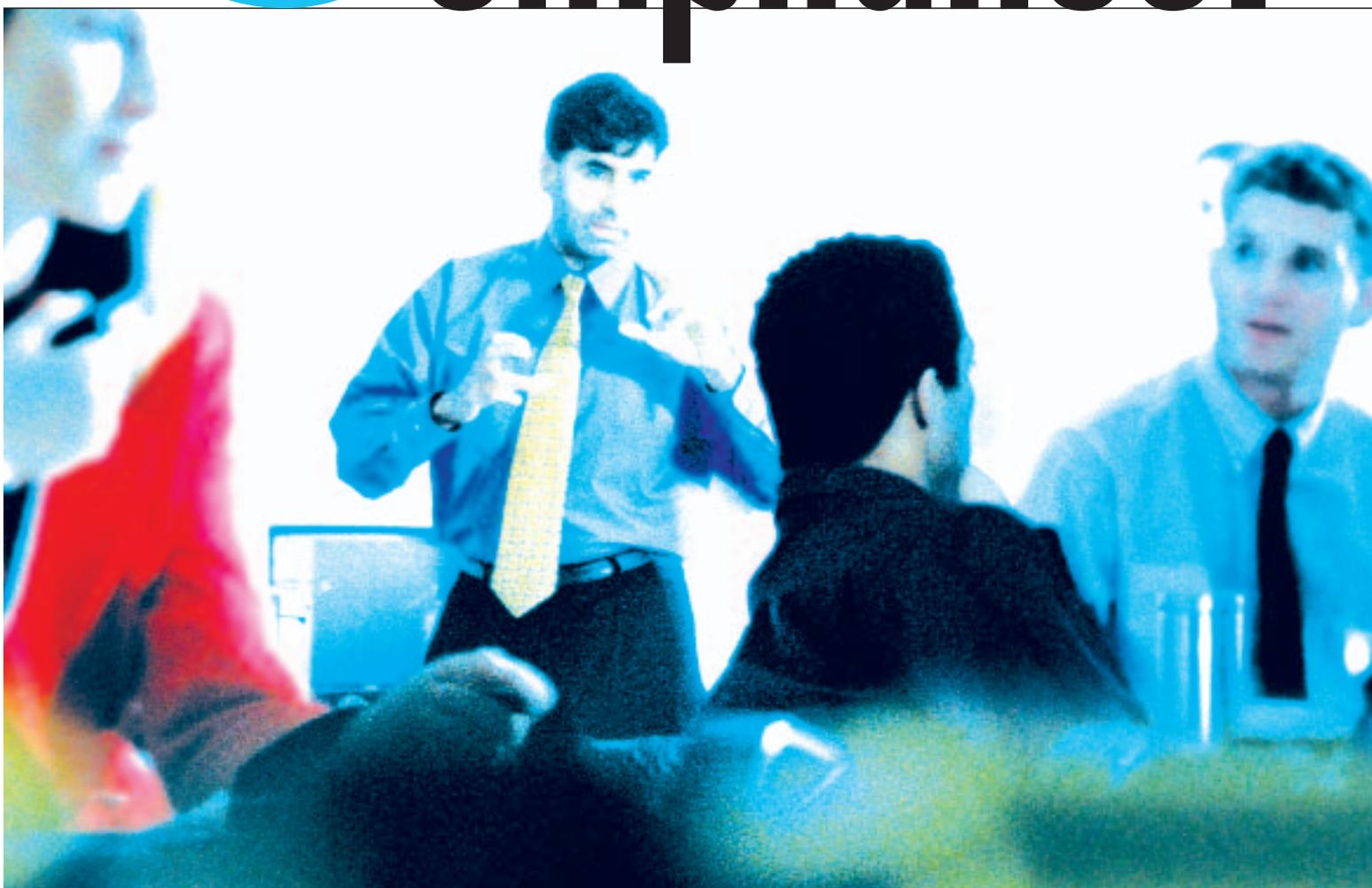


# C orporate ompliance:



Arlene B. Finkelstein, Peter W. Lilienthal, Gerald L. Maatman Jr., and Carole A. Spink, "Corporate Compliance: If You Don't Ask, They Might Not Tell You," *ACCA Docket* 20, no. 8 (2002): 62-87.

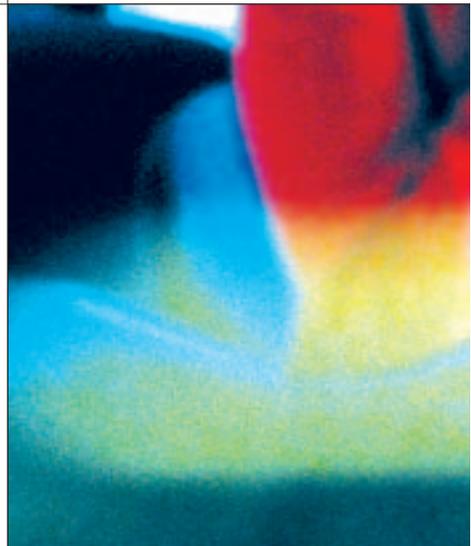


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# If You Don't Ask, They Might Not Tell You

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**I**f your company is like most organizations, your existing workplace reporting policies and procedures are designed to address regulatory and human resource issues. Although those issues may well be your company's priorities, they are not necessarily your employees' priorities. If you were a mouse in the corner behind the corporate water cooler, would you expect to hear discussions about possible financial irregularities, harassment, discrimination, and unauthorized use of corporate assets? Or would you be more likely to hear such comments as the following:



- "Why is it that the human resources department never returns my phone calls about my benefits problems?"
- "What is the company doing with my cash during the three days that it takes to get it deposited into my IRA at the end of the month?"
- "Why with all of the cost-cutting going on can the bigwigs still afford to have their holiday party?"
- "Why hasn't someone replaced the security lights in the parking lot that have been burned out for two weeks?"

We believe that most organizations suffer from a disconnect between what is important to management and what is important to employees, and the result is a skepticism among employees, at best, and a cynicism, at worst, about what is really important to the organization.

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Ask yourself the following question: Is management merely “covering its behind” with its workplace policies and procedures, or does it have a genuine, palpable commitment to rooting out problems and doing something about them? This philosophical distinction is significant, and unfortunately, the message is in the asking. In short, if you do not ask, will they tell?

