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Recent
Developments

CALIFORNIA SUPREME COURT ELIMINATES CO-WORKER LIABILITY: A Non-Supervisory Employee is Not Liable for Sexual Harassment Under the California Fair Employment and Housing Act (December 9, 1999)

Tomorrow the California Supreme Court will announce, in a unanimous decision, that although the California Fair Employment and Housing Act ("FEHA") prohibits "any person" from harassing an employee, it *cannot* impose personal liability on a non-supervisory co-worker.

SUMMARY

In *Carrisales v. Department of Corrections*, the plaintiff was an employee of the Department of Corrections who sued the Department, two of her supervisors and a co-worker for sexual harassment in violation of the FEHA. Carrisales claimed that the co-worker sexually harassed her, and alleged that neither the Department nor her supervisors stopped it. The two supervisors were ultimately dismissed from the case because they never personally sexually harassed the plaintiff, but the remaining issue before the Court was whether the harassing co-worker could be liable for sexual harassment.

The Court looked at several statutory authorities as well as recent case law dealing with individual liability for discrimination under the FEHA. First, Carrisales argued that since the FEHA prohibits "any person" from committing harassment, co-workers must be liable. The Court disagreed. Importantly, the Court noted that if an employer takes appropriate action in the face of a harassment claim, then no unlawful practice has occurred. Thus, the Court reasoned, the Legislature could not have intended that a harassing co-worker's liability should turn on his or her employer's failure to take appropriate action.

Second, Carrisales argued that if co-workers were liable, it would better deter harassment because they would have to ultimately pay. The Court also rejected that argument. First, the Court noted that the FEHA already obligates employers to take immediate and appropriate action when they become aware of harassment whether the allegation is against a co-worker or supervisor. The Court stated, "In light of these duties, employers should take a very dim view of all forms of harassment, whether by supervisors or others." Additionally, the Court stated that it has no duty to establish public policy— that role is for the Legislature.

Finally, the Court noted that federal law does not impose personal liability on individual employees, whether supervisory or not, for hostile work environment or sexual harassment under Title VII.

Although *Carrisales* eliminates liability for the non-supervisory harasser, it does not eliminate *employer* liability for that harassment, especially if the employer does not take prompt, effective action when learning of the harassment. Indeed, the Court was quite clear and unwavering in its pronouncement that employers have a duty to take all reasonable steps to prevent harassment from occurring in the first place, and take immediate action when it becomes aware of the bad conduct. The Court also made clear that even though a plaintiff cannot sue a co-worker under the FEHA for harassment, that does not prevent a harasser from being personally liable under some other

statute or theory, such as assault and battery or perhaps under California's sexual battery statute.

WHAT THIS MEANS

As we have emphasized repeatedly, employers must: (1) effectively train their employees; and (2) take all claims of harassment seriously, including a thorough investigation, whether the claim is against a supervisor, co-worker, client or customer. Only then will the employer be able to escape punishment for harassment claims.

PP&S NEWS

PP&S is pleased to announce the hiring of two new associates, Leonid Zilberman and Sandra McDonough. Lonny, a 1995 graduate of Santa Clara University Law School, comes to us from the employment group at Landels, Ripley and Diamond in San Francisco. Sandy, a 1997 USC Law School graduate, joins us from Richards, Watson & Gershon in Los Angeles. We are thrilled to have these attorneys join PP&S, and we assume they are happy to be in sunny San Diego! We hope our clients and friends have the opportunity to meet Lonny and Sandy soon.

Happy Holidays from all of us at PP&S.

If you would like any further information about California law regarding co-worker liability, please feel free to call or e-mail Lonny Zilberman (lzilberman@paulplevin.com) (619) 744-3648) or any of our other attorneys at (619) 237-5200.

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.

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