

REVISITING PREVENTIVE LAW AS A STRATEGY FOR LOCAL GOVERNMENTS AFTER *FARAGHER* *v. CITY OF BOCA RATON**

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I. INTRODUCTION

When the Local Government Law Section¹ of the Florida Bar hosted The Governor's Conference on Local Governments in the 1990s,² one of the innovative strategies presented for implementation by governmental entities was that of reducing liability and costs for lawsuits by developing training programs to ensure that government employees were aware of the legal constraints on governmental conduct.³ Almost ten years ago, conference participants identified the necessity of holding the line on damage awards and attorneys' fees and suggested that local governments develop training programs for their employees.⁴ Now, with the United States Supreme

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1. The Florida Bar Local Government Law Section was renamed the City, County and Local Government Law Section in 1996.

2. The Governor's Conference on Local Governments in the 1990s was held in Clearwater, Florida, on January 18–20, 1989, and was co-sponsored by the Governor's Office, the Florida Department of Community Affairs, the Florida League of Cities, the Florida Association of Counties, the Local Government Law Section of the Florida Bar, and the Florida Institute of Government.

3. See generally DAVID GELFAND, THE DYNAMIC RELATIONSHIP BETWEEN LOCAL AND FEDERAL GOVERNMENTS: PREPARATIONS AND PROSPECTS FOR THE 1990s, JOURNAL OF PROC. OF THE GOVERNOR'S CONFERENCE ON LOCAL GOVERNMENT IN THE 1990s (1989) (on file with the *Stetson Law Review*).

4. See John J. Copelan, Jr. et al., *Local Government in the 1990's: An Interim Report from the Florida Governor's Conference*, 18 STETSON L. REV. 565, 569 (1989).

Court's recent decision in *Faragher v. City of Boca Raton*,⁵ local governments must adopt aggressive preventive law programs.⁶ All governments should proactively pursue such strategies or face a potential time-bomb of future claims. As we approach the beginning of a new millennium, enacting a preventive law strategy is instrumental in limiting claims for employee misconduct in areas such as discrimination, sexual harassment, and violations of § 1983.⁷

As we celebrate the Fifteenth Anniversary of the inaugural issue of The Local Government Law Symposium, almost ten years after The Governor's Conference on Local Governments in the 1990s,⁸ we are revisiting the use of preventive law, in light of *Faragher*, as a strategy for local governments to examine how successful, preventive law programs can be implemented. These programs can reduce a jurisdiction's exposure to claims for employee misconduct, discrimination, and harassment.⁹ Moreover, through training methods including client newsletters, written policies, procedural manuals, and videotaped presentations, impermissible behavior can be identified and liability for employee actions contrary to government policy can be shifted away from the public body, and be used as a defensive tool.¹⁰

II. FARAGHER v. CITY OF BOCA RATON

The United States Supreme Court, in *Faragher*, has underscored the importance of preventive law in the field of employment discrimination by holding that an employer is vicariously liable for actionable discrimination caused by a superior.¹¹ The action, however, is subject to an affirmative defense, which is examined by looking to the reasonableness of the employer's conduct as well as that of the plaintiff victim.¹² "Between 1985 and 1990, . . . [Ms.] Faragher worked part time and during the summers as an ocean lifeguard for

5. 118 S. Ct. 2275 (1998).

6. *See id.* at 2292.

7. *See id.*

8. *See supra* note 2.

9. *See* John J. Copelan, Jr. & Barbara S. Monahan, *Preventive Law: A Strategy for Local Governments in the Nineties*, 44 SYRACUSE L. REV. 957 (1993).

10. *See* Copelan, *supra* note 4, at 569-70; *see also* Copelan & Monahan, *supra* note 9, at 960.

11. *See Faragher*, 118 S. Ct. at 2292-93.