In our view, it no longer is adequate simply to have well-intentioned, protection-oriented policies and procedures in place. Rather, organizations and, particularly, their legal departments need to take extra measures to ensure the integrity of their reporting systems. The best way to achieve this integrity is to get employees to buy in, to remove

the limitations on the information that they are empowered to share. You want to change your message to employees from “This is what management wants to hear about and nothing more” to “Your feedback is important to us, and we want to make it as easy and comfortable as possible for you to share with us what is on your mind.” This difference can be extremely powerful and rewarding.

In this article, we will provide a practical step-by-step approach for transforming your company’s well-intentioned workplace policies and procedures on discrimination, harassment, safety and security, fraud and theft, ethics, benefits, and other employee concerns into a system that delivers. We will show you that, by empowering your employees, you will better protect your workplace and add to your bottom line.

## THE COSTS OF NONCOMPLIANCE

There are real, bottom-line reasons for you to be concerned about the effectiveness of your company’s policies and procedures for reporting workplace issues. The most obvious is litigation risk. Ineffective policies and procedures can result in discrimination or harassment claims or whistleblower lawsuits. They can also inspire unionization, employee turnover, and workplace bullying. Let’s look briefly at each of these costs.

### Discrimination and Harassment Claims

As you undoubtedly know, an employer cannot rely on the mere existence of policies and procedures for reporting misconduct as a defense to a discrimination or sexual harassment claim. Indeed, in *Burlington Industries, Inc. v. Ellerth*<sup>1</sup> and *Faragher v. City of Boca Raton*,<sup>2</sup> the U.S. Supreme Court held that, in order to establish an affirmative defense, an employer must demonstrate that it has widely disseminated and consistently enforced thorough policies against discrimination and sexual harassment. The silver lining for these requirements is that a court cannot assess punitive damages against an employer for the actions of its supervisory personnel so long as the employer undertakes good-faith efforts to comply with employment discrimination laws.<sup>3</sup>

Obviously, the cost of employment-related lawsuits can significantly affect your company's bottom line. From 1994 to 2001, average jury awards in discrimination and sexual harassment cases increased from \$93,000 to \$218,000.<sup>4</sup> In 1994, only 33 percent of jury awards in these cases ranged from \$100,000 to \$499,999, and only 7 percent of such awards were \$1 million or greater.<sup>5</sup> In contrast, in 2000, 41 percent of such verdicts ranged from \$100,000 to \$499,999, and 20 percent of verdicts were \$1 million or greater.<sup>6</sup> Besides the cost of the verdicts, companies also have the expense of outside counsel and the internal time and effort required to coordinate a defense. (For a more detailed discussion of these costs, see the sidebar on this page). Your company cannot afford to take this exposure lightly.

#### **Whistleblowing Lawsuits**

Exposure to workplace issues because of inadequate company response to employee grievances extends beyond traditional employment discrimination and harassment claims. Consider the employee

who discovers that the company is not adequately enforcing its safety rules. The employee is concerned that an accident will soon occur if the safety rules are not followed. The employee complains to his direct supervisor about the company's lax attitude toward safety, but nothing is done. The employee remains concerned and decides to bring the matter to the attention of his manager's boss. Soon after the employee has made this second complaint, his direct supervisor begins writing him up for performance issues. The employee wishes that he had never said anything at all.

This situation is a classic example of a whistleblower lawsuit waiting to happen. If a company deters or even punishes an employee for complaining of illegal, unethical, or inappropriate conduct, the aggrieved employee may bring a whistleblower claim. Each of the 50 states and the District of Columbia have enacted some type of whistleblower protection statute for deterring and uncovering wrongful conduct.<sup>7</sup> Moreover, numerous federal statutes protect whistleblowers, although some statutes do not provide employees a private cause of

## LITIGATION "COSTS": MORE THAN DOLLARS AND CENTS

When managing litigation, we, as in-house counsel, tend to look at the obvious expenses, such as outside counsel fees, court fees, and the other usual litigation expenses. Those expenses can average \$150,000. What we sometimes overlook, however, is the nonmonetary cost to the company. What are the nonmonetary expenses that we may not think to assess when we have to defend a litigation matter?

The most obvious expense is the time litigation takes away from the company, time that should be spent on the business of the company but is spent instead on trying to defend the company. The people spending this time are not only the in-house counsel and their staff but also the essential business people. The people who should be running the company are busy answering interrogatories, being deposed, collecting documents, attending mediations, and talking to in-house and outside counsel about settlement offers.

Sometimes, the litigation matters can consume months or years of the company's most precious

asset, the time of its managers and executives. These employees' efforts are now focused on how they can help mitigate the potential financial liability that the company faces instead of focusing on how to make money for the company.

These employees are often consumed with the eventual outcome of the litigation and how it will affect their careers. Will a bad result sabotage their career? Will they be held accountable for any financial liability that results from the litigation? Do they have any potential personal liability for their actions?

When we strategize and try to assess the potential cost of the litigation matter, we need to somehow account for the psychological effect that it will have on the business in general. Will the litigation be the topic of conversation at the water cooler or in the cafeteria every day? Will our company's executives be spending their valuable time consumed in discovery instead of in profit building?

Preventing potential litigation is both economically and emotionally good business.

action to pursue a remedy if they are wrongfully discharged for whistleblowing activity.<sup>8</sup>

Whistleblower lawsuits have a 68 percent chance of resulting in a verdict for the plaintiff.<sup>9</sup> The verdicts for such claims are high: the average jury award is \$200,000.<sup>10</sup> As with discrimination and harassment claims, your company should take this exposure seriously.

### **Unionization**

Another potentially costly consequence of inadequate workplace policies and procedures is the disgruntled employee. Employees who feel that the company has a poor employee feedback system and a general lack of management-worker communication might seek an alternative voice for their concerns. A willing “ear” might be a union. In 2001, 13.5 percent of wage and salary workers were union members.<sup>11</sup> Today, an employee can simply surf the internet to hook up with other disgruntled employees. In terms of websites and internet communication, unions are already more global than any multinational corporation. Moreover, the ease with which employees can use the internet to complain about workplace issues has sufficiently removed tra-

## **IN TERMS OF WEBSITES AND INTERNET COMMUNICATION, UNIONS ARE ALREADY MORE GLOBAL THAN ANY MULTINATIONAL CORPORATION.**

ditional barriers to unionization. We do not intend a judgment on the value of unions. We simply want to identify the potential to the company for an increase in corporate costs. Depending on the labor issues, a company may incur approximately \$25,000 to \$100,000 in legal fees. In addition, it might cost a company approximately \$10,000 to \$30,000 to call in a labor relations consultant.

