Adopting the Avoidable Consequences Affirmative Defense: Applying the Lessons of Ellerth/Faragher to FLSA Claims

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I. Introduction

This article introduces a new defense to claims that employers have failed to pay their employees in compliance with the Fair Labor Standards Act (“FLSA”). When an employer has committed itself to full compliance with the FLSA, has adopted well-publicized policies prohibiting off-the-clock work, and has provided a mechanism for reporting violations, courts should impose a reciprocal duty on employees. Under this doctrine of avoidable consequences, employees would have a duty to mitigate the harm by complying with the employer’s pay practices policies and internally reporting any FLSA violations. As the Court has provided in the Title VII cases of Burlington Industries, Inc. v. Ellerth 3 and Faragher v. City of Boca Raton 4, in some cases this affirmative defense would provide a complete defense to FLSA liability, particularly as it relates to meal and rest period and time clock violations.

A. Current State of Wage and Hour Litigation

In the Middle District of Florida, more wage and hour lawsuits were filed each month in early 2008 than were filed in the entire one-year period ending July 2007.5 Nationwide, the number of wage and hour class actions filed in the federal courts more than doubled from 2001 to 2006,6 and the pace is not slowing. Off-the-clock, misclassification, and overtime claims under the FLSA are mushrooming. The federal Department of Labor (“DOL”) has actually

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reduced enforcement actions, including investigations and lawsuits, over this period.\textsuperscript{7} It is the employees and plaintiffs’ bar who are increasingly aware of possible wage claims. In a recent review of employment law class actions filed during a six-month period, nationwide over 75% were wage and hour related.\textsuperscript{8}

In addition to the increasing likelihood that an employer will be subject to a wage and hour lawsuit, an employer’s potential liability under the FLSA is staggering. In the past few years, wage and hour lawsuits have exposed employers to “bet the company” jury verdicts and threatened the ability of many companies to continue doing business. In today’s class-action-rich litigation environment, wage and hour missteps have led to a veritable parade of horribles, including adverse publicity and direct loss in share value. As a result, many companies have been compelled to pay significant amounts to settle these lawsuits. The year 2007 alone saw the following multi-million dollar wage and hour class action settlements involving well-known and respected employers within the specified industries:

\begin{itemize}
  \item $87 million – package delivery industry
  \item $65 million – computer industry
  \item $53.3 million – supermarket industry
  \item $38 million – office supply industry
  \item $14 million – financial services industry
  \item $14 million – beverage bottling and distribution industry
\end{itemize}

Along with the expanding number and size of class actions, wage and hour violations claimed in the suits are also multiplying. There is no evidence that employers are intentionally violating wage laws in greater number today than historically. If anything, timekeeping technology and awareness of wage and hour laws have brought more workplaces in compliance with reasonable interpretations of the FLSA. However, as the workplace becomes technologically more complex and work schedules accommodate the needs of both employers and employees, the aging FLSA has more and more trouble adjusting to the modern-day workplace. While unpaid overtime cases remain the largest single claim, missed meal and rest period cases are proliferating. Off-the-clock allegations, donning and doffing, unpaid work time, and unpaid travel time claims are also becoming commonplace, resulting in hundreds of millions of dollars in damage awards, civil and statutory penalties, litigation expenses, business costs, and lost productivity.

This is not the first time courts have struggled with a glut of employment litigation. After the 1991 Civil Rights Act was passed, Title VII employment discrimination suits accelerated as plaintiffs explored their new rights to recovery of compensable and punitive damages and to jury trials.\textsuperscript{9} Title VII employment filings spiked from 8,272 in 1990 to 23,735 in 1998.\textsuperscript{10} In part responding to the onslaught of Title VII cases filed, the courts developed common law

\textsuperscript{7} U.S. Gov’t Accountability Office, \textit{FLSA: Better Use of Available Resources \& Consistent Reporting Could Improve Compliance} (GAO-08-962T), July 15, 2008, at 6 (showing 9% decrease in enforcement actions from FY 2001 to 2006).
\textsuperscript{8} Littler Mendelson, \textit{Total Wage and Hour Compliance: An Initiative to End the Wage and Hour Class Action War}, p. 2 (discussing review of class action suits filed from October 1, 2007 to March 28, 2008).
\textsuperscript{9} Pub. L. No. 102-166 (Nov. 21, 1991) (modifying 42 U.S.C. § 2000e \textit{et seq.}).
affirmative defenses allowing the employer the ability to seek dismissal via motions for summary judgment. The seminal cases of Burlington Industries, Inc. v. Ellerth11 and Faragher v. City of Boca Raton12 set forth the means by which employers, through their good-faith and voluntary efforts, can protect themselves wholly from liability in certain circumstances. These decisions rely on common law principles to require both employers and employees to be vigilant about preventing harassment in the workplace, and establish employee training as the cornerstone to defense against harassment charges. Since Ellerth and Faragher, employees are better aware of their rights—and bring EEOC harassment charges about 18% more often than prior to the decisions.13 Title VII employment lawsuits, however, have dropped by more than 6% in the past five years.14

It is time for the courts to adopt a similar common law defense in the wage and hour arena. The FLSA statutory defenses available to employers to defend against off-the-clock allegations and other wage and hour claims are insufficient to address modern collective action practices. Although wage and hour lawsuits are clogging many court dockets,15 the FLSA as currently interpreted constrains courts in their ability to manage caseloads through the use of summary judgment. Under the FLSA statutory defenses, employers are not rewarded for FLSA compliance to the extent that they are in Title VII litigation.

