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Recent
Developments

COURT CONFIRMS THAT EMPLOYERS' EFFORTS TO PREVENT SEXUAL HARASSMENT CAN PREVENT LIABILITY FOR HARASSMENT BY A SUPERVISOR (April 12, 2001)

Summary: Yesterday, the federal Court of Appeals that covers California (the Ninth Circuit) held that even under California law, an employer may be able to avoid sexual harassment liability, even if that harassment was committed by a supervisor, if: 1) the harassment has not resulted in any "tangible employment action" (e.g., termination, demotion, etc.); and 2) the employer can show that: (a) it exercised reasonable care to prevent and correct the harassment; and (b) the employee unreasonably failed to take advantage of any preventative or corrective opportunities or otherwise failed to avoid harm. This ruling is significant because prior court decisions had stated that a California employer was *automatically* liable for any sexual harassment by a supervisor.

Details: The plaintiff, Leslie Kohler, brought a sexual harassment lawsuit against her former employer, Inter-Tel Technologies. She claimed that her supervisor had engaged in numerous inappropriate sexual acts directed toward her. However, it was undisputed that Inter-Tel had a comprehensive anti-harassment policy and that Kohler did not report her supervisor's behavior to the human resources department or any other management personnel. As a result, Inter-Tel argued that it should not be liable for the supervisor's conduct, even if it had occurred.

In 1998, the United States Supreme Court issued two opinions addressing employers' liability for sexual harassment under federal law. In order to encourage employers to take actions to prevent sexual harassment, the Supreme Court held that an employer is presumed liable for a supervisor's sexual harassment. However, an employer can defeat this presumption and avoid liability if it can show that there was no tangible employment action taken against the employee, it exercised reasonable care to prevent and correct the harassment, and the employee unreasonably failed to take advantage of the preventative or corrective measures or otherwise failed to avoid the harm. This affirmative defense was designed to motivate employers to put in place sexual harassment policies, provide sexual harassment training, undertake prompt investigations when sexual harassment complaints are made, etc.

The primary issue in the *Kohler* case was whether this federal rule would be extended to California law. In its ruling, the Ninth Circuit decided that the state and federal laws were more alike than they were different and it was therefore convinced to apply the Supreme Court's affirmative defense to claims brought under California law.

What This Means: This decision underscores the importance for all California employers to make sure they have a comprehensive sexual harassment policy in place, that they effectively notify their employees of the existence of this policy, and that they periodically train their employees on sexual harassment. This case also reinforces the importance of promptly investigating and taking appropriate action in response to any sexual harassment complaint. Employers also want to be sure that they have prevented the occurrence of any "tangible employment action" such as terminations, demotions, pay cuts, etc., so that their efforts to prevent sexual harassment can be a viable defense against a sexual

harassment claim.

If you have any questions about this or wish to learn about Paul Plevin & Sullivan's sexual harassment training programs, please contact Michael Sullivan (msullivan@paulplevin.com) or at (619) 744-3655 at Paul Plevin & Sullivan.

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Send comments to info@paulplevin.com. Last modified 04/20/01