### **Employee Turnover**

A less obvious, but equally costly, reason to be concerned about the effectiveness of your company’s policies and procedures on workplace issues is employee retention. Each time that an employee

leaves your company, he or she is adversely affecting your bottom line.<sup>12</sup> According to the U.S. Department of Labor, the cost of replacing a departing employee is one-third the cost of a new hire’s annual salary.<sup>13</sup> A study by the Hay Group, a professional services firm that assists employers in improving employee productivity, suggests that managers or professionals who resign cost a company the equivalent of 18 months’ salary, and hourly workers cost about a half-year’s salary.<sup>14</sup> When an employee jumps ship, the company also experiences direct and indirect costs. Direct costs include advertising expenses, signing bonuses, headhunter fees, pay for temporary workers, or overtime for coworkers.<sup>15</sup> Indirect costs include management’s time for recruiting, selecting, and training replacement employees, and decreased productivity when current employees must “pick up the slack” until the new hire is up to speed.<sup>16</sup> Less quantifiable indirect costs include the departing employee’s knowledge and expertise and the value of established relationships with the company’s clients, customers, vendors, other employees, and so forth.<sup>17</sup>

### **Workplace Bullying**

Many workplace problems do not rise to the level of illegal or discriminatory conduct. This fact does not mean that a company should simply dismiss these problems as petty or unimportant. Policies and procedures that monitor only illegal or discriminatory conduct fall short in identifying an equally important and costly problem: workplace bullying.

The phenomenon known as “workplace bullying” has been shown to have major bottom-line consequences for employers.<sup>18</sup> Examples of bullying behavior include the following: making aggressive eye contact, intimidating physical gestures, or accusations of wrongdoing; engaging in the silent treatment; insulting, belittling, or excessively or harshly criticizing coworkers; inconsistently complying with rules; and stealing credit for work.<sup>19</sup> Employers suffer direct, indirect, and opportunity costs as a result of such behavior. Direct costs include increased medical and workers’ compensation claims due to work-related stress, as well as the costs of lawsuits emerging from abusive work situations.<sup>20</sup> Indirect costs include employee turnover, absenteeism, poor customer relationships, and even acts of sabotage and revenge.<sup>21</sup> Because innocent employees tend to

disengage from a bullying workplace, a company also can suffer opportunity costs. Moreover, employees who perceive the company's response as inadequate often feel "decreased commitment and loyalty to their organization and [do] the minimum work to get by."<sup>22</sup> These employees feel that the interests of individual employees do not matter to the company.

### **A FOUNDATION OF TRUST**

Clearly, you would like to save your company the costs outlined above and ensure that employees enjoy a hospitable and productive work environment. No matter how well intended your company is, however, it may be doomed to failure if employees do not trust the system. Trust is critical to employee buy-in.

First and foremost, employees must trust that there is a benefit to putting their reputations and careers on the line by coming forward with concerns about pos-

## **WHEN YOU THINK ABOUT YOUR OWN COMPANY'S ETHICS, COMPLIANCE, AND REPORTING PROGRAMS, ARE YOU CONFIDENT THAT YOUR EMPLOYEES HAVE SUFFICIENT TRUST TO USE THEM?**

sible violations of corporate policy or recommendations for operational changes. Regrettably, not many individuals have the courage, conviction, and confidence of Enron's Sherron Watkins, who sent a signed letter to the company's chief executive officer, suggesting that the company was in danger of "imploding due to a wave of accounting scandals."<sup>23</sup>

Second, employees must trust that management will respond responsibly and respectfully to the issues that they bring forward. Here, too, the recent Enron debacle is an unfortunate case in point. The company allegedly rewarded Watkins's trust in CEO Kenneth Lay by confiscating her computer and demanding her termination for insubordination, and she reportedly has incurred personal legal bills in excess of \$250,000.<sup>24</sup> Although many other individuals in the Enron organization apparently shared Watkins's concerns about the accounting shell game that was allegedly occurring, no one else reportedly expressed them openly to senior management.<sup>25</sup>

When you think about your own company's ethics, compliance, and reporting programs, are you confident that your employees have sufficient trust to use them? And what, if any, benchmarks is your company using to judge their effectiveness? As more fully described in the sidebar on page 74, the implementation of the federal Sentencing Guidelines made it no longer just good business to have a comprehensive corporate compliance program—it became financially astute to do so.

Our experience is that many internal reporting initiatives have serious shortcomings. Indeed, implementing an antidiscrimination and antiharassment policy alone does not automatically end such acts. One of the main reasons that these well-intentioned policies fail is that management often gives short shrift to addressing employee buy-in. Think about the origins of any program that your company has in place. Was this program initiated as a result of employee insistence or, as is more likely the case, at the direction of your company's board of directors, legal department, or audit firm or a regulatory body? Consider implementation of the program. Were employees involved in the design process, or did the company use a consultant or hire an expert to fulfill a corporate mandate? In all likelihood, the process was not employee-sponsored and employee-driven. It was probably top-down in nature.

Unfortunately, management by mandate is not a reliable approach when it comes to employees putting themselves on the firing line. You must also win their hearts and minds. The good news is that this step is not as difficult as it may seem.

### **AN ACTION PLAN FOR COMPLIANCE**

It is possible for you to feel comfortable that your company's policies and procedures will effectively detect workplace issues before they turn into crises. Your company's policies can actually flag fraud, abuse, overzealousness, noncompliance, and other undesirable activities. They can stand up in a court of law or in the court of public opinion to the retrospective scrutiny of a canny lawyer, a media-savvy official, and/or a sound-bite reporter. You need a plan of action to get your company into compliance. The following plan should help you get started:

## 1. Inventory and Evaluate Existing Reporting Mechanisms

Your first challenge is to inventory what your organization currently has in place for employees to use to report ideas, questions, and concerns. You might be shocked to discover all that is out there. It is not that uncommon to find that employees have a maze of conflicting and confusing mechanisms to use for communicating about workplace-related issues. For some issues, employees may go to the human resources department; for others, the legal department. In larger organizations, employees' options might include contacting an ombudsman's office, the audit department, a safety and security officer, and/or an external hotline.

In inventorying these reporting mechanisms, it is helpful to compile details about their use: Where can employees find the instructions for using a specific mechanism? What are the hours of its operation? Who is in charge of monitoring employee feedback, and even more important, who is responsible for

### **YOUR COMPANY'S POLICIES CAN ACTUALLY FLAG FRAUD, ABUSE, OVERZEALOUSNESS, NONCOMPLIANCE, AND OTHER UNDESIRABLE ACTIVITIES.**

responding to it? How does your company track and document resolution? (For an example of an inventory, see the sidebar on page 76.)

