

A Plaintiff's Obligation to "Avoid Harm Otherwise"

Publication

9.25.99

The law of sexual harassment has always included a requirement that the plaintiff not have "welcomed" the behavior complained of by soliciting it or inciting it. Although this concept has been harshly criticized by some who claim that it unfairly blames the victim and distracts the factfinder's attention away from the actions of the harasser, the U.S. Supreme Court has reaffirmed the concept in every one of its decisions regarding workplace harassment. In its *Ellerth* and *Faragher* decisions last year, the Court reaffirmed and strengthened the notion that a plaintiff whose own actions were the genesis of the harassment claim cannot expect later to prevail on that claim. By announcing in *Ellerth* and *Faragher* that a harassment claim may be defeated by a showing either that the plaintiff failed to report the harassment via channels provided by the employer, or failed to "avoid harm otherwise," the Court endorsed the welcomeness concept and imposed a requirement that plaintiffs not instigate conduct of which they might later seek to complain.

This article appeared in the Autumn 1999 issue of the *Employee Relations Law Journal*.

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