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California Supreme Court Rejects Federal Title VII Defenses to Sexual Harassment Claims, but Holds That Doctrine of Avoidable Consequences May Limit Damages Under FEHA.

NO *FARAGHER/ELLERTH*, BUT A DEFENSE TO DAMAGES: CALIFORNIA'S NEW DEFENSE TO HARASSMENT CLAIMS

By Paul R. Lynd

In a major decision regarding sexual harassment by supervisors, the California Supreme Court finally decided whether California's Fair Employment and Housing Act ("FEHA") includes a special or "affirmative" defense to sexual harassment claims recognized by the United States Supreme Court in federal employment harassment claims. Ruling in *Department of Health Services v. Superior Court*, the California Supreme Court held that California's FEHA does not allow the federal "*Faragher/Ellerth* defense," named for the two cases that established it.

California employers faced with claims of sexual harassment by supervisors may assert a different defense under the FEHA: the doctrine of avoidable consequences. This defense allows an employer to plead and prove that it took appropriate steps to prevent and address harassment, but that the employee unreasonably failed to take advantage of those protections. It enables employers to limit damages, so that they will not be liable for damages an employee could have avoided by utilizing the employer's complaint procedures.

The *Health Services* decision does not give employers as broad a defense as would have been available if the Court had recognized the federal *Faragher/Ellerth* defense, which allows an employer to avoid all liability. In California, doctrine of avoidable consequences only limits damages. Nonetheless, the decision affords California employers a significant new defense to

claims of sexual harassment by supervisors. It also underscores certain steps that employers must take so that they can meet the requirements of the new defense.

WHY THE COURT DID NOT RECOGNIZE *FARAGHER/ELLERTH*

In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the United States Supreme Court recognized under federal Title VII law a defense to employer liability for harassment involving a hostile work environment. The federal law defense requires an employer to prove that (1) it "exercised reasonable care to prevent and correct promptly" any harassing behavior, and (2) the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." If these requirements are proven, an employer can avoid all liability under this defense.

In *Department of Health Services*, the California Supreme Court emphasized that FEHA's provisions differ from Title VII. The *Faragher/Ellerth* defense was based on the law of agency. The FEHA imposes strict liability for all harassment by supervisors, and thus does not allow defenses based on agency.

THE AVOIDABLE CONSEQUENCES
DOCTRINE CAN LIMIT DAMAGES

While employers face strict liability for harassment by supervisors, the California Supreme Court held that they are not liable for all damages. They may rely on the doctrine of avoidable consequences, which derives from common law. The doctrine of avoidable consequences is a simple concept that precludes a person injured by another's wrongful conduct from recovering damages that the injured person "could have avoided by reasonable effort or expenditure." Under the FEHA, an employer will have the burden of pleading and proving the doctrine of avoidable consequences as an affirmative defense. In this context, the defense has three elements: (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.

Again, the defense only allows an employer to avoid some damages, but not liability. The Court stated that it allows an employer "to escape liability for those damages, and only 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." Thus, an employer will have to demonstrate that, if an employee has taken reasonable steps to utilize the employer's complaint procedures, the harassing conduct could have ceased. But the employer remains liable in all instances for any compensable harm the employee suffered *before* the time at which the harassment would have ceased.

The employee's actions will be judged by a reasonableness standard, which the Court noted "is not as high as the standard required in other areas of law." But, the particular level of reasonableness remains unclear. The Court indicated that it should be assessed "in light of the situation existing at the time and not with the benefit of hindsight." Thus, the Court stated that immediate reporting of harassing conduct through internal grievance mechanisms may not be required in all circumstances. It also indicated that delay resulting from "informal strategies" at resolution might be excusable. The question of reasonableness will depend on each individual situation. Also, these issues likely will have to be defined further by future cases.

WHAT AN EMPLOYER MUST
SHOW AND SHOULD DO

In addition to pleading the doctrine of avoidable consequences as an affirmative defense, an employer should be prepared to establish the avoidable consequences defense by showing it did several things. The Court stated that an employer should show that it adopted appropriate antiharassment policies and communicated essential information to its employees concerning the policies and implementing procedures. The Court identified other factors that may be considered. They include whether an employer prohibited retaliation for reporting alleged violations, whether the employer's procedures protect employee confidentiality as much as is practical, and whether the employer "consistently and firmly" enforced its policies. But, the Court recognized that potentially relevant evidence includes "anything tending to show that the employer took effective steps" to encourage individuals to report harassment and for the employer to respond effectively.

There are several proactive steps that employers should take. Employers should

ensure that they have appropriate written harassment policies, including clear provisions prohibiting all types of prohibited harassment and spelling out procedures for making and investigating harassment complaints. These policies, or a separate written policy, should make clear that the employer will not tolerate any retaliation because an individual makes a harassment complaint or cooperates with a harassment investigation. The policies also should make clear that confidentiality will be preserved to the maximum extent possible.

In addition to having adequate written policies and procedures, it is critical that they be clearly communicated to all employees. It is advisable that employers obtain signed acknowledgements from employees stating that they have received and understand the policies and procedures. Finally, it is imperative that all employers "consistently and firmly" enforce their policies, and that they respond expeditiously to any complaints.

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