SUPREME COURT OF THE UNITED STATES

No. 97–282

BETH ANN FARAGHER, PETITIONER *v.* CITY OF BOCA RATON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 26, 1998]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

For the reasons given in my dissenting opinion in *Burlington Industries* v. *Ellerth*, *ante*, absent an adverse employment consequence, an employer cannot be held vicariously liable if a supervisor creates a hostile work environment. Petitioner suffered no adverse employment consequence; thus the Court of Appeals was correct to hold that the City is not vicariously liable for the conduct of Chief Terry and Lieutenant Silverman. Because the Court reverses this judgment, I dissent.

As for petitioner's negligence claim, the District Court made no finding as to the City's negligence, and the Court of Appeals did not directly consider the issue. I would therefore remand the case to the District Court for further proceedings on this question alone. I disagree with the Court's conclusion that merely because the City did not disseminate its sexual harassment policy, it should be liable as a matter of law. See *ante*, at 31.[1] The City

[1] The harassment alleged in this case occurred intermittently over a 5-year period between 1985 and 1990; the District Court's factual findings do not indicate when in 1990 it ceased. It was only in March 1990 that the Equal Employment Opportunity Commission (EEOC) issued a "policy statement" "enjoining" employers to establish complaint proce-

should be allowed to show either that: (1) there was a reasonably available avenue through which petitioner could have complained to a City official who supervised both Chief Terry and Lieutenant Silverman, see Brief for United States and EEOC as *Amici Curiae* in *Meritor Savings Bank, FSB* v. *Vinson*, O.T. 1985, No. 84–1979, p. 26,[2] or (2) it would not have learned of the harassment even if the policy had been distributed.[3] Petitioner, as the plaintiff, would of course bear the burden of proving the City's negligence.

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dures for sexual harassment. See *ante,* at 28. The 1980 Guideline on which the Court relies––because the EEOC has no substantive rulemaking authority under Title VII, the Court is inaccurate to refer to it as a "regulation," see *ante,* at 32,––was wholly precatory and as such cannot establish negligence *per se.* See 29 CFR §1604.11(f) (1997) ("An employer should take all steps necessary to prevent sexual harassment from occurring . . . ").

[2] The City's Employment Handbook stated that employees with "complaints or grievances" could speak to the City's Personnel and Labor Relations Director about problems at work. See App. 280. The District Court found that the City's Personnel Director, Richard Bender, moved quickly to investigate the harassment charges against Terry and Silverman once they were brought to his attention. See App. to Pet. for Cert. 80a.

[3] Even after petitioner read the City's sexual harassment policy in 1990, see App. 188, she did not file a charge with City officials. Instead, she filed suit against the City in 1992.