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California Employer Found Not Liable for Harassment by Nonemployee

A California State Appellate Court recently found that the California Fair Employment and Housing Act does not impose liability on employers for the harassment of employees by individuals not also employed by the employer. However, employers should remember that they may be liable for harassment by nonemployees under Federal law and should further be aware of pending California legislation.

In the recent case of *Carter v. California Department of Veterans Affairs*, a nurse in a residential care facility sued for sexual harassment, alleging that a resident's conduct created a hostile work environment. The nurse and the resident developed a friendship which continued beyond the time during which the nurse provided active care to the resident at the facility's clinic. The resident gave quilting instructions to the nurse and several others in the residential area of the facility and the nurse invited the resident to her home for Thanksgiving dinner. The resident then began to make inappropriate comments regarding the nurse's anatomy, which the nurse at first regarded as inappropriate but harmless. However, the resident became persistent in telling the nurse he wanted to sleep with her. When the nurse told him that she would not sleep with him, he threatened to ruin her reputation by telling "everyone" that he had slept with her. The nurse later overheard the resident telling others in the facility that they were sleeping together. The resident also chased the nurse around the facility on his scooter and left derogatory and sexually explicit messages on her home telephone answering machine.

While residents at the facility were subject to a code of conduct which prohibited disruptive behavior, including sexual harassment, and provided that residents could be evicted for misconduct, the employer's only response to the nurse's complaints was to counsel the resident to leave the nurse alone and to issue a walkie-talkie to the nurse to call security if she had any further problems. When the resident's behavior did not change, the nurse took two stress leaves and ultimately did not return to work.

In deciding whether or not to hold the employer liable for sexual harassment by the resident under the California Fair Employment and Housing Act, the Court considered the statutory language and legislative history of the Fair Employment and Housing Act which imposes liability on an employer for sexual harassment by "an employee." The court noted that the legislative history of the Fair Employment and Housing Act shows that previous drafts of the

bill contained language holding the employer liable for harassment by "any person" as opposed to "an employee." The Court found that because the version of the bill which was adopted used the "an employee" language rather than the "any person" language, the legislature must have intended not to hold employers liable for harassment by individuals other than employees.

A different California Appellate court reached the same decision in a case decided in 2002, which is currently being reviewed by the California Supreme Court. However, employers should remember that Federal law does hold employers liable for sexual harassment perpetrated by third parties such as customers, clients and/or vendors, where the employer knew or should have known of the harassment but failed to take immediate and appropriate corrective action. Moreover, AB76, currently pending in the California State Legislature, would "clarify" the Fair Employment and Housing Act and impose liability upon employers for the sexual harassment of employees by third parties where the employer knew or should have known of the harassment but failed to take immediate and appropriate corrective action, mirroring the Federal standard.

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