You may find that instructions and guidelines for using your reporting tools overlap. Policies may have gaps in coverage. Management may ignore followup and tracking responsibilities. To get to where your company needs to be, you and your company must understand the current situation. Developing an inventory is the best way to do that.

Once you have collected this information, you may find that employees are not using the available reporting mechanisms. Be careful not to interpret this lack of use necessarily as a good sign. We are reminded of a client who conscientiously offered its employees the alternative of discussing concerns directly with their supervisors or using an internal hotline, consisting of an answering machine locked in a desk drawer in the general counsel's office. When this individual was

asked how he measured the success of this two-pronged approach, he pointed proudly to the fact that he had received only five calls the previous year from roughly 2,000 employees. But when pressed about how he had concluded that the system was functioning effectively, he did not have a convincing response.

## 2. Assess Employee Awareness and Confidence

Because it is extremely difficult to make a subjective judgment about the performance of a specific reporting system, you must go directly to the users themselves. Not only can discussions with employees provide some valuable insight into what may or may not be functional, but also such undertakings might help you to avoid the type of misperception that occurred in *Faragher*. Although the Florida city had workplace reporting policies, its management was unaware that the policies had not been universally distributed. It, therefore, could not establish an affirmative defense to a claim of sexual harassment by a supervisor.

There are a number of ways in which you can survey employees about feedback mechanisms. They range from a formal, structured approach developed and administered by a third party experienced in employee surveys to informal focus groups conducted either by internal staff or by an independent resource, such as a consultant or a legal adviser. Because individuals from outside the organization generally do not have vested interests in any existing feedback mechanisms, employees are more likely to share candid insights and opinions with them.

As is the case for any good surveying technique, you should obtain as representative a sampling of the workforce as possible. Give thought to including English-as-a-second-language employees, employees from all shifts, employees from both central and remote locations, and even employees based in other countries. More often than not, companies inadvertently overlook the special needs of nonmainstream employees in the development of policies and procedures, leaving the companies vulnerable to complaints.

## 3. Revise Reporting Policies and Procedures

Based on what you discover from your inventory and the employee feedback phases, you can begin to refine or reinvent your existing reporting policies  
(continued on page 76)

## CAN YOUR COMPANY AFFORD NOT TO COMPLY?

The U.S. Sentencing Commission Guidelines (“Guidelines”), enacted in November 1991, changed the corporate landscape. It was no longer just good business to have a comprehensive corporate compliance program. It became financially astute to do so. The Guidelines provide a financial incentive for corporations to institute formal, comprehensive compliance programs to prevent, detect, and react to improper business conduct.

The Guidelines were devised to encourage good corporate behavior by subtracting penalty points for corporate responsibility and adding points for corporate culpability. As a result, a company that self-monitors and is proactive in preventing, detecting, and reporting criminal conduct and that cooperates with and assists law enforcement authorities not only will be deemed to be the good employer but also may be directly affecting its bottom line in a positive way.

What if your company does not comply with the Guidelines? A court may order a probation term for your company. Probation may include unannounced examination of your company’s books and records by a probation officer, interrogation of your company’s employees, and payment of restitution, fines, or other monetary sanctions.<sup>1</sup>

One way to ensure that your company has an effective corporate compliance program is to make sure that your company has incorporated the following seven elements into its compliance program:<sup>2</sup>

### FEDERAL SENTENCING GUIDELINES: SEVEN ELEMENTS OF AN EFFECTIVE CORPORATE COMPLIANCE PROGRAM

**1.** The organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal conduct.

**2.** Specific individual(s) among high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures.

**3.** The organization must have used due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of due diligence, had a propensity to engage in illegal activities.

**4.** The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, such as by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required.

**5.** The organization must have taken reasonable steps to achieve compliance with its standards, such as by using monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution.

**6.** The standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an offense. Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.

**7.** After an offense has been detected, the organization must have taken all reasonable steps to respond appropriately to the offense and to prevent further similar offenses, including any necessary modifications to its program to prevent and detect violations of law.

### NOTES

1. 2001 Federal Sentencing Guideline Manual § 8D1.4(b)(2)(4), Nov. 1, 2001.
2. 2001 Federal Sentencing Guideline Manual § 8A1.2, Commentary 3(k), Nov. 1, 2001.

(continued from page 72)

and procedures. We strongly recommend that you involve employees in this process. Whatever you ultimately deploy should be not just “for” them, but equally or more so “about” them. Here, too, the best way to accomplish that goal is to involve a mix of front-line and middle-management representatives.

In terms of process redesign, we have learned from employees that the following are the most important features of a viable and valued employee feedback system:

- *Convenience.* The more convenient a system is to use, the more likely employees are to use it. For starters, that notion means making it accessible around-the-clock from any company site, including sites located overseas. According to In Touch statistics, employees place more than 40 percent of all hotline calls at night or on weekends. A user-friendly system also should incorporate as many communication options as possible, such as phone, fax, email, and person-to-person. If you encourage phone access, then you should provide a toll-free number; if at all possible, the actual call-in number should be an easy-to-remember one. Toll-free access is available from most countries, and the charges are not at all prohibitive. Fax access, too, should include a toll-free number,

an easy-to-remember number, and international functionality. As for email, it tends to be a fairly straightforward ease-of-use alternative.

- *Safety and Comfort.* Do not overlook the security and comfort that employees feel when using the system. Although you can achieve affirmative-defense protection by requiring employees to discuss their concerns directly with a supervisor or other designated individual, you weaken your argument when you fail to secure a risk-free reporting method for employees. We strongly recommend that your company offer a communication channel that gives employees the choice of shielding their identity. Shielding identity means minimizing or eliminating the possibility that your company can and will track down a reporting source by using caller ID or recognizing a voice, analyzing handwriting, or tracing the source of email. An outsourced hotline or independent ombudsperson offers more security to employees. In general, third-party operators tend to offer solutions that address both the convenience and the safety challenges.

We often hear from companies that, if there is no way for them to identify or talk with the source of a report, they could end up spending time, energy, and resources in conducting a wild-goose chase. After all, receipt of an employee report via a confidential and/or anonymous reporting channel puts

## SAMPLE EMPLOYEE COMMUNICATIONS INVENTORY

Use the following sample to develop an employee communications inventory to keep track of what kinds of issues may need your attention before they get out of hand, for example.