This article explores the application of the familiar Ellerth/Faragher defense to off-the-clock claims. It relies on the age-old principle that a plaintiff cannot intentionally increase his damages by proceeding in the face of harm, and must thus participate in reducing his damages. A well-planned program of wage and hour compliance and preventive training can raise employee awareness of wages properly due, promote legal compliance, and prevent needlessly punitive class action suits.

B. Existing Statutory Defenses to Wage and Hour Claims

Since its 1938 enactment, the FLSA has been amended repeatedly to respond to court interpretations and changing work conditions.16 The 1947 amendment, known as the Portal-to-Portal Act, established the three primary defenses used in modern FLSA suits.17 The first of these reduces an employer’s liability for back wages where the statutory violation is not willful.18

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15 Courts are developing new procedures to expedite resolution of the growing number of wage and hour cases. For example, the United States District Court for the Middle District of Florida has issued novel scheduling orders in wage and hour cases designed to streamline discovery and foster settlement early in litigation. The scheduling orders often stay discovery pending plaintiff’s responses to initial court-ordered interrogatories regarding hours worked, rate of pay, and overtime, and defendant’s reciprocal production of relevant timesheets and payroll records. The parties then attend a mandatory mediation to explore settlement and potential resolution of the case. See, e.g., Thompson v. GGR Roofing, Inc., No. 6:06-CV-39-ORL-19JGG (M.D. Fla. Feb. 21, 2006) (scheduling order).
17 29 U.S.C. § 251 et seq.
the second defense prevents the assessment of liquidated damages in an amount equal to the back wages owed;19 the third—used infrequently—is a complete bar to employer liability.20

1. Defense to Third Year of Back Wages and Civil Money Penalties

Under the Portal-to-Portal Act, a plaintiff filing a claim for unpaid wages, overtime, and liquidated damages can recover for the two years prior to the date he files a claim.21 If the plaintiff can prove that an employer willfully violated the FLSA, however, the statute of limitations is expanded to three years.22 Thus, in litigation, an employer can reduce its liability by one-third if the employer establishes that it did not act willfully. In addition, the DOL may issue civil money penalties (“CMPs”) of up $1,100 per FLSA violation it finds willful.23

Under the Supreme Court’s holding in McLaughlin v. Richland Shoe Co., an employer willfully violates the FLSA if it either knew its actions were prohibited by the FLSA or showed reckless disregard for whether the FLSA prohibited its conduct.24 The plaintiff (who may be the Secretary of Labor or a private plaintiff) bears the burden of showing that the defendant’s acts were willful.25 Proof of willfulness requires the plaintiff to show that the defendant acted recklessly, and not just unreasonably, in determining its legal obligation under the FLSA.26

Courts consider an employer’s remedial measures when assessing proof of willfulness. Employers who, upon becoming aware of potential violations, take substantial efforts to ensure compliance with the FLSA will be found not to have acted recklessly.27 On the other hand, when the law is clear and an employer disregards the law, the employer will be found to have acted recklessly.28

Failure by an employer to investigate its compliance with the FLSA may also be considered as evidence of willfulness. The DOL considers an employer’s failure to inquire into whether it is complying with the FLSA as proof of willfulness.29 The First Circuit has criticized the DOL’s approach as not complying with the Supreme Court’s willful standard as outlined in Richland Shoe, holding that a failure to inquire regarding FLSA compliance is negligent, but not reckless, behavior.30 The DOL disagrees with the First Circuit’s holding, and few other federal courts have followed it. Accordingly, and since DOL has final authority to assess FLSA

22 Id.
23 29 C.F.R. § 578.3.
26 Id.
29 Id.
30 See Baystate Alternative Staffing, Inc. v. Herman, 163 F.3d 668 (1st Cir. 1998).
penalties, in order to avoid CMPs, employers should proactively audit their compliance with the FLSA.

2. Section 11 Good Faith Defense Against Liquidated Damages

Wage claims under the FLSA can be particularly expensive for the defending employer because any amount of overtime or back wages found due to employees is typically doubled as liquidated damages. Courts normally award liquidated damages in an amount equal to the back wages owed (up to three years of back wages). However, Section 11 of the Portal-to-Portal Act allows the court to reduce the otherwise mandatory liquidated damages:

If the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that it had reasonable grounds for believing that his act or omission was not a violation of the [FLSA], the court may, in its sound discretion, award no liquidated damages or award any [lesser] amount thereof. 32

This is the most commonly asserted defense to FLSA claims. It is not, however, a complete bar to liability; it merely reduces the amount of damages owed. The Section 11 good faith defense is available if the employer proves that it “acted in subjective good faith” and “had objectively reasonable grounds for believing that the acts and omissions giving rise to the failure [to pay overtime] did not violate the FLSA.” 33 “Good faith in this context requires more than ignorance of the prevailing law or uncertainty about its development.” 34 Rather, “[i]t requires that an employer first take active steps to ascertain the dictates of the FLSA and then move to comply with them.” 35 The fact that an employer does not purposely violate the FLSA is insufficient to establish that it acted in good faith. 36 “Nor is good faith demonstrated by the absence of complaints on the part of employees.” 37 Moreover, “simple conformity with industry-wide practice” will not establish good faith, although at least one court has held that conformity with industry practice is at least relevant to a finding of good faith. 38

Accordingly, the Section 11 defense to liquidated damages is available where an employer can prove that it relied on the advice of counsel. 40 Employers may also prevail on a

