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NEW TWIST IN SEXUAL HARASSMENT CASES: *FARAGHER* AND *ELLERTH*

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ABSTRACT

Employer liability for supervisory conduct in the area of sexual harassment was addressed by the Supreme Court in 1998 and by the EEOC in 1999. The Equal Employment Opportunity Commission reports that sexual harassment remains a pervasive problem in the American workplace. The number of sexual harassment charges filed with the agency and its state counterparts more than doubled between 1991 and 1998 [1]. In 1998 the Supreme Court rendered two significant decisions that changed the focal point in such sexual harassment cases. This article discusses those decisions, their impact on the landscape of sexual harassment law, and possible employer responses.

OVERVIEW OF THE LAW OF SEXUAL HARASSMENT

Apparently no employment sector is exempt from allegations of harassing behavior. Even the annual report on Texas state judicial conduct for 2000 contained two instances of employer harassment. An appeals court judge was issued a public warning for kissing an employee during court hours, an action that was uninvited and unwelcome. Further, a special master was issued a public reprimand for making an employee participate in the following game as a condition of employment. The judge "would bind the employee's hands behind her back, tie her ankles, and gag her with a scarf. While the employee was bound and gagged, the judge would watch scenes from his personal collection of 'bondage' videos" [2, p. 305].

Sexual harassment is a form of sex discrimination under Title VII of the Civil Rights Act of 1964. The Equal Employment Opportunity Commission (EEOC), charged with enforcing this statute, has determined that the act is violated when a supervisor makes sexual advances or demands sexual favors of an employee as a condition of employment or favorable status. The EEOC has defined sexual harassment as:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when
> (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
> (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affect such individual, or
> (3) such conduct has the purpose or effect of reasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment [3, § 1604.11 (a)].

Sexual harassment can embrace situations in which job opportunities, promotions, merit pay increases, and the like are given out in exchange for sexual favors, or when a person is terminated, demoted, or otherwise adversely treated for refusing sexual overtures. Title VII also covers constructive discharge in which the employee quits the company because s/he reasonably feels that to be the only feasible option.

Actionable sexual harassment also occurs where the working environment is considered "hostile," that is, a sexually charged climate that would be offensive to reasonable persons. The standards for judging hostility are sufficiently demanding so as to filter out ordinary tribulations in the workplace, such as abusive language, in an effort to assure that Title VII does not become a "general civility code" [4]. The Supreme Court has held that actionable sexual harassment must be sufficiently severe and pervasive so as to alter the conditions of employment and to create an abusive environment judged from the totality of the circumstances [5]. In hostile working environment cases the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances. Courts must consider the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or instead a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance [6]. Further, the Supreme Court has recently reiterated that illegal harassment must create a sexually objectionable environment that is both objectively and subjectively offensive [7].

EEOC Guidelines describe hostile environment harassment as conduct that has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment [3]. A plaintiff's claim of repeated actions of rubbing up against an employee, telling off-color jokes, and commenting suggestively about an

employee's appearance has survived the defendant employer's motion for summary judgment in a hostile environment case [8]. It is not necessary for an employee to prove that the offensive conduct has been psychologically injurious before the situation is actionable [6]; however, an employee's enthusiastic acquiescence in the conduct that later forms the basis of the complaint mitigates against employer liability [9, 10], particularly since the conduct which forms the basis of the complaint must be unwelcome.

The *EEOC Guidelines* state that in sexual harassment cases the agency will examine the record as a whole and the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred [3]. Even though the EEOC rejects the reasonable woman standard for defining hostile environment, it suggests that the employee-plaintiff's race, color, religion, gender, national origin, age, or disability be considered. The Ninth Circuit has held that the severity and pervasiveness of the harassment should center upon the perspective of the victim [9]. The Ninth Circuit recognizes a *prima facie* case of hostile environment sexual harassment when conduct is alleged that a reasonable woman would consider sufficiently severe or pervasive to alter conditions of employment and create an abusive working environment. That court justified the use of a reasonable-woman standard because it believed that a sex-blind test would tend to be male-biased and systemically ignore the experiences of women, which can include rape and sexual assault.