### ABC Manufacturing Company Employee Communication Inventory

Date Prepared: September 2002

REPORTING ISSUE	OVERSIGHT DEPARTMENT	HOURS OF OPERATION
Harassment	HR	8:00–18:00
Discrimination	HR	8:00–18:00
Ethics concerns	Legal	8:00–18:00
Safety & security	Safety	24 hours
Fraud & theft	Audit	8:00–18:00
Financial irregularities	Audit	8:00–18:00
Hostile workplace	HR	8:00–18:00
Benefits issues	HR	8:00–18:00
Regulatory violations	Legal	8:00–18:00
Ideas & suggestions	Legal	8:00–18:00
Other criminal acts	Legal	8:00–18:00

the company on notice and requires it to initiate an investigation. What this argument fails to take into account is that the technology of both live-operator and automated systems is currently such that the company can carry on a long-term dialogue with an employee without ever knowing the identity of the individual involved. Typically, this dialogue is accomplished through the use of randomly assigned case ID numbers; it is remarkably easy to pass questions and progress reports back and forth until the situation resolves.

Last, no discussion about safety and comfort should ignore a consideration just about universally overlooked by companies: preference. When your employees want to share information, do they prefer talking to a machine or to a real person? Our somewhat surprising anecdotal evidence shows that companies have greater success using automated systems. We believe that the user-friendliest approach would be to offer both. Current technology permits a system user to choose easily between person and machine.

- *Scope of Feedback.* The vast majority of employee reporting systems place the burden of deciding what to report on the employee. This decision burden tends to be a subtle and easily overlooked trap of reporting programs, and it warrants elaboration.

Although companies may do their well-intentioned best to describe what constitutes inappropriate behavior, the most inevitable by-product of efforts to define issues is the creation of gray areas. Although the words in the policy and procedure manual may read, “The company has zero tolerance for sexual harassment as hereby defined,” such a statement does not necessarily empower employees. It is human nature to have concerns about the relative significance of an

**IT IS HUMAN NATURE TO HAVE CONCERNS ABOUT THE RELATIVE SIGNIFICANCE OF AN ISSUE, NOT TO MENTION RESERVATIONS ABOUT CAUSING A FUSS.**

issue, not to mention reservations about causing a fuss. In addition, employees may have doubts about how a specific issue fits into the overall scheme of offensive behaviors. They may ask themselves, “Is this really what they want to hear from me?”

Take the case of an employee who is offended by the image of a woman in a sexy outfit on a coworker’s computer screen. On the one hand, such a viewing may be a clear violation of corporate policy on computer use and sufficient

PHONE REPORTING	EMAIL REPORTING	FAX REPORTING	OTHER	POLICY LAST REVIEWED	12-MONTH UTILIZATION	FILE MAINTENANCE RESPONSIBILITY
Yes	No	No	HR Rep	10/5/99	5 cases	HR
Yes	No	No	HR Rep	10/5/99	10 cases	HR
Yes	Yes	No	In-person	1/30/02	3 cases	Legal
Yes	Yes	Yes	Hotline	6/30/97	35 cases	Safety
Yes	No	No	Hotline	6/30/98	3 cases	Audit
Yes	No	No	Hotline	6/30/98	0 cases	Audit
Yes	No	No	Hotline	10/5/99	10 cases	HR
Yes	Yes	Yes	Hotline	1/1/02	235 cases	HR
Yes	Yes	No	None	5/15/95	2 cases	Legal
Yes	Yes	Yes	Boxes	5/31/97	25 cases	Legal
Yes	No	No	Hotline	5/15/95	2 cases	Legal

grounds for an employee to report the coworker to a supervisor. But realistically, how comfortable do you think that employee will be going on record as an informant? On the other hand, the image may simply be personally offensive to the

**IF CORPORATE POLICIES AND PROCEDURES ARE OUT OF SIGHT, THEY ARE OUT OF MIND.**

viewer. In this case, the employee must come to his or her own interpretation of what constitutes a hostile workplace for sexual harassment purposes and decide whether it is what the company has in mind when it boasts of a zero tolerance policy.

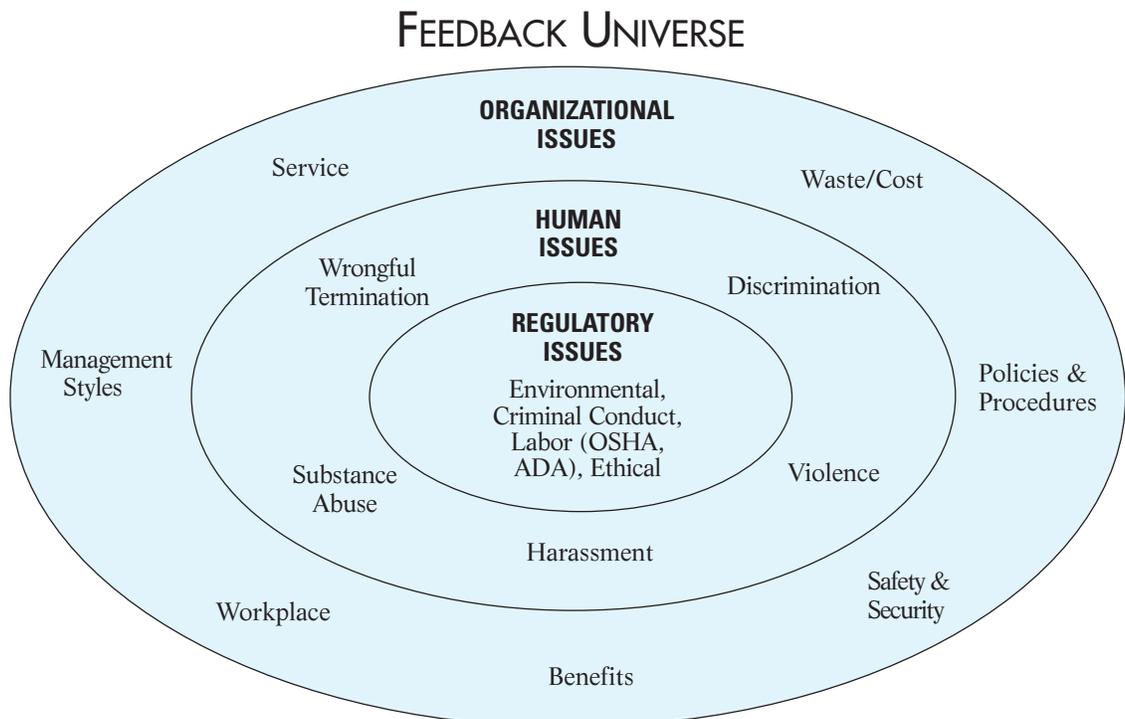
Moreover, ambiguous or less severe behaviors that commonly arise in hostile work environment situations generate different perceptions among males and females.<sup>26</sup> For example, men and women generally agree that sexual coercion and sexual propositions constitute sexual harassment.<sup>27</sup> They do not, however, necessarily agree that sex-related jokes or requests for dates do.<sup>28</sup>

Not only can this issue be difficult for the individual, but also it can reach the heart of the buy-in challenge that we raised earlier.

