



CALIFORNIA SUPREME COURT CLARIFIES LIABILITY AND DAMAGES RULES IN SEXUAL HARASSMENT CASES

(November 25, 2003)

Summary

Late on Monday, the California Supreme Court issued a major sexual harassment decision. In [Department of Health Services v. Superior Court](#), the Court reversed and clarified prior decisions by ruling that: a) employers are *strictly liable* for a supervisor's harassment, but b) employees cannot recover damages that they could have reasonably avoided.

Details

The plaintiff, Theresa McGinnis, alleged that her supervisor at the Department of Health Services ("DHS") sexually harassed her from early 1996 until late 1997. In 1996, Ms. McGinnis told a coworker about the offensive behavior, but didn't formally report her concerns to management until November 1997. DHS investigated Ms. McGinnis' allegations and determined that her supervisor had violated DHS' sexual harassment policy. DHS began disciplinary action against the supervisor, which prompted him to retire.

Despite DHS' response, Ms. McGinnis sued DHS for sexual harassment. DHS asked the trial court to dismiss the claim, arguing that Ms. McGinnis' failure to promptly use its anti-harassment policies and procedures provided it with a complete defense to her claim. In support of this argument, DHS relied on the United States Supreme Court's twin 1998 decisions in *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742 and *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, which created an affirmative defense under Title VII for employers in similar situations.

The trial court denied DHS' motion, and the Court of Appeal declined to review that decision. However, the California Supreme Court granted DHS' petition for review. Its decision Monday marked a major change in California law. Although the Court confirmed that an employer is strictly liable for harassment committed by a supervisor, a proposition that was largely presumed, it recognized that an employer may limit a plaintiff's damages if the plaintiff failed to reasonably avoid the claimed harassment.

This new damages limitation theory was based upon the common law "doctrine of avoidable consequences," under which a plaintiff cannot recover damages that could have been avoided by the use of reasonable effort. To use this damages defense, the employer must show: (1) the employer took reasonable steps to prevent and correct workplace 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.

The Court emphasized that if an employer wishes to avail itself of this new defense, it will need to show that it had effective, communicated anti-harassment and anti-retaliation policies and procedures. The Court also indicated that it would look at past circumstances to determine how reasonable or unreasonable the employee's conduct was.

What this means

This case is a positive development for employers because it rewards them for their efforts to prevent harassment. However, because liability for supervisory harassment is now confirmed to be strict, it is more important than ever to effectively train supervisors on harassment issues. It also underscores the importance of implementing and communicating effective anti-harassment and anti-retaliation policies for non-supervisory employees so that any failure to use those policies and procedures will be viewed as unreasonable.

If you have any questions about this or any other topic, please contact [Fred Plevin](#) or [Joe Connaughton](#) at (619) 237-5200 at [Paul, Plevin, Sullivan & Connaughton](#).

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