Title VII has been interpreted as requiring that the harassing behavior be gender-based, in addition to affecting a term or condition of employment and being unwelcome [11]. The Supreme Court has held that Title VII covers same sex discrimination, including same-sex sexual harassment, and that the harassing conduct does not need to be motivated by sexual desire in order to support an inference of discrimination on the basis of sex [4]. While employees can be subject to liability under state fair employment statutes or under tort law (assault, battery, intentional infliction of emotional distress), depending on the nature of their actions, Title VII does not create a cause of action against the employee, only against the employer [12]. How the employer's responsibility is to be determined was the central issue in both *Faragher* [7] and *Ellerth* [13].

ELLERTH AND *FARAGHER:* NEW TURNING POINT

Two 1998 decisions of the Supreme Court focused on the employer's responsibility for the actions of supervisors in Sexual harassment discrimination suits. In *Burlington Industries, Inc. v. Ellerth,* plaintiff-employee Ellerth alleged that she was subjected to constant sexual harassment for over a year by her supervisor, Slowik [13]. Slowik was a vice president in a middle-level management position who had authority to make hiring and promotion decisions subject to supervisory approval. Ellerth stated that on numerous occasions he had made offensive overtures to her, warned her that she needed to "loosen up" and threatened that he

had the capacity to make her life either very easy or very hard at work. On one occasion he touched her in a sexual manner without consent and told her she would be in a sales environment with men who work in factories and who "like women with pretty butts/legs" [13, p. 748]. About three weeks following her voluntary resignation, Ellerth wrote a letter explaining that she quit because of Slowik's behavior. She previously had informed no one of the harassing behavior, even though Burlington had a policy against sexual harassment [13].

The federal district court granted summary judgment in favor of the defendant company, determining that, while the plaintiff had established a sufficiently severe and pervasive hostile working environment, the company had not known and should not have known of the conduct. The Seventh Circuit reversed and remanded the case. On appeal, the Supreme Court examined whether an employee who refuses the sexual advances of a supervisor, yet who suffers no tangible job consequences, could recover under Title VII without showing that the employer was negligent or otherwise at fault for the supervisor's actions [13].

Until this time many lower courts had used the terms *quid pro quo* and hostile working environment to determine issues concerning vicarious liability. These terms are not statutorily rooted, but rather appeared first in the academic literature to distinguish types of harassment, and then made their way into judicial decisions, along with corresponding standards of employer responsibility. In *Ellerth* the Supreme Court determined that such a categorical classification should not be ultimately controlling on the issue of vicarious liability, although the terms were not entirely irrelevant to Title VII litigation. The Court considered the terms relevant to the extent that they illustrate a distinction between cases in which a threat is carried out and cases involving offensive conduct in general. "When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe and pervasive" [13, pp. 753-754].

The Court characterized a tangible employment action as one which constituted "a significant change in employment status, such as the hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits" [13, p. 761]. At the core of the decision was the Court's belief that such decisions ensure that the injury could not have been inflicted absent the agency relationship between the company and the supervisor. Since tangible employment actions require an official act of the enterprise, such actions taken by the supervisor become the actions of the employer under Title VII.

In *Faragher v. City of Boca Raton,* the plaintiff was employed as an ocean lifeguard for the city of Boca Raton [7]. Faragher's immediate supervisors,

Terry and Silverman, created a sexually hostile atmosphere by subjecting her to uninvited and offensive touching, by making derogatory comments about women in general, and by making references to sexual relations in a variety of contexts. The city's sexual harassment policy had never been disseminated to the Marine Safety Sector in which Faragher, Terry, and Silverman were employed. Faragher did not complain to higher management about her supervisors' conduct, but eventually resigned and filed suit. The district court concluded that the harassment was pervasive enough to support an inference of constructive knowledge by the city under agency law and awarded nominal damages. The Eleventh Circuit reversed.

