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A LITTLER MENDELSON TIME SENSITIVE NEWSLETTER

IN THIS ISSUE

OCTOBER 2003

Legislature Rejects Recent Court Decision and Imposes Liability on Employers for Sexual Harassment by Customers.

THE CUSTOMER IS NOT ALWAYS RIGHT: CALIFORNIA'S LEGISLATURE IMPOSES LIABILITY BASED UPON CUSTOMER HARASSMENT

By Robert Blumberg

On October 6, 2003, Governor Gray Davis signed Assembly Bill 76 into law, amending the Fair Employment and Housing Act (FEHA) to impose liability upon employers who fail to act promptly to prevent sexual harassment by non-employees. In doing so, the legislature expressly rejected the October 2002, California Court of Appeal case of *Salazar v. Diversified Paratransit, Inc.*, which held that an employer was not liable under the FEHA for sexual harassment committed by a customer.

THE SALAZAR CASE

As frequently occurs, legislative enactments often stem from outrageous factual situations. In August 1997, Diversified Paratransit hired Raquel Salazar as a bus driver, transporting developmentally disabled individuals. Her employer was aware that one of the passengers on Salazar's bus had significant disciplinary problems over a period of several years. He refused to remain seated. He had carried a knife onto a bus, and refused to relinquish it upon request. He had exposed himself to at least three other female bus drivers, each of whom complained in writing. Despite this, the company had not refused to provide the passenger with transportation, or taken other precautionary measures, such as requiring a male driver or male assistant to be present on his bus. Upon being hired, Salazar had similar problems with this individual. He exposed himself to her. He had grabbed her and made comments regarding her physical appearance. In response, Salazar requested that she be given another route. Her employer rejected this request. Less than a month after being hired, the passenger exposed himself again, then physically attacked and groped Salazar. Two days later Salazar quit and sued. During trial, the court dismissed Salazar's FEHA sexual harassment claim, holding that such a claim could not be brought based upon the conduct of a customer, no matter how egregious. Salazar appealed.

The Court of Appeal agreed with the trial court's ruling that an employer could never be liable for harassment by a customer. In doing so, the Court of Appeal rejected as inapplicable federal authority interpreting Title VII, which had regularly imposed liability upon an employer for sexual harassment committed by customers. Salazar appealed this decision and the California Supreme Court agreed to hear the case, which is still pending before the Supreme Court.

THE LEGISLATURE REJECTS SALAZAR

Less that two months after the Court of Appeal issued the *Salazar* decision, Assembly Bill 76 was introduced. Its stated purpose is to "make it unlawful for an employer to fail to take immediate and appropriate corrective action to prevent harassment of an employee by any person, once the employer knows or should have known of this conduct." The legislature indicated that it was specifically acting in

response to and rejecting the *Salazar* decision.

Initially, the bill proposed simply replacing the words "an employee" with "any person" in the statutory definition of harassment. However, recognizing that this would greatly expand the scope of the FEHA, the legislature subsequently decided to limit the amendment to *sexual harassment* committed by non-employees, by adding the following language:

> *An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of those nonemployees shall be considered.*

Thus, other types of harassment such as racial or religious harassment by non-employees would still not fall within the purview of the FEHA. Although the bill was designated as "non-urgency" and therefore not retroactive, by declaring that this is merely a clarification of existing law, the amendment will apply to prior conduct and existing litigation.

THE CUSTOMER IS NOT ALWAYS RIGHT

While based upon the egregious facts of *Salazar*, the ramifications from this change in the law will cover much more mundane conduct. For example, what should a company do if a customer sends an off-color email to an employee? What if a customer asks an employee out on a date? At what point must the employer confront, and likely embarrass or alienate a customer? Businesses with frequent customer contact, such as bars and restaurants are especially vulnerable to this type of suit.

To avoid liability, employers should do the following:

- Review their sexual harassment policy to make sure it includes customer harassment. Employees, especially if working remotely, should be notified on how to complain about harassment by customers.
- Train supervisors regarding how to identify potential problems, even where the employee does not complain, or only makes joking references regarding customer misconduct. Employees, especially those relying on commissions and tips, may not report even the most obnoxious customers. Supervisors should watch closely for such situations, and must take even passing references seriously.
- Train supervisors not to punish the employee who complains, even if the goal is to separate the employee from the customer. It may be arguably retaliatory to remove an employee from a lucrative account, or limit hours worked due to complaints regarding customer misconduct.
- Train supervisors regarding how to respond to employee complaints about customers. This should include documenting the employee's complaint, identifying any other witnesses, and documenting both the supervisor's investigation and the appropriate response taken to the customer's actions. The law does not require an employer to immediately cease doing business with any customer who makes an off-color joke, or asks an employee out on a date. It does require an employer to take immediate and appropriate corrective action.

Any time there is a change in employment law, there is a chance that employees will seize upon it. As in situations involving allegations of employee harassment, the employer's response to customer harassment should be appropriate for the conduct. In many cases, simply notifying the customer that the conduct is not welcome may be sufficient. However, if it is not, the company must be prepared to take more affirmative steps, including in an appropriate case ending the business relationship or removing the customer from the premises. Remember that the costs of a lawsuit, which can include emotional distress and punitive damages, will usually far exceed the value of the customer's business.

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