



# County Technical Assistance Service

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## Employee's Duty to Exercise Reasonable Care

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Dear Reader:

The following document was created from the CTAS electronic library known as e-Li. This online library is maintained daily by CTAS staff and seeks to represent the most current information regarding issues relative to Tennessee county government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other e-Li material.

Sincerely,

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## Employee's Duty to Exercise Reasonable Care

**Reference Number:** CTAS-1072

The second part of the employer's defense requires the employer to show that the aggrieved employee "unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 118 S.Ct. at 2293, *Ellerth*, 118 S.Ct. at 2270. If the aggrieved employee could have avoided all of the harm, the employer will not be liable; if only some of the harm could have been avoided, the damages will be reduced accordingly.

*Unreasonable failure to complain.* This determination depends on the circumstances and information available to the employee *at that time*. Employees should not be expected to complain immediately after the first or second incident of relatively minor harassment. The employee may tell the harasser directly that he or she wants the harassment to stop, then wait to see if this is effective. If the harassment persists, though, further delay may be found unreasonable.

Other reasons for an employee's failure to complain may include:

1. The employee had reason to fear retaliation - The employee's fear of retaliation must be reasonable. To assure employees that such a fear is unwarranted, the employer must clearly communicate and enforce a policy that no employee will be retaliated against for complaining of harassment.
2. There were obstacles to making complaints - Unnecessary obstacles to complaints might include: undue expense to the employee, inaccessible points of contact for making a complaint, or unnecessarily intimidating or burdensome requirements. An employee's failure to participate in alternate dispute resolution (ADR) does not constitute unreasonable failure to avoid harm; while an employee may be expected to cooperate in the employer's investigation, the employee is not expected to give up legal rights, either procedural or substantive, as an element of exercise of reasonable care, nor can an employee be required to resolve the matter with the harasser.
3. The complaint mechanism was not effective - The employer cannot rely on an employee's failure to complain if the employee's failure is based on a reasonable belief that the process was ineffective (e.g., where the policy requires the employee to report the incident to the harassing supervisor, or where the employee is aware of other instances where co-workers' complaints failed to stop harassment.) One way an employer can help this perception is to release information about corrective and disciplinary actions taken to stop harassment.

*Other efforts by employee to avoid harm.* The employer cannot use the defense even if the employee unreasonably failed to use the complaint process, if the employee made other efforts to avoid harm. A prompt complaint to the EEOC or Tennessee Human Rights Commission (THRC) while the harassment is ongoing could qualify as such an effort, as could a union grievance. Also, a temporary staffing agency employee could complain of harassment to the staffing firm or to the client, reasonably expecting either to correct the problem. The timing of the complaint is important - if the employee could have avoided damages by complaining sooner, then the damages may be reduced accordingly.

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