12. *See id.* at 2293.

the Marine Safety Section of the Parks and Recreation Department of . . . the City of Boca Raton.”¹³ She claimed that, during this time, two of her immediate supervisors violated Title VII, 42 U.S.C. § 1983, and various Florida laws.¹⁴ The Title VII claim alleged that two of her immediate supervisors “created a ‘sexually hostile atmosphere’ at [work] by repeatedly subjecting [Ms.] Faragher and other female lifeguards to ‘uninvited and offensive touching,’ by making lewd remarks, and by speaking of women in offensive terms.”¹⁵ In February 1986, the City of Boca Raton adopted a sexual harassment policy which was stated in a memorandum by the City Manager.¹⁶ This memorandum was addressed to all employees, and was reissued when the policy was revised in May 1990.¹⁷ Evidence at trial showed that the City may have actually circulated the memos and statements to given employees.¹⁸ However, the City completely failed to disseminate the policy among employees of the Marine Safety Section.¹⁹ At the time of the harassment, Ms. Faragher did not complain to higher management, but she did informally discuss the situation with a supervisor who failed to report the complaints to higher ranking City officials.²⁰ Upon the filing of an additional harassment complaint by another former lifeguard, the City determined that the two supervisors behaved improperly and disciplined them with a reprimand.²¹ The supervisors were given a choice between a suspension without pay or a forfeiture of annual leave.²² In deciding the case, the Supreme Court reviewed its decision in *Meritor Savings Bank, FSB v. Vinson*,²³ which became the foundation and statement of law for the *Faragher* decision:

In sum, there are good reasons for vicarious liability for misuse of supervisory authority. That rationale must, however, satisfy one more condition. We are not entitled to recognize this theory under

13. *Id.* at 2279.

14. *See id.*

15. *Id.*

16. *See id.*

17. *See Faragher*, 118 S. Ct. at 2279.

18. *See id.*

19. *See id.*

20. *See id.* at 2281.

21. *See id.*

22. *See id.*

23. 477 U.S. 57 (1986).

Title VII unless we can square it with *Meritor's* holding that an employer is not “automatically” liable for harassment by a supervisor who creates the requisite degree of discrimination, and there is obviously some tension between that holding and the position that a supervisor's misconduct aided by supervisory authority subjects the employer to liability vicariously; if the “aid” may be the unspoken suggestion of retaliation by misuse of supervisory authority, the risk of automatic liability is high.²⁴

When no tangible employment action was taken, the Court recognized “an affirmative defense to liability in some circumstances, even when a supervisor has created the actionable environment,”²⁵ which would allow

an employer to show as an affirmative defense to liability that the employer had exercised reasonable care to avoid harassment and to eliminate it when it might occur, and that the complaining employee had failed to act with like reasonable care [by not] tak[ing] advantage of the employer's safeguards and otherwise to prevent harm that could have been avoided.²⁶

The burden of proof is on the defending employer to prove, by a preponderance of the evidence, that he used reasonable care in the prevention and correction of sexually harassing behavior.²⁷ Additionally, the employer must show that the employee unreasonably failed to utilize any of the preventive policies in place or to otherwise avoid the harassment.²⁸ This is where the existence of a strong preventive law program is highly beneficial.

Preventive law has long been utilized by the private sector to identify and limit potential claims in the corporate and business arenas.²⁹ The direct application of these same principles to public

24. *Faragher*, 118 S. Ct. at 2291 (footnote omitted). In a footnote, the Court explained that Title VII was amended by Congress after the Court's decision in *Meritor*; however, Congress chose to leave *Meritor* intact. *See id.* at 2291 n.4. Therefore, the Court's decision in *Faragher* must comply with its earlier decision in *Meritor*. *See id.*

25. *Id.* at 2291.

26. *Id.* at 2292.

27. *See id.* at 2293.

28. *See id.*

29. *See generally* Dana H. Freyer & Benjamin B. Klubes, *A Practical Approach to Implementing a Corporate Compliance Program for Smaller Companies*, PREVENTIVE L. REP., Winter 1994, at 33 (outlining a preventive compliance program for small companies

sector entities has become increasingly popular. Since the Governor's Conference on Local Governments in the 1990s, several local governments in Florida have implemented proactive programs that are highly successful.³⁰ One such successful program was started by Broward County in 1989, which was implemented "to increase the awareness of county employees who regularly encounter situations" that may lead to future claims.³¹ Two other outstanding programs are the presentation of liability workshops to county staff by the Hillsborough County Attorney's Office and the utilization of formal training and informal communications by the Sarasota County Attorney's Office.