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33 Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 142 (2d Cir. 1999) (internal quotation marks omitted).
35 Id.
36 Id.
37 Id.
38 Id.
39 See Vega v. Gasper, 36 F.3d 417, 428 n.9 (5th Cir. 1994) (noting that reliance on industry custom can be relevant but not dispositive under § 11).
40 See, e.g., Roy v. County of Lexington, 141 F.3d 533, 548 (4th Cir. 1998) (finding § 11 satisfied where employer relied on advice of counsel); Featsent v. City of Youngstown, 70 F.3d 900, 906-07 (6th Cir. 1995) (same); Hill v. J.C. Penny Co., 688 F.2d 370, 375 (5th Cir. 1982) (same); Garcia v. Allsup’s Convenience Stores, Inc., 167 F. Supp. 2d 1308, 1316 (D.N.M. 2001) (“an employer establishes a good faith defense to liquidated damages by diligently consulting legal specialists and labor specialists and following their advice”) (collecting cases); cf. So. N. England Telecomm., 121 F.3d at 72 (rejecting § 11 defense, noting that the employer “does not contend that it was relying on the advice of informed counsel”); cf. Debejian v. Atlantic Testing Labs., Ltd., 64 F. Supp. 2d 85, 91-92 (N.D.N.Y. 2000).
Section 11 defense when 1) uncertainty about the application of the FLSA and lack of controlling precedent causes the FLSA violation; 41 2) application of the FLSA to the particular employees presents a “fact-intensive issue;” 42 3) the employer compensates its employees in certain instances more generously than the FLSA required; 43 and 4) the employer incorrectly but reasonably believes that it is complying with written guidance from DOL. 44

3. Section 10 Complete Good Faith Defense

Section 10 of the Portal-to-Portal Act provides a complete bar to FLSA liability if an employer proves that it acted in good faith in conformity with and reliance on written DOL guidance. The purpose of the Section 10 “good faith” defense is to completely protect an employer from liability who relies in good faith on the Wage Hour Administrator’s mistaken or invalid interpretation of the FLSA.

The Act provides:

No employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the FLSA if the employer pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the Administrator of the Wage and Hour Division of the DOL, or any administrative practice or enforcement policy of [the Administrator]. 45

In addition to the Part 541 regulations (and the Preamble to the Final Rule), an employer may rely on a Wage and Hour Division Opinion Letter and the Field Operations Handbook. 46

Valid Section 10 defenses are exceedingly rare. 47 The Section 10 defense applies only if the employer can prove that it had actual knowledge of and relied on an agency regulation, order, exemption prior to determining that employee was exempt).

40 See Martin v. Cooper Elec. Supply Co., 940 F.2d 896, 910 (3d Cir. 1991) (legal uncertainty can support a § 11 defense provided the uncertainty “actually led the employer who violated the Act to believe that it was in compliance at the time of the violation”); Hultgren v. County of Lancaster, 913 F.2d 498, 508-10 (8th Cir. 1990) (“uncertainty about the application of the Act may be considered in determining the appropriateness of liquidated damages”) (collecting cases); Horan v. King County, 740 F. Supp. 1471, (E.D. Wash. 1990) (§ 11 defense applied in part because “issue presented was one of first impression,” and “statute and regulations [were] uncertain and confusing”).


43 See Roy v. County of Lexington, 141 F.3d 533, 548 (4th Cir. 1998).

44 See Nelson v. Ala. Inst. for Deaf and Blind, 896 F. Supp. 1108, 1115 (N.D. Ala. 1995); Schneider v. City of Springfield, 102 F. Supp. 2d 827, 841 n.9 (S.D. Ohio 1999) (although written guidance did not address employer’s particular circumstances and thus could not be relied upon for § 10 defense, the employer did not, as a matter of law, “act[] unreasonably or in bad faith by inferring from them that it properly compensated its [employees]”).


47 U.S. Dept. of Labor Field Operations Handbook, FOH § 52.08 (May 31, 1997). See, e.g., Frank, 950 F.2d 590 (§ 10 defense available where improper overtime calculation was consistent with Administrator’s Opinion Letter
ruling, approval, interpretation, practice, or enforcement policy before making a decision. Also, some courts have held the DOL guidance must provide a clear an unambiguous answer to the employer’s particular situation, and not leave the employer “to its own devices to interpret the [FLSA].”

To be successful, each of these three defenses outlined above require the employer’s vigilant compliance with the FLSA. The first two defenses discussed, the defense to a third year of back wages and civil money penalties and the section 11 good faith defense to liquidated damages, limit the employer’s potential damages when a wage and hour violation exists. The third defense, the section 10 good faith defense, provides a complete bar to liability, but is rarely successful. The defenses do not ask whether the wage and hour violation could have been prevented by the employee’s participation in the compliance process. Nor do the defenses impose a duty or obligation on the employee to engage in or cooperate with the employer’s compliance efforts.

By applying the principles adopted by the Supreme Court in Ellerth and Faragher to the FLSA to adopt an affirmative defense rewarding employers for engaging in prevention and remediation while also imposing a duty on employees to self-report potentially unlawful pay practices, employer compliance with the FLSA will increase, and the surge in FLSA litigation will eventually decrease, similar to the reduction recently seen in Title VII employment actions. As one court has observed, the duty imposed on the employee has increased Title VII compliance, to the benefit of both employers and employees.

The rules of [Faragher and Ellerth] place obligations and duties not only on the employer but also on the employee. One of the primary obligations that the employee has under those rules is to take full advantage of the employer’s preventative measures. The genius of the Faragher-Ellerth plan is that the corresponding duties it places on employers and employees are designed to stop sexual harassment before it reaches the severe or pervasive stage amounting to discrimination in violation of Title VII. But that design works only if


48 See 29 C.F.R. §§ 790.14 to 790.19. But see Int’l Ass’n of Firefighters v. City of Rome, 682 F. Supp. 522, 532 (N.D. Ga. 1988) (“[T]he Court will not hold that because the written interpretations were not originally relied upon, the City was forever deprived of the benefit of the agency’s written advice.... Once the City received such written interpretations, proper reliance upon them is protected by the Portal-to-Portal Act.”); Marshall v. Baptist Hosp., Inc., 473 F. Supp. 465, 479 (M.D. Tenn. 1979) (“[I]t would be patently absurd to hold as a general rule that defendants whose pre-existing views happen to comport with administrative pronouncements could never be said to act thereafter in reliance on them.”), rev’d on other grounds, 668 F.2d 234 (6th Cir. 1981).