The Supreme Court reversed the appeals court's ruling and announced the following holding in both *Ellerth* and *Faragher:* "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" [7, p. 807]. An affirmative defense, when applicable, is a part of the defendant's answer to the complaint that goes beyond denying the allegations and sets forth the facts and arguments that function as a defense to the action. A valid affirmative defense permits the defendant to prevail, even assuming that everything the plaintiff claims is true. The *affirmative defense* enunciated by the court in *Ellerth* and *Faragher* for sexual harassment cases has two parts and requires the defendant-employer to show by a preponderance of evidence that:

1. the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and
2. the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities the employer provided in order to avoid harm.

Commensurately, the Court asserted that no affirmative defense is available in cases in which a tangible employment action is taken against the victim by the harasser.

Presumably, employer liability for co-worker harassment was left unchanged by the decisions. In other words, an employer will still be liable for the actions of a co-worker if the employer either knew or should have known of the misconduct, unless the employer can prove that it took immediate and appropriate corrective action [1]. Therefore, the plaintiff in such cases must establish that s/he was subject to unwelcome harassment based on sex which affected a term, condition, or privilege of employment, and that the employer knew or should have known of the harassment and failed to take proper remedial action [14].

The decisions in *Ellerth* and *Faragher* highlight the importance of two critical questions in sexual harassment cases. First, is the harasser a supervisor or

co-worker? Second, has there been a tangible employment action? If no tangible adverse employment action is taken against the victim, that is, no one is fired, demoted, or adversely reassigned to another position or area as a result of the harassing behavior, then the employee must prove the elements of a severe and pervasive hostile working environment subject to the articulated affirmative defense.

CRITICISMS AND CONTINUING CONCERNS

Criticisms of the Decisions

Commentators in the wake of the Supreme Court's rulings have expressed dismay over the likely impact that *Faragher* and *Ellerth* will have on the employment relationship. For example, an employer, who in good faith attempts to promulgate and enforce proper policies and procedures, could still be found liable for an isolated incident that resulted in an adverse action, regardless of the proactive care exercised and notwithstanding that the supervisor's conduct was inconsistent with company policy [15]. On the other hand, if the affirmative defense succeeds in precluding employer liability, some victims of actual discrimination will be left without a remedy, even though agency principles would seemingly dictate employer responsibility [16].

Likewise, employees subjected to the same hostile working environment could face different obstacles with respect to litigating their respective complaints. An employee who suffers an adverse job consequence will not face an affirmative defense, while an employee who was subjected to the same or even worse hostile working environment, but who did not incur a tangible job detriment, must rebut that defense [17]. Therefore, the tangible consequence test arguably change the critical issue from (the determination of the merits of the claim to the nature of the damages inflicted [17, p. 310].

Further, it seems as though these decisions raised as many questions as they answered. These decisions call into question whether Congress should permit the courts further latitude to define the rules in sexual harassment cases, or amend the statute to provide greater clarity and certainty. Obviously, employers will have to re-examine their policies on sex discrimination, and both employees and employers may be blind-sided by these new rules. Perhaps Congress and the EEOC are better equipped to formulate such regulations and refine the law of sexual harassment. It is a long way from Title VII's general prohibition against discrimination based on sex to the latest announced framework for evaluating the validity of sexual harassment claims. As a result of the recent pronouncements, several critical questions have surfaced, such as who is a supervisor, what is a tangible employment action, and what proof must be forthcoming to establish the affirmative defense.

