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Sexual Harassment: California Supreme Court Reinforces Strict Liability Standard But Announces New Defense of "Avoidable Consequences"

In the case of State Department of Health Services v. Superior Court of Sacramento County (McGinnis), decided November 24, 2003, the California Supreme Court ruled that an employer will still be strictly liable for hostile environment harassment where the acts of harassment are committed by a supervisor. However, the Court also announced for the first time a defense based on the doctrine of avoidable consequences that can be used to limit a plaintiff's recoverable damages.

Strict liability under California's Fair Employment and Housing Act ("FEHA") means the employer will be found to have violated the anti-harassment provisions of the FEHA where a supervisor is the harasser whether or not the employer knew about the harassment. Most California employers accepted this standard without question until 1998 when the United States Supreme Court decided the cases of Burlington Industries, Inc. v. Ellerth and Faragher v. City of Boca Raton.

In the Ellerth and Faragher opinions, the U.S. Supreme Court interpreted Title VII and announced that an employer could defend itself against claims for sexual harassment committed by a supervisor if there has been no tangible employment action taken against the victim and the employer demonstrates: (1) that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunity provided by the employer or failed to avoid harm otherwise. As a result of the Ellerth and Faragher opinions, many California employers tried to rely on this defense in FEHA actions. California courts were split on whether an Ellerth/Faragher defense could apply in FEHA action. The California Supreme Court resolved that dispute in the McGinnis case.

Theresa McGinnis began working for the Department of Health Services ("DHS") in 1992. She alleges that she was sexually harassed by her supervisor from early 1996 until late in 1997. While she told a coworker about the harassment in 1996, she never formally reported it to management until November 1997. In response to this formal complaint, DHS investigated the allegations, determined that the supervisor had violated DHS' policy against sexual harassment, and began disciplinary action against the supervisor, prompting him to retire. McGinnis filed a lawsuit against both DHS and the supervisor, alleging sexual harassment and sex discrimination in violation of FEHA. DHS moved for summary judgment, arguing that the Ellerth/Faragher defense should apply to FEHA actions and that McGinnis' failure to promptly use DHS' internal policies and

procedures provided a complete defense. DHS' motion was denied and the employer appealed to the California Supreme Court.

In its opinion, the California Supreme Court reaffirmed that under the FEHA, an employer is strictly liable for all acts of sexual harassment by a supervisor. The Court also found that the Title VII Ellerth/Faragher defense does not apply to FEHA actions. However, the Court announced that an employer can raise the defense of "avoidable consequences," which will not eliminate liability, but can be used to reduce a plaintiff's damages. The defense will apply if the employer can prove three elements: (1) the employer took reasonable steps to prevent and correct workplace sexual harassment; (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered.

If successful, the defense will allow the employer to escape liability for those damages that the employee could have prevented with reasonable effort and without undue risk, expense, or humiliation, by taking advantage of the employer's internal complaint procedures appropriately designed to prevent and eliminate sexual harassment. An employer cannot avoid damages for acts occurring before the reasonable time for the employee to have complained.

Although the Court announced the avoidable consequences defense in the context of a sexual harassment case, the defense should logically apply to other claims for harassment under the FEHA as well (i.e., race, color, national origin, ancestry, religion, sexual orientation, pregnancy, physical or mental disability, medical condition, marital status, age).

To take advantage of the avoidable consequences defense, California employers should review their anti-harassment policies and practices with counsel to confirm that the policies and practices appropriately encourage employees to report acts of suspected harassment, prohibit retaliation for reporting violations, and protect confidentiality. Employers should communicate these policies and all implementing procedures to employees and ensure that the policies are consistently enforced.

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