The way that most organizations clear their conscience regarding potential employee confusion over what is and what is not a reportable offense is to encourage individuals to discuss their concerns with an internal representative. Once again, this policy places the burden on the employee to take that bold step to be identified and risk the consequences. This burden gets back to the desirability of providing a confidential and anonymous mechanism.

But perhaps the biggest missed opportunity of all in the construction of employee feedback and reporting systems is the omission of many important organizational and individual problem areas. In the sidebar on this page, we have created a “Feedback Universe.” In most contemporary organizations, the center two rings of issues are addressed by formal policies and procedures. In contrast, few organizations have well-established mechanisms for dealing with the topics included in the “Organizational Issues” ring.

Why is that? Is it because employee feedback about such topics as policies and procedures, ben-



efits, and physical workplace is not important? Is it because it is assumed that these are topics that employees are comfortable discussing with their supervisors and area managers? Is it because management does not care what employees think on these subjects or because management does not believe that employees have anything impor-

## **IN DEVELOPING YOUR REINFORCEMENT MATERIAL, KEEP IN MIND THAT DESIGN PLAYS AN IMPORTANT ROLE.**

tant to say about these subjects? Or is it nothing more than a simple lack of awareness that has caused these subjects to be excluded from the approved list of acceptable feedback topics?

Whatever the case, it is our contention that a truly effective, empowering, and defensible feedback system would encourage feedback on all of these topics: regulatory issues, human issues, and organizational issues. The major benefit of opening up the system in this way is that it removes the burden from the employee of deciding whether and where a specific concern fits into the feedback structure defined by the corporation. Rather, the message becomes, "Feel free to talk to us about anything, and we'll decide in which issue box to place it." There no longer are any gray areas because all issue areas have become fair game.

### **4. Develop Internal Marketing Plans and Measurement Objectives**

If corporate policies and procedures are out of sight, they are out of mind. Although your company likely took great care to incorporate reporting policies into employee handbooks and maybe even posted them on an intranet, you would be well advised to do a good deal more. Our mantra is that, when it comes to workplace-related issues, you cannot do enough to promote, publicize, and reinforce policies and remind employees about what they should do when they think that they have an issue, conflict, or concern with a manager, subordinate, or coworker.

We have found the following specific actions helpful in assuring that employees will use reporting mechanisms:

- *Think about the places that employees are most likely to look for instructions for problem-reporting.* Off the top of your head, would you know where to find the instructions for reporting each of the issues delineated in the inventory table in the sidebar on page 76? You might be surprised to discover how difficult it can be. That difficulty leaves your company vulnerable to criticism and/or liability. We are reminded of an audit that we conducted for a Fortune 100 company. The attendees at the introductory session were a mix of attorneys and human resource generalists assembled from a variety of units and locations. We asked the attendees to bring copies of their phone directories and employee handbooks. We then cited examples of specific employee dilemmas and asked them to see how quickly they could locate the resource to contact to discuss or report the concern. Suffice it to say that, had we not ended the exercise after a few embarrassing minutes, some of them might still be searching. Stressed employees do not always think logically. If you want to do the most to protect your company and truly empower its employees, involve employees in the policy and procedure development process.
- *Use as many varieties of reinforcement as possible.* There are a myriad of creative ways to reinforce programs. Among the most commonplace is the ongoing distribution of magnets, wallet cards, phone stickers, desk toys, and other paraphernalia used to promote various corporate initiatives. Other good techniques include placing articles in company publications, operating booths at company benefit fairs, filming segments in video productions, providing links on intranets, and displaying workplace posters. In developing your reinforcement material, keep in mind that design plays an important role. Getting the word out is about communication. To the extent possible, use a professional designer and a really good editor.
- *Provide feedback about successes.* How can you convince employees that the policies and procedures that exist for their benefit actually function as intended? And how can you let employees know that coworkers have successfully used problem-resolution options? Unfortunately, you cannot publicly discuss most internal case studies.

You cannot openly write about the marketing vice president that the company had to terminate for harassment or about how an employee tip revealed environmental violations. Compounding this challenge is the natural tendency of rumor mills to exaggerate or misreport processes and results. Nonetheless, you should try to find ways to demonstrate that employees are using reporting systems and that the systems work. Depending on the specifics, you may be well advised to consult with communications professionals. One of the beauties of having the kind of unconstrained feedback system that we described earlier is that it is far easier to talk about successes and activity. Most of the information received is what might best be described as low-hanging fruit. Compared to such easily correctable, but very real day-to-day irritations as dress codes, unsanitary restrooms, late paychecks, and inflexible scheduling, more serious issues, such as harassment, discrimination, fraud, and substance abuse, are relatively infrequent. If you describe successes in addressing mundane irritants, employees will gain confidence that the system will work equally well for more substantial problems. In addition, reporting on success stories gives you an excellent opportunity to promote the system and to remind employees how to use it.

- *Develop tools for measuring success.* How do you know whether the well-intentioned policies and procedures that you have developed to protect your company and its employees are functioning? Can you take comfort from the fact that you receive few, if any, formal complaints? Regrettably, there appear to be scant quantitative data available about employee use of reporting systems. According to In Touch statistics, companies that operate third-party, limited-topic hot-lines, such as waste, fraud, and hostile workplace, report annual use levels up to 1 percent. Companies that operate more expansive systems tend to see annual employee use levels of 5 to 10 percent. Is more use necessarily better? The answer ultimately gets back to your company's vision of employee empowerment. Another way to measure functionality is to survey your company's employees about their awareness of, confidence in, and perspectives regarding various categories of policies and procedures.

You can incorporate both generalized and specific questions into any employee satisfaction surveys. Alternatively, you can develop an annual survey of your own, focused solely on the subject of compliance awareness and reporting.

## 5. Monitor and Report Outcomes

In your role as in-house counsel, are you aware of the numbers and types of complaints that employees are reporting? Of equal importance, is this information provided to the company's management team and perhaps the board of directors? We advise companies to monitor complaints and to report on investigatory outcomes to managers and/or directors. Your overview report need not be a complicated document. Something as simple as the sample employee feedback report in the sidebar on page 86 can be extremely effective. This sample report is designed to summarize the numbers of calls in each major organizational issue area that were received over the past 30 days by the company's external and/or internal reporting systems. It also reflects the percentage of each category in relation to the total. In most cases, it is helpful to supplement the numbers with a paragraph or two of narrative, such as the following: "The two calls in the safety and security area were about an inoperative parking lot light. The problem has been fixed." Also, it is helpful to include a trend table that provides an overview of monthly results.

