

**Preventing Harassment and Discrimination:
Why the Current System Fails
and What to Do About It**

October 23, 2018

Joseph E. Murphy
Senior Advisor, Compliance Strategists

Paul E. McGreal
Professor of Law, Creighton University

Federal Employment Discrimination Cases

- Burlington Industries v. Ellerth (1998)
- Faragher v. City of Boca Raton (1998)
- Kolstad v. American Dental Ass'n (1999)

Two-Part Affirmative Defense

The defense comprises two necessary elements:

- that the **employer exercised reasonable care to prevent and correct promptly** any sexually harassing behavior, and
- that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Ellerth's Elaboration

“While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.”

United States Sentencing Guidelines

1. Standards and Procedures (i.e., internal controls)
2. Role of High-Level Personnel/CECO
3. Care in Delegating Substantial Discretionary Authority
4. Communicate Standards; Reporting System; Evaluate
5. Audit and Monitor Standards
6. Use Discipline and Incentives
7. Respond to Wrongdoing
8. Risk Assessment

Ellerth and Faragher Applied

“Easy as P.I.E.: Avoiding And Preventing Vicarious Liability For Sexual Harassment by Supervisors”

Blair T. Jackson and Kunal Bhatheja
62 Drake Law Review 653 (2014)

Sexual Harassment Training

- 2018-2019 New York State and City Laws
- 2017 Amendment to Maine Law
- 2017 Complaint Form for California Law
- 2017 US EEOC Respectful Workplaces Training Program

How could “reasonable care” possibly be satisfied by doing only a tiny percentage of what is covered in the U.S. Sentencing Guidelines standards and what we do in other compliance areas?

Ellerth and Faragher: A New Approach?

Minarsky v. Susquehanna County
(3rd Cir. July 3, 2018)

- Court ruled that both elements of the affirmative defense should go to the jury.

Minarsky v. Susquehanna County

“If a plaintiff’s genuinely held, subjective belief of potential retaliation from reporting her harassment appears to be well-founded, and a jury could find that this belief is objectively reasonable, the trial court should not find that the defendant has proven the second *Faragher- Ellerth* element as a matter of law. Instead, the court should leave the issue for the jury to determine at trial.”