The Definition of a Supervisor

The Supreme Court in *Ellerth* and *Faragher* determined that an employer could be liable for sexual harassment committed by a supervisor with immediate (or successively higher) authority over the employee, in cases that did not culminate in a tangible adverse employment action. Who, then, is a "supervisor"? The EEOC suggests that the distinction between co-worker and supervisor should center more on the job function than title, because it is their authority that justifies treating employer responsibility for supervisor harassment differently from that of co-workers [1]. Interestingly, even in the absence of actual authority, liability could nevertheless be imposed based on apparent authority if the employee reasonably believed that the person had supervisory power as might occur, for example, if the chain of command was unclear or the person had broadly delegated powers [1].

The EEOC defines an individual as a supervisor under Title VII if the person either has the authority to undertake or recommend tangible employment decisions affecting the employee or the authority to direct the employee's daily work activities [1]. The EEOC suggests that an individual would qualify as a supervisor if that person were given the authority to recommend tangible job decisions, even if the decision were subject to review by a higher-level supervisor, as were Slowik's decisions in *Ellerth,* so long as the initial recommendation was given substantial weight. Further, an individual without such authority could nevertheless qualify as a supervisor if s/he had the authority to direct daily work activities. Relaying instructions concerning work assignments, directing a limited number of tasks, and coordinating a project of limited scope are examples of insufficient authority to qualify the employee as a supervisor [1]. While these suggestions are helpful in answering the question of who does and who does not qualify as a supervisor, they are not dispositive of the issue.

It could be crucial to make the distinction in cases of adverse tangible actions in order to either establish or avoid liability, so no doubt the issue will be litigated in situations where the chain of command is obscure or authority widely dispersed. On the other hand, in cases where no adverse consequence has occurred, the affirmative defense in supervisor cases is sufficiently similar to the actual or constructive knowledge requirements in co-worker cases so as to dictate sufficiently similar results.

Tangible Employment Actions

Is it a tangible adverse consequence when a transferred worker's salary remains constant but a lower minimum salary grade is imposed, or when an employee is moved from a regular schedule to a weekends-and-night schedule without a salary change? It will likely take a fair amount of litigation to define exactly what constitutes a tangible employment action [18].

Courts are beginning to address this area of ambiguity in order to decide in practical terms what constitutes tangible adverse consequences. The 6th Circuit Court of Appeals recently announced a rule covering lateral transfers, in which there is no dimunition in pay or benefits. There is no actionable injury in such cases, unless there are some other materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment opportunities that could reasonably be viewed as causing objective tangible harm [19]. The D.C. Circuit has suggested that there is a *de minimis* exception for either temporary actions or nonmaterially adverse actions, for example, those with no economic loss [20]. In what the Seventh Circuit considered a "close call," the court upheld a jury finding that the confiscation of the art supplies of a teacher, which were necessary for her to be able to perform her assigned tasks, coupled with a negative evaluation, which was subsequently reversed six months later, constituted a tangible employment action [21].

Another pertinent inquiry is whether a constructive discharge will constitute an adverse employment action. Can an employee who felt compelled to resign because of a hostile working environment be treated the same as one who is actually terminated by the employer? If so, the employer would be denied the affirmative defense in both situations. Some commentators would argue that, while the Supreme Court did not address this issue, justice would be better served by applying the affirmative defense to cases of constructive discharge [22]. On the other hand, while constructive discharge does not constitute institutional action per se, it can be a legitimate response to the hostile environment. Why should those victims be treated differently because they took action to end the harassing behavior rather than the employer?

In effect, the problem of constructive discharge might be viewed as a corollary to the general question of the harassed employee's responsibility. The Supreme Court noted in *Faragher* that victims of employment discrimination are to use reasonable means under the circumstances to avoid harm or minimize the damages that result from a violation of Title VII [7]. To what situation this duty applies is unclear. For example, would resigning one's position in a hostile working environment violate a duty to avoid harm, particularly if the employer has a comprehensive antiharassment policy and adequate reporting procedures [23]?

