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Fact or Fiction? Deepfakes Complicate Harassment Investigations

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Picture this: An employee comes to your office with digital evidence of harassment: a voicemail from a co-worker making sexual comments and a text that includes a nude photo of the same person. It seems obvious that what the complaining employee is saying is true; the evidence is right in front of you. But what if it was all fabricated?

A responsibility to investigate

Title VII of the Civil Rights Act of 1964 makes it unlawful to discriminate against or harass an employee based on their sex and other protected categories. In 1998, the U.S. Supreme Court established what is known as the Faragher-Ellerth affirmative defense, providing employers with a defense against a claim of harassment.

The employer must satisfy two elements to successfully assert this defense: (i) the employer must exercise reasonable care to prevent and promptly correct any sexually harassing behavior, and (ii) the employee must have unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

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