The benefits of a periodic report, such as this sample, are threefold. First and foremost, it forces the centralization and monitoring of important data. Second, it provides a way for senior management and/or board members to know quickly what's going on and to ask questions about details that might concern them. Third, a somewhat modified table of this kind—that is, one that lumps harassment, fraud, and so forth in with organization and morale issues—published in a newsletter, included on an intranet, or posted on a bulletin board can provide employees the assurance that other employees are providing feedback and that management is monitoring that feedback.

Once again, the more centralized your reporting mechanisms and collection points are, the easier it will be for you to capture and analyze ongoing use.

*(continued on page 86)*

From this point on . . .  
Explore information related to this topic.

#### ONLINE:

- David M. Benck and Tess Thrasher Hughes, “Investigating a Sexual Harassment Complaint: Prompt Remedial Action,” *ACCA Docket* 20, no. 3 (2002): 72–85, available on ACCA Online<sup>SM</sup> at [www.acca.com/protected/pubs/docket/ma02/investigate1.php](http://www.acca.com/protected/pubs/docket/ma02/investigate1.php).
- Mark N. Bonaguro, “Managing Termination: How to Avoid Litigation by Treating Employees Fairly and with Respect,” *ACCA Docket* 19, no. 3 (2001): 60–76, available on ACCA Online<sup>SM</sup> at [www.acca.com/protected/pubs/docket/ma01/terminatepage1.html](http://www.acca.com/protected/pubs/docket/ma01/terminatepage1.html).
- Campaign against Workplace Bullying, the main website for the grassroots movement provides an overview of workplace bullies, legislative reform information, and suggestions for ridding the workplace of bullies, at [www.bullybusters.org](http://www.bullybusters.org).
- Disgruntled employee websites that provide a forum for disgruntled employees to air their company’s dirty laundry for all to see, such as [www.disgruntled.com](http://www.disgruntled.com), [www.i-resign.com](http://www.i-resign.com), [www.disgruntledemployees.net](http://www.disgruntledemployees.net), [www.greedyassociates.com](http://www.greedyassociates.com), [www.employer-employee.com/Burnout.html](http://www.employer-employee.com/Burnout.html), and [www.cubiclenews.com](http://www.cubiclenews.com).
- Brian Edwards, Craig Holmes, F. Skip Sugarman, “Religion in the Workplace: How Accommodating Must You Be?” *ACCA Docket* 20, no. 3 (2002): 20–38, available on ACCA Online<sup>SM</sup> at [www.acca.com/protected/pubs/docket/ma02/religion1.php](http://www.acca.com/protected/pubs/docket/ma02/religion1.php).
- Andrew R. Gold and Katharine H. Parker, “Workplace Sexual Harassment Policies: Exercising Reasonable Care in Prevention,” *ACCA Docket* 20, no. 3 (2002): 58–71, available on ACCA Online<sup>SM</sup> at [www.acca.com/protected/pubs/docket/ma02/harassment1.php](http://www.acca.com/protected/pubs/docket/ma02/harassment1.php).
- Joanna Grossman, *Sexual Harassment in the Workplace: Do Employers’ Efforts Truly Prevent Harassment, or Just Prevent Liability?* FINDLAW’S COMMENTARY (May 7, 2002), at [http://writ.corporate.findlaw.com/scripts/printer\\_friendly.pl?page=/grossman/20020507.html](http://writ.corporate.findlaw.com/scripts/printer_friendly.pl?page=/grossman/20020507.html).
- Peter O. Hughes and Deborah A. Keller, “Beyond the FMLA: Medical Leave as a Reasonable Accommodation,” *ACCA Docket* 20, no. 3 (2002): 40–57, available on ACCA Online<sup>SM</sup> at [www.acca.com/protected/pubs/docket/ma02/fmla1.php](http://www.acca.com/protected/pubs/docket/ma02/fmla1.php).
- U.S. Department of Labor, elaws Advisors, an interactive website with interactive tools that provide information about federal employment laws, at [www.dol.gov/elaws](http://www.dol.gov/elaws).
- U.S. Sentencing Commission, Federal Sentencing Guidelines Manual and Appendices, at [www.uscc.gov/guidelin.htm](http://www.uscc.gov/guidelin.htm).

#### ON PAPER:

- Robert A. Baron and Joel H. Neuman, *Workplace Aggression—The Iceberg beneath the Tip of Workplace Violence: Evidence on Its Forms, Frequency, and Targets*, 21 PUB. ADMIN. Q. 446 (1998).
- Eletta Sangrey Callahan and Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99 (Fall 2000).
- EMPLOYMENT PRACTICE LIABILITY: JURY AWARD TRENDS AND STATISTICS (Victoria Marshall ed., LRP Publications Co. 2001).
- TERENCE R. MITCHELL, BROOKS C. HOLTOM, AND THOMAS W. LEE, HOW TO KEEP YOUR BEST EMPLOYEES: DEVELOPING AN EFFECTIVE RETENTION POLICY (The Academy of Management Executives Nov. 2001).
- Maria Rotundo, Dung-Hanh Nguyen, and Paul R. Sackett, *A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 86 J. OF APPLIED PSYCHOLOGY 914 (Oct. 2001).

(continued from page 82)

## SAMPLE EMPLOYEE FEEDBACK REPORT

Use the following sample to develop an employee feedback report that would be helpful for management to monitor employee feedback at your company:

**Employee Feedback Report  
XYZ Corporation  
For Month Ending August 2002**

**CALL SUMMARY**

Major Categories	Total # of Calls	% of Total Calls
Safety and security	2	4
Harassment and discrimination	3	6
Fraud and financial issues	2	4
New products and cost savings	6	12
Organization and morale	7	14
Benefits	20	40
Policies and procedures	7	14
Miscellaneous	3	6
<b>Total</b>	<b>50</b>	<b>100</b>

### CONCLUSION

Unresolved workplace issues can have devastating effects on a company's bottom line. It simply is not enough for a company to have well-written policies and procedures in place. A company must demonstrate its philosophical, budgetary, and time commitment to the enforcement of such policies and procedures. Specifically, companies must communicate the rights and responsibilities of the workforce, publicize and promote reporting mechanisms, and assure that users trust these mechanisms.