Proving the Affirmative Defense

Suppose an employer fails to take reasonable care to prevent harassment, such as by failing to disseminate company policies defining and prohibiting harassing behavior, failing to monitor the activities of its supervisors, or failing to educate both supervisors and subordinates adequately on the policy and procedure for reporting complaints. Is the affirmative defense available even in cases in which no tangible action was taken against the victim? In *Faragher,* the Supreme Court determined that because the City of Boca Raton had failed to disseminate its policy

against sexual harassment among beach employees and had made no attempt to keep track of the conduct of supervisors, the city did not exercise reasonable care to prevent the harassment. As a result, the employer was unable to satisfy its burden under the first prong [7], its obligation to exercise care and correct sexually harassing behavior.

The second prong of the affirmative defense questions whether the employee acted unreasonably in failing to utilize opportunities made available by the employer for reporting the harassment. Some of the circuit courts have considered the employees' delays in reporting when they evaluated the reasonableness of the employees' conduct [24]. Most courts have rejected the notion that a generalized fear of retaliation for reporting instances of sexual harassment would justify an employee's failure to report [15, 18]. Further, in one case allegedly involving same-sex sexual harassment, the court did not excuse the employee's embarrassment as being a valid justification for not utilizing the complaint procedure, since the "company's stated policy of having complaints be handled confidentially alleviates any problem of shame" [25, at 192]. Additionally, the Eleventh Circuit has suggested that making informal complaints outside what the company policy specified as proper channels would not be considered reasonable as long as the employer had valid, publicized complaint procedures with multiple avenues for seeking redress [26]. Presumably, while a failure to file a grievance would not affect employees' rights under the Act [5], the reasonableness of their reaction to the events would be subject to evaluation.

An interesting quirk, though, could arise in cases in which no tangible action has occurred, the employer exercised reasonable care, and the employee has utilized the appropriate procedures [27]. Will the employer be denied the defense, which is stated in the conjunctive, and be subjected to liability because both requirements cannot be satisfied? Such a result from an economic standpoint might counsel against terminating certain supervisors who have been accused of harassment, if the employer will be subject to liability anyway [27].

SUGGESTED ACTIONS FOR EMPLOYERS

In Cases of Tangible Job Consequences

The two recent Supreme Court cases teach that employers should strive to discover all potential cases of sexual harassment before they result in tangible job detriments and commensurately deprive the employer of the affirmative defense under Title VII. Since there is no affirmative defense in cases when tangible job consequences have occurred, the employer's only strategy in such cases would be to establish that the adverse decision was not caused or related to the sexual harassment, but was for other nondiscriminatory, job-related reasons. In other words, cases of tangible adverse actions in alleged sexual harassment suits will require the employer to justify the decision on other grounds.

If an alleged target of sexual discrimination is, at the same time, a problem employee with performance issues, the employer after *Ellerth* and *Faragher* might be reluctant to get rid of the employee and forfeit any affirmative defense in a subsequent lawsuit based on sexual harassment. However, just because the employee suffered a tangible adverse employment action does not mean that the employer is automatically liable. Rather, the employer must articulate performance-based reasons for the discharge to establish that the adverse action was not a result of sexual harassment [28].

Performance-based criteria for adverse employment actions abound, such as tardiness, absenteeism, nonperformance, and breaches of duties under agency law. However, it is paramount that the employer document performance-based problems. To this end, it is critical to have job descriptions by which to evaluate performance, performance reviews to provide valuable feedback, and documented progressive discipline counseling in cases of marginal performance. Establishing nonarbitrary reasons for adverse employment actions based on legitimate performance-based evaluations preserves the integrity of the workplace and serves the interests of both the employer and its employees. Not only does the recognition of "for cause" in personnel decisions inject a sense of fairness and procedural due process into the work environment, given the crucial importance of a tangible adverse employment actions now in sexual harassment cases involving supervisors, it is critical.

