. Ranney's stasis research on issues of definition in harassment; specifically, she writes about the oxymoron of "welcome sexual harassment," and the Supreme Court's mention of "unwelcome sexual conduct" ties into this loaded term because the specification of "unwelcome" implies that "welcomeness" matters in a harassment case. As a harassment case, it should be assumed to be a situation of "unwelcomeness." Furthermore, in ignoring how they have implicitly discussed what should be considered 'tangible effects' or 'fulfilled threats', the court has further widened definitional ruptures present in sexual harassment by the implicit assumptions in the defense that give increased influence to already biased terms, such as 'reasonable woman,' a term which is described by rhetoric academics as having "so far failed to revolutionize this area of law" (Ranney 1) and "in…[the legal] context if in no other, an oxymoron" (Ranney 14).

The Supreme Court decision in *Ellerth v. Burlington* set historic standards for how the courts would approach workplace sexual harassment from then on. For example, in an article in *Time* in 2019, a Professor Vicki Schultz of Yale Law School talks about how the corporate harassment complaints process "deters many victims of harassment from ever reporting to the U.S. Equal Employment Opportunity Commission (EEOC) and suing, because they fear retaliation if they have to complain in-house," (Waxman par. 13). Schultz then describes how

Ellerth plays a part in cyclical corporate silencing, saying, “The Faragher and Burlington Industries decisions are best understood against the backdrop of a trend toward ‘privatizing’ discrimination claims” (Waman par. 13). As Schutlz puts it, “In this era, the Supreme Court began upholding and/or favoring rules that forced employment discrimination victims into private fora other than courts” (Waxman par. 13)**;** the two upper courts involved Ellerth’s case may only differ on the ‘tangibility’ behind the logic of their mirrored decisions, but through the Supreme Court’s defense of this usage as it applies to *quid pro quo* harassment, it circumvents the future equalitive progression of the legal interpretation offered. Due to the entwining of the court’s logic with definitional ruptures, the *Faragher-Ellerth* defense clarifies how corporations can protect themselves while ultimately confusing practical application for victims, shifting rhetoric from a public, judicial situation to a private, corporate one and encouraging victims to stay silent.

Works Cited

Crowley, Sharon and Debra Hawhee. *Ancient Rhetorics for Contemporary Students*. 5th Edition, Pearson, 2012, pp. 56-76.

Kennedy, Anthony. *Burlington v. Ellerth*. *Cornell Law School*, 26 June 1998. Web. www.law.cornell.edu/supct/pdf/97-569P.ZO. Accessed 12 April 2019.

Pound, Edward T. and Kevin Johnson. "Jordan: I testified 'truthfully' Lawyer, White House stress close friendship." *USA Today,* final ed., 7 March 1998. Retrieved from nexis Uni. Accessed 2 March 2019.

Ranney, Frances J. "What's a Reasonable Woman to Do? The Judicial Rhetoric of Sexual Harassment." *NWSA Journal*, Vol. 9, No. 2, Summer 1997, pp. 1-22.

Schiappa, Edward. *Defining Reality: Definitions and the Politics of Meaning*. Southern Illinois UP, 2003, pp. 3-33.

Waxman, Olivia B. "The Surprising Consequences of the Supreme Court Cases That Changed Sexual Harassment Law 20 Years Ago." *Time*, 26 June 2018. Web. http://time.com/5319966/sexual-harassment-scotus-anniversary/. Accessed 12 April 2019.

Wood, Diane P. *Burlington v. Ellerth Circuit*. *FindLaw*, 27 November 1996. Web. www.caselaw.findlaw.com/us-7th-circuit/1379871.html. Accessed 12 April 2019.