

Paul Plevin & Sullivan LLP

Serving California Employers

Recent
Developments

CALIFORNIA COURT LIMITS EMPLOYERS' DEFENSE IN SEX HARASSMENT CASES (November 30 , 2001)

SUMMARY:

Yesterday, a California appellate court ruled that a recently-created sex harassment defense cannot be used by employers sued under California law.

As many of you may recall, in 1998, the United States Supreme Court issued a pair of decisions establishing what has been called the "*Faragher-Ellerth*" defense. This rule allowed an employer to avoid liability in harassment cases if:

1. the victim had no tangible job loss;
2. the employer had an effective, well-publicized anti-harassment program in place; and
3. the victim failed to use that program.

This rule was particularly important to California employers because it provided a way to avoid harassment liability, even if by a supervisory employee, if it could establish all elements of the defense. However, because the United States Supreme Court's decisions interpreted federal discrimination law (Title VII), there has been some question whether the defense would apply to claims under state law. Employers were given hope earlier this year when the Ninth Circuit Court of Appeals opined that California courts would apply the *Faragher-Ellerth* defense to claims under California law. (See our [April 12, 2001 E-Update](#).) In yesterday's decision, the California Court of Appeal rejected the Ninth Circuit's reasoning and held that the defense doesn't apply to California harassment cases.

DETAILS:

The name of the case is *Dept. of Health Services v. The Superior Court of Sacramento County*. (Here is a [link](#) to it.) Although the particular facts aren't very important, essentially what had happened was that an employee alleged long-standing sexual harassment by her supervisor, but, despite the existence of a detailed complaint resolution procedure, hadn't complained to anyone. After the employee brought suit, the employer asked the court to dismiss the action based upon the "*Faragher-Ellerth*" defense, because the employee hadn't suffered any tangible job action, the employer had a well-publicized, effective sexual harassment program, and the employee failed to complain.

The appellate court rejected that defense, and held that the *Faragher-Ellerth* defense is only available in federal Title VII actions, not in California Fair Employment and Housing ("FEHA") actions. The court based its conclusion on differences in the language of the two statutes, focusing primarily upon a provision in the FEHA that holds employers strictly liable for harassment by a supervisor. (For those of you who like to review the statute, it is Government Code section 12940(j)(1) and can be found [here](#).)

In the end, the court held that a California employer has no defense if a supervisory employee harasses a

subordinate.

WHAT THIS MEANS:

Unless this case is overturned by the California Supreme Court, it is a very bad turn of events for California employers. It means that employers are on the hook for supervisory harassment, even if they have a terrific anti-harassment policy, even if they scrupulously train on that policy, and even if the allegedly harassed employee never says a peep about the alleged harassment.

Although some might argue that this new development reduces the importance of effective sexual harassment training (because that training no longer can serve as a defense to a sexual harassment claim), we believe exactly the opposite. Effective sexual harassment training is now more important than ever because the stakes have been raised. If this "strict liability" rule stays in place – which it well may – it is crucial for employers to ensure that their supervisors understand what sexual harassment is, and the risks attendant to it. Moreover, given the liability that a "stealth plaintiff" can now cause, it is extremely important to ensure that employees are aware of and use available complaint mechanisms. Now may also be the time for employers to consider additional methods to ensure that their harassment policy is being followed, perhaps by surveys, audits or other periodic evaluation devices. As the court in the Dept. of Health Services case explained, it is the employer's job to know if sexual harassment is occurring, and to prevent it before it happens.

If you have any questions about this or any other employment issue please contact Joe Connaughton by e-mail at jconnaughton@paulplevin.com or by telephone at (619) 744-3645.

This E-Update is offered as general information to our clients and friends. The Update is not intended as legal advice applicable to any specific situation and should not be taken as such.

Send comments to info@paulplevin.com. Last modified 12/03/01