49 EEOC v. Home Ins. Co., 672 F.2d 252, 265 (2d Cir. 1982). See also Cole v. Farm Fresh Poultry, Inc., 824 F.2d 923, 927 (11th Cir. 1987) (“[N]onstatutory interpretations hedged with qualifications, here the caveat that the correct answer depends on the particular circumstances, cannot provide the definitive opinion necessary to raise the statutory bar of section [10].”); Burnison v. Mem’l Hosp., Inc., 820 F. Supp. 549, 558 (D. Kan. 1993) (no § 10 defense allowed based on regulation using terms such as “adequate” and “usually,” which raised distinctly factual questions upon which the regulation offers no guidance.”); but see Marshall, 668 F.2d at 238 (§ 10 defense allowed based on the employer’s reasonable construction of an ambiguous regulation: “courts should be hesitant to impose retroactive minimum wage liability on employers in the face of an administrative interpretation which the employer could plausibly interpret as insulating him from liability”).
employees report harassment promptly, earlier instead of later, and the sooner the better.\textsuperscript{50}

II. The Doctrine of Avoidable Consequences as an Established Affirmative Defense

In \textit{Burlington Industries, Inc. v. Ellerth}\textsuperscript{51} and \textit{Faragher v. City of Boca Raton},\textsuperscript{52} the United States Supreme Court established the now well-known affirmative defense to sexual harassment suits. Employers may raise the defense to avoid liability for a supervisor’s harassment where the employer implements an effective policy for reporting and resolving harassment complaints and the plaintiff unreasonably fails to avail herself of the policy.\textsuperscript{53} Although courts now apply the \textit{Ellerth/Faragher} affirmative defense without question in Title VII cases, the same principles should be applied to develop a similar defense to FLSA claims.

In establishing the affirmative defense to sexual harassment, the Supreme Court signaled its interest in preventing future violations and rewarding employers who make reasonable efforts to discharge their duties under Title VII. The Court explained that although the statute seeks to make employees whole for unlawful discrimination, its “primary objective” is “not to provide redress but to avoid harm.”\textsuperscript{54} In adopting the defense, the Court sought to accomplish this objective by enforcing an employer’s affirmative obligation to prevent unlawful conduct.\textsuperscript{55} The Court reasoned that this scheme not only would implement the statute’s remedial objectives, but also would enhance the EEOC’s enforcement efforts, which are designed to encourage voluntary compliance and reward employers who take reasonable steps to prevent improper conduct.\textsuperscript{56}

While affirming the employer’s duty to prevent harm by requiring that it exercise reasonable care to prevent and correct promptly any sexually harassing behavior, the Court recognized that the employee also has a duty to avoid or mitigate the harm by taking advantage of any preventive or corrective opportunities provided.\textsuperscript{57} According to the Court, the employee’s duty derives from the “general theory of damages,” and requires that the employee “use such means as are reasonable under the circumstances to avoid or minimize the damages” that result from violations of the statute.\textsuperscript{58}

This general principle is often referred to as the avoidable consequences doctrine, and has deep common law roots.\textsuperscript{59} Both contract and tort law embrace the principle that plaintiffs cannot recover damages for harm they could have prevented. The Restatement of Torts provides that

\begin{itemize}
\item \textsuperscript{50} Baldwin v. Blue Cross/Blue Shield of Alabama, 2007 WL 805528 at *16 (11th Cir. 2007) (emphasis added).
\item \textsuperscript{51} 524 U.S. 742 (1998).
\item \textsuperscript{52} 524 U.S. 775 (1998).
\item \textsuperscript{53} Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807.
\item \textsuperscript{54} Faragher, 524 U.S. at 805-06.
\item \textsuperscript{55} Id. at 806.
\item \textsuperscript{56} Id. See also Kolstad v. American Dental Ass’n, 527 U.S. 526, 545 (1999) (holding that Title VII is intended to promote prevention and remediation).
\item \textsuperscript{57} Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807.
\item \textsuperscript{58} Faragher, 524 U.S. at 806 (observing that the “requirement to show that the employee has failed in a coordinate duty to avoid or mitigate harm reflects an equally obvious policy”).
\item \textsuperscript{59} Faragher, 524 U.S. at 805; Ellerth, 524 U.S. at 764 (“Title VII borrows from tort law the avoidable consequences doctrine ... and the considerations which animate that doctrine would also support limitation of employer liability in certain circumstances.”).
\end{itemize}
one injured by the tort of another is not entitled to recover damages for any harm that he could
have avoided by the use of reasonable effort or expenditure after the commission of the tort." 60
As explained in the Comments of the Restatement, this limitation on damages is necessitated by
public policy which “requires that persons should be discouraged from wasting their resources,
both physical or economic.” 61