III. THE BROWARD COUNTY PREVENTIVE PROGRAM

Broward County's training program had several objectives, including: encouraging an environment where employees respect each others' individuality; identifying harassing and/or discriminating behavior; understanding Broward County's discrimination and harassment policies and procedures; and maintaining a discrimination/harassment free environment through awareness and communication.³² Additionally, the program identified the five principles of Public Service Ethics, along with Broward County's ethics policies, and promoted an understanding of the County's Whistleblower and Workplace Violence policies.³³ These objectives were met through the implementation of a training program which was first provided to Managers and Supervisors and then to every employee of the County.

Through a cooperative team approach, County Administrators, the Division of Human Resources, the County's Office of Equal Opportunity, and the Office of the County Attorney conducted a three hour training session.³⁴ The training session was a combination of panel discussions, lecture presentations, and case study outlines

from the legal and managerial perspective).

30. See, e.g., Copelan & Monahan, *supra* note 9, at 961-63 (describing the success of the Broward County Preventive Law Program).

31. See Copelan & Monahan, *supra* note 9, at 961.

32. See Managers/Supervisors Employment and Sexual Harassment Policy Training Update, Beyond Sexual Harassment: Mutual Respect in the Workplace (1992) (unpublished training manuals on file with author).

33. See *id.*

34. See *id.*

utilizing video tape scenarios followed by group participation and discussion.³⁵ Class component topics included ethics, employment issues, and case study exercises on sexual harassment, including appropriate responses to sexual harassment. Employment issues were broken down into those dealing with equal employment opportunity, sexual harassment, whistleblower protection, and workplace violence.³⁶ The teaching method included a discussion and summary followed by guidelines for managers.³⁷ Printed materials were prepared, including a reference guide with an agency point of contact and a phone number for the person to contact in each area. In addition, copies of pertinent documents, including EEO complaint process summaries and existing county policies were distributed as appendix materials. Thus, the materials used for training became a deskbook resource tool for employees and managers after the seminar.

Other aspects of the preventive law program included the publication of a quarterly client newsletter, *Legally Speaking*, which has informative articles on legal issues likely to be encountered and the use of legal compliance reviews.³⁸ The legal compliance review program is a voluntary program whereby a client performs a self-evaluation with his or her attorney.³⁹ The goal of the self-evaluation was to anticipate and determine potential legal problems.⁴⁰ As such, this legal checkup sought to identify any problems in advance and allow for corrective action to divert and even avoid consequences of a problem.⁴¹ To prepare the legal compliance review, a questionnaire was developed and distributed. The questionnaire was utilized to identify what rules, regulations, and statutes were encountered on a day-to-day basis by the department. The questionnaire also served as a format for a formal discussion, between the attorneys and the support staff, of the various concerns which needed to be explored to assure each department conformed with the law. In addition, the questionnaire allowed for a department to take advantage of opportunities which were otherwise overlooked.

35. *See id.* at 5.

36. *See id.* at 32-34.

37. *See supra* note 32.

38. *See* Copelan & Monahan, *supra* note 9, at 962-63.

39. *See id.* at 963.

40. *See id.*

41. *See id.*

The role of the County Attorney's Office was to provide effective legal advice before trouble developed.⁴² The review was not intended to be an evaluation of the work of the department, but rather a survey of potential legal consequences that might arise from the duties and activities of the former.⁴³ Cooperation from the top level of the agency is important to the success of this program. A side benefit of the review is that employers are educated about the law which increases their confidence in dealing with situations involving discrimination and harassment. Further follow-ups allow the County Attorney's Office to help in other functional areas as well. An Assistant County Attorney, appointed as the point of contact, arranged meetings following the receipt of the information. This offer went out to all of the department directors throughout the County and subsequent meetings were followed up by face-to-face meetings.

Issues that are important to cover in the basic review include statutes, regulations, and ordinances regarding the following areas, which are applicable to some, if not all, of the modes of operation: health and safety regulations; environmental laws; venue laws; public records and public meeting laws; ethics laws; and public policies including whistleblower provisions, equal employment opportunity laws; reasonable accommodation for religion and disability; wage and hour laws; workers compensation; labor management relation laws; family medical leave; and the American Disability Act. Self-assessment is encouraged to identify which statutes have been issues of potential concern or difficulty within the department, as well as to determine which have presented particular concerns in the past five years. Special attention is also given to other areas dealing with litigation and how the department should respond to situations which are likely to give rise to personal injury actions and subsequent court proceedings.

