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SAN FRANCISCO

Employers May Use Doctrine of Avoidable Consequences to Limit Damages in Supervisor Sexual Harassment Claims Under the FEHA

SAN DIEGO

**State Dept. Health Services v. Superior Ct. (McGinnis),
Ca. Supreme Court, No. S103487 (Issued November 24, 2003)**

SACRAMENTO

Last week, the California Supreme Court addressed two key issues that are critical to an employer's defense to hostile environment sexual harassment claims brought under the California Fair Employment and Housing Act (FEHA). In *State Dept. Health Services v. Superior Ct. (McGinnis)*, the court first addressed whether an employer is strictly liable for hostile environment sexual harassment by a supervisor. More importantly, the court then examined whether the damages a plaintiff may recover from the employer in such a case include damages that the plaintiff could have avoided by utilizing preventive and corrective measures provided by the employer.

LOS ANGELES

LAS VEGAS

The *McGinnis* court answered the first inquiry affirmatively, holding that an employer is strictly liable for hostile environment sexual harassment by a supervisor. As to the second inquiry, the court held that in a FEHA action against an employer for hostile environment sexual harassment by a supervisor, an employer may be able to plead and prove at least a partial defense based on the avoidable consequences doctrine.

NEWPORT BEACH

In establishing such a defense to damages claims under FEHA, the court departed from the well-established *Ellerth/Faragher* defense which applies to sexual harassment cases under Title VII of the Civil Rights Act. In doing so, the court delineated the distinctions between Title VII of the Civil Rights Act and FEHA with regard to their treatment of sexual harassment.

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The California Supreme Court rejected the application of the *Ellerth/Faragher* defense in the context of FEHA hostile environment claims because of the significant difference in the wording of the statutes. The court noted that Title VII does not specifically address sexual harassment and that the creation of the *Ellerth/Faragher* defense was derived from general agency principals. On the other hand, the FEHA expressly prohibits sexual harassment in the workplace and imposes two particular standards of employer liability for sexual harassment, depending on whether the person engaging in the harassment is the victim's supervisor or a nonsupervisory co-employee.

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Thus, although the *McGinnis* court declined to apply Title VII precedent, it nonetheless concluded through an independent analysis of FEHA's anti-harassment provisions using state law principles, that a defense similar to

the *Ellerth/Faragher* defense does apply to hostile environment sexual harassment claims brought under the FEHA. That defense is available through the doctrine of avoidable consequences.

The Doctrine of Avoidable Consequences

In *McGinnis*, the court explained that strict liability, in the context of supervisor harassment, is not absolute liability in the sense that it precludes all defenses. "Even under a strict liability standard, a plaintiff's own conduct may limit the amount of damages recoverable or bar recovery entirely."

The court reasoned that a plaintiff may not recover damages that the plaintiff could easily have avoided, and that "the community's notions of fair compensation to an injured plaintiff do not include wounds which in a practical sense are self-inflicted." The doctrine is consistent with the aims of FEHA in that it encourages preventive action by both the employer and the employee, while affording compensation to the employee for harms that neither party could have avoided through reasonable care.

Thus, the doctrine of avoidable consequences allows an employer to limit a plaintiff's damages by establishing the following three elements: (1) the employer took reasonable steps to prevent and correct workplace sexual 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.

This defense will allow the employer to escape liability for those damages that the employee more likely than not could have prevented with reasonable effort and without undue risk, expense, or humiliation, by taking advantage of the employer's internal complaint procedures appropriately designed to prevent and eliminate sexual harassment.

If an employer has no sexual harassment complaint procedure or fails to communicate the complaint

procedure to its employees, it will not be able to avail itself of the doctrine of avoidable consequences.

Be Proactive!

Following the *McGinnis* decision, employers can be proactive in limiting the damages of employees who prevail in FEHA sexual harassment actions by implementing complaint procedures appropriately designed to prevent and eliminate sexual harassment.

- Establish a harassment complaint procedure with several point-persons to whom employees should direct any complaints of harassment
- Communicate the complaint procedure to all staff both verbally and in writing by giving a workshop, regularly disseminating a copy of the procedure, including the procedure in an employee handbook, and posting the procedure in common areas
- Make sure that the complaint procedure is designed to ensure the confidentiality of the reporting employee
- Prevent retaliation against those who report sexual harassment in the workplace
- Consistently enforce your company's policies regarding the prohibition of workplace sexual harassment

Key: The more accessible the complaint procedure is to your employees, the more unreasonable an employee will appear for failing to use it!

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