In contract law, the corollary to the doctrine of avoidable consequences is the duty to
mitigate damages caused by a breach of contract. The Restatement of Contracts provides that
“damages are not recoverable for loss that the injured party could have avoided without undue
risk, burden or humiliation.” 62 As explained in the Comments of the Restatement, “a party
cannot recover damages for loss that he could have avoided by reasonable efforts. Once a party
has reason to know that performance by the other party will not be forthcoming, he is ordinarily
expected to stop his own performance to avoid further expenditure.... Furthermore, he is
expected to take such affirmative steps as are appropriate in the circumstances to avoid loss by
making substitute arrangements or otherwise.... The amount of loss that he could reasonably
have avoided by stopping performance, making substitute arrangements or otherwise is simply
subtracted from the amount that would otherwise have been recoverable as damages.” 63

In adopting the avoidable consequences doctrine 64 as part of the affirmative defense to
claims for sexual harassment, the Faragher Court relied on established precedent. 65 In Ford
Motor Co. v. EEOC 66 the Court ruled that an employer can toll back pay liability in a Title VII
failure-to-hire case by making the plaintiff an unconditional offer of employment. In that case,
the plaintiffs had rejected the employer’s unconditional offer of employment because it did not
include an offer of retroactive seniority. In tolling the employer’s liability for back wages to
coincide with the date that the plaintiffs rejected the offer, the Court upheld Title VII’s statutory
provision imposing a duty on all plaintiffs to minimize damages. 67 In so holding, the Court
explained that an employee’s duty to avoid damages rests on an “ancient principle of law” which
provides that “[w]here one person has committed a tort, breach of contract, or other legal wrong
against another, it is incumbent upon the latter to use such means as are reasonable under the
circumstances to avoid or minimize the damages. The person wronged cannot recover for any
item of damage which could thus have been avoided.” 68

60 RESTATEMENT (SECOND) TORTS § 918(1).
61 RESTATEMENT (SECOND) TORTS § 918, cmt. a.
62 RESTATEMENT (SECOND) CONTRACTS § 350(1).
63 RESTATEMENT (SECOND) CONTRACTS § 350, cmt. b.
64 Under the avoidable consequences doctrine, a defendant may have its damages reduced, but cannot receive
absolution from liability. However, “[a]s applied in employment discrimination cases, the Supreme Court has
specifically stated that a plaintiff’s reticence could be sufficiently serious as to completely preclude an employer’s
liability, regardless of whether the avoidable consequences doctrine operates differently in tort law.” Savino v. C.P.
Hall Co., 199 F.3d 925, 935 (7th Cir. 1999) (citing Faragher, 524 U.S. at 807).
65 524 U.S. at 806.
67 42 U.S.C. §2000e-5(g) sets forth the duty to mitigate requirement of Title VII, providing that “[i]nterim earnings
or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce
the back pay otherwise allowable.” Id. at 231, n.14. See also, n.96, infra (discussing distinction between differing
duties to mitigate in Title VII and in Ellerth).
68 Id. at 231 & n.15.
In enforcing the employee’s duty to mitigate that is imposed by Title VII as well as by “ancient principles of law,” the Court in *Ford Motor Co.* recognized the relationship between an employer’s efforts to comply with Title VII and an employee’s duty to avoid damages:

The primary objective of Title VII is to bring employment discrimination to an end, by achieving equality of employment opportunities and removing barriers that have operated in the past to favor an identifiable group... over other employees. The preferred means for achieving this goal is through cooperation and voluntary compliance. To accomplish this objective, the legal rules fashioned to implement Title VII should be designed, consistent with other Title VII policies, to encourage Title VII defendants promptly to make curative, unconditional job offers to Title VII claimants, thereby bringing defendants into “voluntary compliance” and ending discrimination far more quickly than could litigation proceeding at its often ponderous pace.... The rule tolling the further accrual of backpay liability if the defendant offers the claimant the job originally sought well serves the objective of ending discrimination through voluntary compliance, for it gives an employer a strong incentive to hire the Title VII claimant.69

In *Faragher*, the Court expanded on the notion that a plaintiff cannot increase her damages by unreasonably failing to avail herself of an employer’s voluntary efforts to comply with the statute:

An employer may, for example, have a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense. **If the plaintiff unreasonably failed to avail herself of the employer’s preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so.** If the victim could have avoided the harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.70

Even though the FLSA does not contain a statutory duty to mitigate damages similar to that contained in Title VII, the doctrine of avoidable consequences, so firmly rooted in both tort and contract law as well as in Supreme Court jurisprudence, should apply with equal force to the FLSA. When an employer makes reasonable and diligent efforts to adopt and enforce remedial measures designed to ensure FLSA compliance, at a minimum, employees should be obligated to avail themselves of those measures, and should not be allowed to increase their damages under the FLSA for their failure to do so.

### III. Applying the Doctrine of Avoidable Consequences to FLSA Claims

While the objectives of Title VII and the FLSA differ, the primary means of achieving those objectives is the same: voluntary cooperation and compliance with the law. The

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69 *Id.* at 228-29 (citations omitted).
70 *Ellerth*, 524 U.S. at 806-07 (emphasis added).
Department of Labor has recently placed a strong emphasis on compliance in achieving the goals of the FLSA. In 2002, the DOL created the Office of Compliance Assistance Policy, “which is charged with raising public awareness of the laws enforced by the DOL,” including the FLSA.\(^71\) As the DOL website notes, “[s]ince its inception, the Office of Compliance Assistance Policy has spearheaded a variety of efforts to raise awareness of America’s employment laws and make complying with them easier. These enhanced compliance assistance activities are designed to protect the wages, health benefits, retirement security, safety and health of America’s workforce by preventing employment law violations. Compliance assistance focuses on increasing voluntary compliance with the Department’s laws.”\(^72\)