Once the department and its managers identify those areas of interest, there are follow-up meetings and target dates set to allow for in-person meetings. The coordinating attorney of the legal compliance review for the Office of the County Attorney invites attorneys who provide legal services in the particular areas of interest to attend these follow-up meetings. This allows those attorneys to meet with clients in person, which may only have been by phone call or

42. *See id.*

43. *See id.*

memorandum in the past.

IV. HILLSBOROUGH COUNTY PROGRAM FOR RISK-PREVENTION

The County Administrator requested the Hillsborough County Attorney's Office to institute liability workshops to provide an education to county staff in the areas of claims prevention and risk management. The purpose of this request was to increase the staff's awareness of relevant issues.⁴⁴ The key to the program's success was the County Administrator's support of the workshops and the staff's opportunity and encouragement to attend the workshops. The liability workshops are most effective when held with smaller groups of employees; this allows for interaction and dialogue, since the staff is more comfortable and likely to ask more questions.⁴⁵ Additionally, the County found that targeting specific hot spots in the departments is quite effective. Each workshop is flexible enough to include new issues which may arise. In addition, the Hillsborough County Attorney's Office found that follow-ups should be instituted on these new issues that are brought to the attention at the workshop.⁴⁶ This can be very important in implementing safety measures as a result of casual discussions during the sessions. Encouraging the attendance of the appropriate staff and attorneys at the workshop to enhance communication on a daily basis was instrumental in the success of the program.

Topics covered within the liability workshop presented by the Hillsborough County Attorney's Office include: claims and liabilities; prevention, including the necessity of notice to the County; types of notice, such as actual and constructive; notice to the risk manager responsible for handling claims; the requirement that reports be limited to facts rather than opinions; the necessity for routine maintenance, checklists, and tickler systems; and finally, a discussion on how contracts and interlocal agreements may interface with the responsible areas.⁴⁷ In addition to the preservation of evidence, discussion of documents is very important in the area of litigation.

44. See Jennie G. Tarr, *Conducting Liability Workshops for Government Clients* (1998) (unpublished continuing legal education program materials on file with author).

45. *See id.*

46. *See id.*

47. *See id.*

Specifically, discussions as to how documents can help or hurt the case, including public records and e-mails, and an explanation of how statements, including representations made to potential plaintiffs, can create liability. Additionally, discussion of the issue of attorney-client privilege and how to deal with issues and representations that relate to the media is paramount. The other part of these liability workshops deals with the issue of labor, including the Family Medical Leave Act, the issue of personal liability, including sovereign immunity for tort action under § 768.28(9)(a) of the Florida Statutes,⁴⁸ and the reimbursement of legal expenses pursuant to state law and county policy.

V. SARASOTA COUNTY'S PREVENTIVE LAW PRACTICE

The Sarasota County Attorney's Office also developed a preventive law practice that utilizes a variety of approaches from formal training programs to informal communications. The publication of a quarterly newsletter, *Of Counsel*, is one technique used, and through formal programs similar to those discussed above, the level of awareness of the law is raised within the County workforce.⁴⁹ The Sarasota County Attorney's Office program "is committed to the proposition that a well informed, trained and sensitized work force is our best bet for minimizing our exposure to legal judgments and the adverse publicity that follows."⁵⁰ Minimizing possible litigation and maximizing legal rights are critical goals of preventive law.⁵¹ The client learns to avoid litigation and other legal quagmires that cost time and money and cause disruption to the organization.⁵²

VI. CONCLUSION

48. Section 768.28(9)(a) governs actions within the scope of employment and the notion of acting "in bad faith or with malicious purpose or in a manner exhibiting wanton and wilful disregard of human rights, safety, or property." FLA. STAT. ANN. § 768.28(9)(a) (West Supp. 1999).

49. See Jorge L. Fernández, *On Point, Remarks from the County Attorney*, OF COUNSEL, Spring 1996, at 1.

50. *Id.*

51. See Copelan & Monahan, *supra* note 9, at 957.

52. See *id.*

The necessity for an aggressive preventive law program has been underscored in *Faragher*.⁵³ The ability to raise an affirmative defense as to liability or damages should encourage all local governments to undertake the development of preventive law programs to minimize future claims. As seen by the several approaches related above, the strategy of an active and viable preventive law program for local government is just as important as one for private sector corporations.⁵⁴

53. *See supra* notes 11–28 and accompanying text.

54. *See* Copelan & Monahan, *supra* note 9, at 958.