Establishing an Affirmative Defense

If there is no tangible job consequence, the employer could still be liable for permitting a hostile working environment. Although there is no litmus test for determining when an employee's conduct crosses the line between being distasteful and being intimidating, hostile, or offensive, a proactive company policy that emphasizes zero tolerance is certainly preferable to litigation. Moreover, it is important for employers to scrutinize the implementation of appropriate policies and procedures to minimize the likelihood that sexual harassment will occur.

Company procedures are particularly important in situations in which no tangible employment action has been taken, and, therefore, the employer's defense would be available under Title VII. The Court surmised in *Faragher* that "[W]hile 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 policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense" [7, p. 807].

An organization should establish a written sexual harassment policy that clearly delineates that such conduct will not be tolerated. It is advisable for company policies:

1. to state expressly that sexual harassment will not be tolerated in any form, and that the prohibition applies equally to all personnel;
2. to insure that employees know what is appropriate conduct and what is inappropriate conduct;
3. to require attendance at gender-neutral training sessions on sexual harassment;
4. to insure that all employees are aware of reporting procedures and avenues for redress; and
5. to maintain a signed acknowledgement indicating receipt of the company policy on sexual harassment in every employee's file [23].

In addition, it might be wise to include a provision in the firm's corporate Code of Ethics that states in unequivocal terms that discriminatory behavior will not be tolerated. Further, employees should be asked to sign an agreement evidencing their intent to abide by, and their commitment to, that Code of Ethics. The message of nontolerance should be reiterated clearly on a regular basis through periodic memoranda, sensitivity seminars, and training programs for supervisory personnel.

Often employees who have been sexually harassed are reluctant to come forward because they fear repercussions. A well-publicized complaint-reporting system that employees trust is essential to a successful program designed to eliminate sexual harassment. The Supreme Court in *Faragher* highlighted the need for such a system with respect to the second prong of the affirmative defense that focuses on the reasonableness of the employee's conduct in failing to report. "And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense" [7, pp. 807-808]. The complaint-reporting procedure should strongly stress that there will be no retaliation against employees who report instances of harassment [18].

Neutral investigative procedures are critical to such a system as well. Employers must have policies in place so that an efficient procedure is available for investigating claims of sexual harassment in which confidentiality is protected to the greatest extent practicable consistent with the rights of the alleged harasser. A neutral party, not the employee's supervisor, should be available to investigate the complaint. Several avenues of redress should be made available so that the alleged harasser does not stand in the way of an employee seeking to grieve.

Each complaint filed should be thoroughly investigated. Each violator should be appropriately reprimanded, and if no action is taken, the reason for not taking action should be explained to the complaining employee. It might also be advisable to ask the complaining employee for a written acknowledgment indicating whether or not he/she is satisfied with the handling of the complaint [23]. Documentation of complaints received and investigations concluded, in addition to any remedial action taken, is essential.

Not only must the employer's policy be first-rate, there must also be mechanisms in place to renew employee awareness, to train supervisors on policy issues, and to insure that the policy is successfully followed [28]. Additionally, it is important to document the preventative practices in place and to keep a complete record of all programs and training sessions the employer sponsored, as well as publications dispersed to supervisors and employees [27]. Computer transmission can be an effective means of documenting communication of company policy [17].

EEOC Guidelines suggest that "[p]revention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned" [3, sec. 1604.11(f)]. The importance of this directive has certainly been enhanced with respect to cases of sexual harassment by supervisors in which tangible adverse consequences have not yet occurred.

CONCLUSION

The Supreme Court made it clear in *Faragher* and *Ellerth* that employers are responsible for the actions of their supervisors in sexual harassment cases. Prevention is the only defense for cases in which adverse tangible job consequences occurred and the dissemination of adequate policies is a large part of the affirmation defense for cases with no tangible job consequences. These rulings left some questions unanswered and created new areas of confusions. There will be, no doubt, further interpretation and clarification of these rulings in the future. In the meantime, employers are once again cautioned to do what they know they should have been doing all along—having good human resource policies and procedures in place and ensuring that they are followed.

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