The Department of Labor’s stated objective of increasing voluntary compliance is reflected the Preamble to the 2004 FLSA Regulations.\(^73\) In creating the 2004 amendments to the FLSA regulations, the DOL included a “safe harbor” provision regarding the effect that improper deductions have on the salary basis test as applied to exempt employees. The safe harbor provision includes a complaint mechanism similar to that endorsed by the Supreme Court in Ellerth and Faragher. The safe harbor provision adopted by the DOL states as follows:

If an employer has a clearly communicated policy that prohibits the improper pay deductions specified in §541.602(a) and includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, such employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints...The best evidence of a clearly communicated policy is a written policy that was distributed to employees prior to the improper pay deductions, by for example, providing a copy of the policy to employees at the time of hire, publishing the policy in an employee handbook or publishing the policy on the employer’s Intranet.\(^74\)

In explaining the basis for its adoption of this provision, the Department of Labor cited Ellerth/Faragher with approval:

The Department continues to believe that the proposed safe harbor provision is an appropriate mechanism to encourage employers to adopt and communicate employment policies prohibiting improper pay deductions, while continuing to ensure that employees whose pay is reduced in violation of the salary basis test are made whole...In our view, this provision achieves the goals...of both encouraging employers to adopt “proactive management practices” that demonstrate the employers’ intent to pay on a salary basis, and correcting violative pay practices.... We believe it furthers the purposes of the FLSA to permit the employer who has a clearly communicated policy prohibiting improper pay deductions and a mechanism for employee complaints, to reimburse the affected employees for the impermissible deductions and take

\(^{72}\) Id. (emphasis added).
\(^{74}\) 29 C.F.R. § 541.603(d).
good faith measures to prevent improper deductions in the future. This is generally consistent with trends in employment law. An employer, for example, that has promulgated a policy against sexual harassment and takes corrective action upon receipt of a complaint of harassment may avoid liability. See Faragher v. City of Boca Raton and Burlington Industries, Inc v. Ellerth.75

These comments indicate that the Department may support the adoption of an Ellerth/Faragher affirmative defense in the context of off-the-clock claims. In the DOL’s view, the purpose of the FLSA is furthered when the employer communicates a policy prohibiting improper pay practices, provides the employee with a mechanism to complain or report improper pay practices, remediates the improper pay practice by making the employee whole, and adopts good faith measures to prevent the improper conduct in the future.76 It logically follows that the Department would also support the adoption of the avoidable consequences doctrine imposing on the employee a duty to report improper pay practices.

The statutory affirmative defenses to the FLSA, added by the 1947 Portal-to-Portal Act, center around the common law doctrine of “good faith.”77 Similarly, courts have looked to common-law doctrines to interpret the FLSA. For example, under certain circumstances, courts have applied common-law principles in crafting fact-specific affirmative defenses to the FLSA.78 These common-law principles include the doctrines of estoppel,79 mootness,80 unclean hands,81

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76 Id.
79 Estoppel is available as a defense under limited factual circumstances. See, e.g., Redman v. United States W. Bus. Res., 153 F.3d 691, 695-96 (8th Cir. 1998) (analyzing factual circumstances but finding estoppel requirements not met in FLSA collective action); Brumbelow v. Quality Mills, Inc., 462 F.2d 1324 (5th Cir. 1972) (estoppel available where homeworker falsified records to show production consistent with employer’s reasonable expectations); Martin v. Blessed Trinity Catholic Church, 2008 U.S. Dist. LEXIS 30323 (M.D. Fla. Apr. 14, 2008) (permitting estoppel defense to proceed where employee retroactively claimed volunteer hours as compensable time). The more common FLSA estoppel analysis rejects the defense on grounds that employees cannot waive FLSA rights outside of government-supervised proceedings. See, e.g., Brooklyn Sav. Bank v. O’Neil, 324 U.S. 697, 706-07 (U.S. 1945) (superseded in part on other grounds by statute) (“to allow waiver of statutory wages by agreement would nullify the purposes of the” FLSA); Caserta v. Home Lines Agency, Inc., 273 F.2d 943, 946 (2d Cir. 1959) (estoppel not applicable to FLSA action where defense is based on employee’s illegal waiver of FLSA rights).
and *de minimis non curat lex.* It stands to reason, then, that in the current litigation-intensive environment, courts may reward compliant employers by broadly applying the common-law duty to mitigate in analyzing liability.

The doctrine of avoidable consequences articulated here as an affirmative defense has not yet been raised explicitly in the FLSA context. Courts, however, have not hesitated to dismiss actions in which an employer could not have known or had no reason to know that an employee was intentionally hiding compensable work or fraudulently altering time records. Moreover, some courts have also found that employees may share responsibility for achieving FLSA compliance.

In *Newton v. City of Henderson,* the employer had a policy that required employees to obtain prior approval to incurring overtime, and also required that any overtime worked be reported within 72 hours of the time it was actually worked. The employer denied the plaintiff’s request for permission to work additional overtime. The *Newton* plaintiff did not demand payment for unauthorized overtime hours until he resigned and brought suit under the FLSA. In rendering judgment in favor of the employer, the appeals court stated:

> The City established specific procedures to be followed in order to receive payment for overtime. An employee was required to submit a request for overtime within 72 hours of the time worked and to use a specified payroll form. Newton ignored these procedures. If we were to hold that the City had constructive knowledge that Newton was working overtime because [his supervisors] had the ability to investigate whether or not [he] was truthfully filling out the City’s payroll forms, we would essentially be stating that the City did not have the right to require an employee to adhere to its procedures for claiming overtime.

In *Newton,* the court favored the actively compliant employer over the employee who subverted the employer’s policies to hide otherwise compensable overtime.