To develop a reliable and effective early warning system for workplace problems, your company should take the following actions: (1) inventory and evaluate your existing reporting mechanisms, (2) assess employee awareness of and confidence in existing reporting policies and procedures, (3) revise current policies and procedures responsibly, (4) develop internal marketing plans and measurement objectives, and (5) monitor and report outcomes. By observing these five steps, your

company will reduce the possibility of being blindsided by potential problems.

If employees do not believe that management is truly committed to providing a safe, sane, and actualizing workplace, your company is at risk of experiencing unpleasant and costly surprises, such as litigation. But if your employees believe that management values their opinions and contributions, your company's bottom line will more likely soar. ■

### NOTES

1. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).
2. Faragher v. City of Boca Raton, 524 U.S. 775 (1998). In Faragher and Ellerth, the U.S. Supreme Court held that employers may be vicariously liable under Title VII for acts of supervisors that constitute sexual harassment, irrespective of the employer's policies and practices, even if the employer lacks actual notice of the supervisor's conduct. Nevertheless, in cases in which the supervisor's sexual harassment does not result in an adverse tangible employment action, such as when the supervisor makes an unwelcome sexual advance, but his threat to deny job benefits if the employee does not capitulate goes unfulfilled, the

- plaintiff's claim is subject to an affirmative defense. The affirmative defense has two components: (1) the employer must prove that it exercised reasonable care to prevent and promptly correct any conduct constituting sexual harassment, and (2) the employer must prove that the plaintiff unreasonably failed to take advantage of a personnel policy or procedure to report, prevent, or correct any conduct amounting to sexual harassment. *See also* Andrew R. Gold & Katharine H. Parker, "Workplace Sexual Harassment Policies: Exercising Reasonable Care in Prevention," *ACCA Docket* 20, no. 3 (2002): 58–71; David M. Benck & Tess Thrasher Hughes, "Investigating a Sexual Harassment Complaint: Prompt Remedial Action," *ACCA Docket* 20, no. 3 (2002): 72–85.
3. *See* *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999). *Kolstad* involved the appropriate standard of proof for a plaintiff's recovery of punitive damages in a Title VII employment discrimination case. The U.S. Supreme Court held that a plaintiff need not show that his or her employer had acted in an egregious manner. Instead, the Court interpreted the Civil Rights Act of 1991 (which authorizes plaintiffs to recover compensatory and punitive damages in cases brought under Title VII and the Americans with Disabilities Act) to authorize punitive damages in cases of intentional employment discrimination if a plaintiff proves that the employer had committed discrimination with malice or with reckless indifference to the federally protected rights of an aggrieved individual. The U.S. Supreme Court also held, however, that, with respect to cases in which a plaintiff sues a company for the acts of its supervisory personnel, punitive damages are improper if the employer undertook good-faith efforts to comply with employment discrimination laws.
  4. *See* EMPLOYMENT PRACTICE LIABILITY: JURY AWARD TRENDS AND STATISTICS 3 (Victoria Marshall ed., LRP Pub. Co. 2001) [hereinafter *EPL Jury Award Trends*].
  5. *Id.* at 5.
  6. *Id.*
  7. *See* Eletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 107–108 (Fall 2000). Only Illinois and Florida offer significant financial awards to plaintiffs for whistleblowing. *Id.* at 110.
  8. *See* Trystan Phifer O'Leary, *Silencing the Whistleblower: The Gap between Federal and State Retaliatory Discharge Laws*, 85 IOWA L. REV. 665, 664 (Jan. 2000). The following federal statutes prohibit retaliatory discharge for whistleblowing activity, but provide no private right of action for the employee to pursue: Toxic Substances Control Act, 15 U.S.C. § 2622; Occupational Safety and Health Act, 29 U.S.C. § 660; Employee Retirement Investment Securities Act, 29 U.S.C. § 1132; Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. § 1855(b); Family and Medical Leave Act, 29 U.S.C. § 2615; Federal Surface Mining Act, 30 U.S.C. § 1293(b); Water Pollution Control Act, 33 U.S.C. § 1367; Safe Drinking Water Act, 42 U.S.C. § 300j-9(l)-(iii); Solid Waste Disposal Act, 42 U.S.C. § 6971(b); Comprehensive Environment Response, Compensation and Liability Act, 42 U.S.C. § 9610(b); and Surface Transportation Act, 49 U.S.C. § 31105(b). *Id.* at n. 6. In contrast, the following federal statutes provide employees a private right of action to pursue retaliatory discharge: Federal Deposit Insurance Corporation Improvement Act, 12 U.S.C. § 1831(j); Energy Reorganization Act, 42 U.S.C. § 5851; Clean Air Act, 42 U.S.C. § 7622; and Vessels and Seamen Act, 46 U.S.C. § 2114. *Id.*
  9. *EPL Jury Award Trends*, *supra* note 4, at 46.
  10. *Id.* at 20.
  11. *See* Bureau of Labor Statistics at [www.bls.gov/news.release/union2.rn0.htm](http://www.bls.gov/news.release/union2.rn0.htm).
  12. *See* Laura Michaud, *Turning the Tables on Employee Turnover*, *FRANCHISING WORLD*, July/Aug. 2000, at 18.
  13. *Id.*
  14. *See* *The Retention Dilemma*, 2 (Hay Group Working Paper), at [www.haygroup.com](http://www.haygroup.com).
  15. Michaud, *supra* note 12, at 18.
  16. *Id.*
  17. *Id.*
  18. *See* David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 480 (Mar. 2000).
  19. *Id.* at 481–82.
  20. *Id.* at 483.
  21. *Id.*
  22. *Id.*
  23. *See* Stephen J. Hedges and Melita Marie Garza, *Lawyers' Report Says Probe Was Curtailed*, *CHICAGO TRIBUNE*, Jan. 16, 2002.
  24. *See* Eric Berger, *Payment Approved for Watkins' Lawyers*, *HOUSTON CHRONICLE*, May 17, 2002.
  25. *See* Michael Kinsman, *It Requires Courage to Take Action When a Company Goes Bad*, *SAN DIEGO UNION-TRIBUNE*, Jan. 27, 2002.
  26. *See* Maria Rotundo, Dung-Hanh Nguyen, and Paul R. Sackett, *A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 86 J. OF APPLIED PSYCHOLOGY 914 (Oct. 2001). Moreover, men's and women's perceptions of what constitutes sexual harassment depend upon whether there is a formal status differential, such as the difference between supervisor and subordinate, between the harasser and the target. *Id.* Studies have shown that men are more likely to perceive behavior between "equals" as harmless social interaction, whereas women are more likely to perceive an element of threatening behavior. *Id.*
  27. *Id.*
  28. *Id.*