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EMPLOYER'S STRICT LIABILITY FOR SEXUAL HARASSMENT IN CALIFORNIA

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In a case of first impression, the California Appellate Court determined on November 29, 2001, that the affirmative defense available to employers established by the United States Supreme Court in 1998 allowed under federal cases brought pursuant to Title VII for sexual harassment is *not* applicable and may not be used in cases brought under the California Fair Employment Housing Act (FEHA). Thus, the federal defense is unavailable to employers in sexual harassment suits brought under California state law where a supervisor is involved in the sexual harassment of an employee.

FEHA provides that an employer is strictly liable for the harassment of an employee by an agent or supervisor whether or not the employer knew about the harassing conduct and whether or not the employer took immediate and corrective action.

Under federal law (Title Vii), an employer has an affirmative defense to a charge of sexual harassment if the employer can show that (1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm

Accordingly, the holding of the Appellate Court in *the Department of Health Services v. Superior Court, CO34163, (2001)*, establishes, for the first time, a distinction between state and federal cases concerning the liability of employers in sexual harassment cases, and reaffirms that employers are strictly liable for any sexual harassment by supervisors of lower level employees.

The implications of this ruling could be far reaching for employers in the State of California because it ensures that plaintiff lawyers will almost always bring sexual harassment cases involving supervisors in state court under the FEHA in order to strip the employer of any defenses and hold it directly responsible for unlawful sexual harassment actions taken by its supervisors and/or agents.

The following is a summary of the differences between the federal and California state law, as well as a description of the holdings of the Court and the implications of such a ruling.

Sexual Harassment Cases under the Federal Law

The Federal Law concerning the liability of employers in sexual harassment cases is based primarily on Title VII (42 U.S.C. Section 2000-2) and two rulings made by the United States Supreme Court in 1998 which outline a defense available to an employer sued for sexual harassment.

Title VII provides that it is unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" (42 U.S.C. § 2000e-2, subd. (a) (1).) Though Title VII does not explicitly mention sexual harassment in the statute, federal case law and the Guidelines of the Equal Employment Opportunity Commission (EEOC) recognize sexual harassment as a type of sexual discrimination and also a violation of Title VII. (29 C.F.R. Section 1604.11). *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 66 [91 L.Ed. 2d 49].

In the companion cases of *Burlington Industries v. Ellerth* (1998) 524 U.S. 742 [141 L.Ed.2d 633], and *Faragher v. City of Boca Raton* (1998) 524 U.S. 775 [141 L.Ed.2d.662], the United States Supreme Court established precedent when it clarified that under Title VII, employers have a defense against a charge of vicarious liability in sexual harassment cases. There the Court said, "a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."

In *Burlington*, the Supreme Court articulated the fundamental basis for its decision by stating that the main purpose of Title VII is to deter sexual harassment cases from occurring by encouraging the creation of anti-harassment policies and effective grievance procedures.

Sexual Harassment Cases under California State Law

Under the FEHA, Gov. Code Section 12900 et seq., it is the public policy of the State of California to protect the rights of all persons to seek and hold employment without discrimination on account of sex or other protected classifications. The Legislature recognized that discrimination foments strife, deprives the state of the fullest utilization of the capacities of its work force, and adversely effects the interests of employees, employers and the public. FEHA was intended to provide effective remedies to eliminate discriminatory practices and is to be liberally construed to effect its purposes. Unlike Title VII, FEHA explicitly mentions sexual harassment as an unlawful employment practice. Gov. Code Section

12940(j)(4)(C).

Unlike Title VII, FEHA also explicitly addresses the question of employer liability for supervisor harassment. Gov. Code Section 12940(j)(1). Several state cases have determined that the language of the FEHA directly imposes "strict liability" on employers for harassment by a supervisor. The crucial difference between the wording of FEHA and that of Title VII is that an employer is deemed liable for the actions of its supervisors *even though the employer did not know, and did not have reason to know, of the supervisor's conduct*. "FEHA offers greater protection and relief to employees than does Title VII. An employer is strictly liable for damages an employee incurs as a result of a supervisor's or agent's sexual harassment." *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 842).

In *Doe v. Capital Cities* (1996) 50 Cal. App. 4th 1038, the Court commented that "characterizing the employment status of the harasser is very significantAn employer's liability under (FEHA) for an act of sexual harassment committed by a supervisor or agent is broader than the liability created by the common law principle of respondeat superior."

The Basis Behind the Holding of the Appellate Court

The Appellate Court in **the *Department of Health Services v. Superior Court, CO34163, (2001)***, made a crucial finding that informed their ruling. It determined that, because the wording of the California Fair Employment and Housing Act is fundamentally distinct from that of Title VII, the *Burlington/Faragher* defense is ultimately inapplicable to state claims. In the Court's words:

California law exhibits a clear intent to hold employers strictly liable for the harassing conduct of supervisory employees, even though the employer did not know, and did not have reason to know, of the supervisor's conduct, and essentially makes the obligation to provide a harassment-free workplace the nondelegable obligation of the employer. The jurisprudence relating to employer liability for harassment by a supervisor under FEHA has developed differently from that under Title VII. Permitting the Burlington/Faragher defense to be applied to FEHA cases would undermine the clear language of section 12940 Gov't, subdivision (j) (1) and legislative intent.

In its ruling, the Appellate Court articulated its belief that, in holding employers strictly liable for sexual harassment, "it gives greater assurance that the victim will be compensated, and those costs may be more easily and appropriately borne by the employer rather than the harasser." The Court also claimed that such a determination would increase the likelihood that the employer would provide adequate training for its supervisors, and then monitor its supervisory staff to ensure that harassment policies are followed. Such a bright line rule would also avoid litigation over whether a 'tangible employment action' was taken against the complaining employee.

Though the ruling might certainly have the aforementioned effects, in disallowing the *Burlington/Faragher* federal defense in state FEHA claims, and in supporting the strict liability wording

of the FEHA, the California Appellate Court simultaneously imposed a significant burden on corporations. Until the California Legislature changes the language of FEHA, which it may never do, entities doing business in California will find themselves with no defense against claims of sexual harassment by a supervisor in the state courts, except the defense that such harassment never happened.

The information provided herein is not intended as legal advice and should not be acted upon. If you have additional questions about this subject matter or would like to consult with an attorney about this or related subject matters, please call Jennifer J. Hagan or James R. Hagan at The Hagan Law Firm (650) 322-8498. Copyright 2005.

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