Similarly, in *Forrester v. Roth’s I.G.A. Foodliner, Inc.,* the court granted summary judgment in favor of the employer when the employee did not attempt to notify the employer of his alleged uncompensated overtime hours, and deliberately omitted those hours from his

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82 Translated as “the law does not concern itself with minor matters” (“*de minimis*”). *See, e.g., Singh v. City of New York,* 524 F.3d 361, 372 (2d Cir. 2008) (applying *de minimis* rule to reject compensable time claims for workers carrying work documents during their commute); *De Asencio v. Tyson Foods, Inc.,* 500 F.3d 361, 375 (3d Cir. 2007) (cert. denied by 2008 U.S. LEXIS 4822 (U.S., June 9, 2008)) (remanding donning and doffing claim with instruction to consider *de minimis* doctrine); *Gorman v. Consol. Edison Corp.,* 488 F.3d 586, 594-95 (2d Cir. 2007) (cert. denied by 2008 U.S. LEXIS 4864 (U.S., June 9, 2008)) (discussing *de minimis* doctrine as alternative to pre- and postliminary activities).
83 47 F.3d 746 (5th Cir. 1995).
84 *Id.* at 748.
85 *Id.* at 749.
86 646 F.2d 413 (9th Cir. 1981).
timesheet even though he knew that if he had reported them, he would have been paid. The court held that:

An employer must have an opportunity to comply with the provision of the FLSA. This is not to say that an employer may escape responsibility by negligently maintaining records required by the FLSA, or by deliberately turning its back on a situation. However, where the acts of an employee prevent an employee from acquiring knowledge, here of alleged compensated overtime hours, the employer cannot be said to have suffered or permitted the employee to work in violation of [the FLSA].

The principle articulated in Forrester is also recognized in the case of Slattery v. HCA Wesley Rehabilitation Hosp. In Slattery, the employee claimed that she had not been paid overtime. To prevail, she was required to show that the employer had actual or constructive knowledge of the overtime. She had failed to record the alleged overtime on her timesheet. The court dismissed the claim because there was no evidence that the employer had knowledge of the overtime hours. Although the employee argued that she was “afraid” to report her overtime, evidence showed that managers believed the employee’s job duties could be completed within normal work hours, the employee never told any managers that she was working unreported overtime, and there was no evidence that any managers saw the employee working the hours at issue. Although Slattery falls short of imposing a duty on employees to report improper pay practices, it recognizes that an employer has no liability when it could not have known those violations were occurring.

In Wood v. Mid-America Management Corp., the court stopped shy of imposing a duty on the employee to report the overtime hours, but expressly stated that an employee bears some responsibility for FLSA compliance. In Wood, the plaintiff was responsible for completing and signing his own time cards. In signing his time card, he acknowledged that he was “attesting to its accuracy.” The plaintiff admitted that his employer always compensated him for the overtime he reported, but that he failed to report some of the overtime he worked. He also acknowledged that the unreported tasks he performed after hours could have been done during the normal workday. In affirming the dismissal of plaintiff’s FLSA claim, the court stated:

At the end of the day, an employee must show that the employer knew or should

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87 Id. at 414.
88 Id. at 414-15.
90 Id. See also, Brumbelow v. Quality Mills, Inc., 462 F.2d 1324 (5th Cir. 1972) (home-based piece-worker could not recover on minimum wage and recordkeeping violations where she under-reported hours of work because she could not maintain acceptable production rate, but employer kept complete work records, piece rate was achievable and achieved by other workers, employer did not improperly instruct plaintiff to falsify records, and employer had no way of knowing plaintiff was falsifying records). See also Wilkes v. The Pep Boys, 2006 U.S. Dist. LEXIS 69539, *11 (M.D. Tenn. 2006) (holding that an employee who sues for additional compensation is not estopped from asserting her rights simply because she under-reported hours, but may not seek such compensation if she deliberately falsified hours without her employer’s knowledge or encouragement).
92 Id. at 379.
93 Id. at 380.
have known that he was working overtime or, better yet, he should report the overtime hours himself. **Either way, the employee bears some responsibility for the proper implementation of the FLSA’s overtime provisions.** An employer cannot satisfy an obligation that it has no reason to think exists. **And an employee cannot undermine his employer’s efforts to comply with the FLSA by consciously omitting overtime hours for which he knew he could be paid.**

*Wood* explicitly recognizes that an employee bears responsibility to comply with the FLSA, beyond merely not undermining the employer’s own compliance program.

Recently, a California Appeals Court also indicated willingness to require employees to take responsibility for their decision to work through meal periods. In *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, the court ruled that employers only have to provide an **opportunity** for employees to take meal periods, not ensure that employees take them. If this case is upheld on appeal, it will signal a dramatic change in the current interpretation of the meal period requirement in California, and provide an additional stepping stone in the journey toward imposing an affirmative duty on employees requiring them to engage in an employer’s preventive measures.

**IV. Implementing Practical Measures to Assert the Avoidable Consequences Defense**

Although the doctrine of avoidable consequences has yet to be formally recognized by the courts in the FLSA context, employers should take steps to implement remedial measures designed to support the defense. In keeping with the standards set forth in *Ellerth* and *Faragher*, employers should engage in the following actions:

**A. Adopt a Well-Publicized Policy and Reporting Procedure**

Adopt and publicize a timekeeping policy that clearly defines compensable working time and provides examples. The policy should advise employees that off-the-clock work is

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94 *Id.* at 381 (emphasis added). See also *Millington v. Morrow County Bd. of Commissioners, et al.*, 2007 U.S. Dist. LEXIS 74348, *27 (S.D. Ohio 2007) (granting employer’s motion for summary judgment on plaintiffs’ claim for overtime compensation when the plaintiff violated the employer’s instruction to complete overtime work during normal work hours, failed to obtain permission to work overtime, and failed to report overtime on his timesheets that he had certified were correct on the grounds that the employer could not have known that the plaintiff was working overtime).  
96 Some may rely on cases such as *Lopez v. Autoserve, LLC*, 2005 WL 3116053 (N.D. Ill. 2005), to argue that unlike Title VII (42 U.S.C. §2000e-5(g)), the FLSA does not impose a duty to mitigate. As recognized by the *Lopez* court, the FLSA does not impose a duty equivalent to Title VII’s requirement that employees mitigate their back wage losses after termination. *Id.* at *2. That is not the duty to mitigate at issue here. Rather, we argue that when an employer has a well-publicized policy prohibiting off-the-clock work and a reporting mechanism for FLSA violations, employees should be required to mitigate their FLSA damages for unpaid wages by reporting the underpayment at the time of the occurrence, rather than waiting until their separation or lawsuit.  
prohibited and that any violations could lead to severe disciplinary action. The policy also should state that it is a serious violation for any employee to instruct another employee to work off the clock and that employees should report such violations immediately. An employer’s effort to prevent off-the-clock work will be a key element of its defense to an off-the-clock work claim. Accordingly, adopting and publicizing a procedure for reporting payroll errors or instructions to work off the clock is crucial. An effective policy clearly defines proper and improper conduct and provides employees with a means to report misconduct or improper instructions. The reporting procedure could be modeled existing procedures for reporting harassment or discrimination claims.

**B. Train Managers and Employees**

A surprising number of employers do not train either managers or non-exempt employees on proper timekeeping practices and the prohibition against off-the-clock work, so it should not be shocking that they often fail to maintain proper records. Experience shows that policies—even models of clarity and concise instruction—are ineffective when employers fail to provide basic training on what they require. Following proper timekeeping practices and complying with the rule against off-the-clock work are among the many responsibilities of a new manager or new employee. Including information on these policies and practices in new manager and new employee orientation will ensure that the employer’s emphasis on strict compliance is not lost or distorted as a result of turnover and “grapevine” explanations by fellow employees.

**C. Correct Improper Pay Practices and Issue Back Wages**

When an employee uses the complaint mechanism and reports an improper pay practice, the employer should be prepared to promptly investigate the complaint, correct any improper pay practice discovered in the investigation, and issue the employee back wages. Failing to investigate a complaint or engage in prompt remedial action could constitute evidence of willful conduct resulting in a third year of back wage liability or liquidated damages.

**V. Conclusion: Applying the Principles of *Ellerth* and *Faragher* to Avoid Liability for Off-the-Clock Claims**

Applying the *Ellerth/Faragher* defense and underlying principles of the avoidable consequences doctrine to wage and hour claims could have an enormously positive impact when it can be shown that the involved employees knew (or should have known) about the violation and failed to seek relief through internal complaint systems. The rationale for adopting the defense in sexual harassment suits applies equally to off-the-clock claims.

First, the DOL has recognized that effective complaint and remediation policies achieve the agency’s goals of both encouraging employers to adopt lawful pay practices and correcting violative payroll policies.\(^{98}\) As noted in its regulations, with regard to the safe harbor provision under the FLSA salary basis test, the DOL’s view is that rewarding an employer who has established a clearly communicated pay policy and a mechanism for employee complaints is

consistent with trends in employment law such as the *Ellerth/Faragher* defense. More generally, like the EEOC, the DOL has placed a strong emphasis on protecting wages through voluntary compliance. Applying the *Ellerth/Faragher* defense to off-the-clock claims will encourage informal resolution and voluntary compliance outside the litigation process.

Second, applying the *Ellerth/Faragher* defense to off-the-clock claims is consistent with an employee’s common law duty to avoid or mitigate the harm resulting from an employer’s unlawful conduct. This well-settled principle underlying the avoidable consequences doctrine served as support for the *Ellerth/Faragher* defense and applies equally in FLSA cases. This concept is grounded in tort and contract law and has long been applied in the employment context. The *Ellerth/Faragher* defense is consistent with FLSA regulations that require employers to pay employees for all hours during which the employer knew or had reason to believe work was being performed. Courts have also looked to common law principles in analyzing defenses to the FLSA including the doctrines of estoppel, mootness, unclean hands, and *de minimis non curat lex*.

Finally, reported cases show that where an employer has adopted a reasonable pay practices policy with a valid complaint mechanism, increasingly, employees may have a reciprocal duty to avail themselves of the complaint procedure and report any unlawful practices, or jeopardize their own recovery in a wage action. If employees are obligated to take full advantage of the employer’s preventative measures, employers in turn can alleviate and remediate violations outside of court. Likewise, the courts’ application of the *Ellerth/Faragher* defense, or doctrine of avoidable consequences, would give employers added incentive to achieve wage and hour compliance. This framework enables a fair outcome because it assigns liability to employers who violate the FLSA while preventing a windfall to plaintiffs who bear responsibility for promoting FLSA compliance.

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99 *Id.* In addition, federal courts have applied similar concepts under Title VII and the FLSA. For example, courts apply the familiar *McDonnell Douglas* burden-shifting analysis to FLSA retaliation claims. See generally *Hinsdale v. City of Liberal, Kansas*, 19 Fed. Appx. 749, 755 (10th Cir. 2001). In seeking to define the term “employee” under federal employment statutes, the United States Court of Appeals for the First Circuit stated, “We regard Title VII, ADEA, ERISA, and FLSA as standing *in pari passu* and endorse the practice of treating judicial precedents interpreting one such statute as instructive in decisions involving another.” *Serapion v. Martinez*, 119 F.3d 982, 985 (1st Cir. 1997).
