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EMPLOYMENT LAW UPDATE

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THE BEST DEFENSE – THE CALIFORNIA SUPREME COURT HOLDS THAT AN EFFECTIVE ANTI-HARASSMENT POLICY WILL HELP PREVENT SEXUAL HARASSMENT AND LIMIT EXPOSURE TO DAMAGES

California Supreme Court Announces New Defense To Sexual Harassment Claims

By Renée D. Wasserman and R. Peter Rittling

California employers have long been held strictly liable for a supervisor's sexual harassment of an employee. Moreover, employers had few tools available for limiting their exposure to large damage awards - until now. Recently, the California Supreme Court held that employers may limit or completely bar the damages awarded to the victim of harassment if the employer took reasonable steps to prevent and correct workplace harassment and the victim unreasonably failed to use the employer's procedures. *State Department of Health Services v. Superior Court (McGinnis)*, 03 C.D.O.S. 10088 (Nov. 24, 2003). It is critical, therefore, that employers implement and enforce an effective anti-harassment policy, that they communicate the policy to employees, and that they strictly and consistently enforce the policy. In this article, we briefly discuss the Supreme Court's decision and provide a strategy for implementing an effective anti-harassment policy. Employers should consult an experienced employment attorney to ensure that their anti-harassment policies and enforcement procedures provide optimal protection.

State Department Of Health Services v. Superior Court

Facts of the Case

Plaintiff Theresa McGinnis worked at the State Department of Health Services ("DHS"). She alleged that her supervisor touched her and made inappropriate sexual comments. In 1996, McGinnis complained to a coworker about the supervisor's conduct, but she did not report it to DHS management until November 1997. Once DHS management received McGinnis' complaint, it investigated and took appropriate corrective action as required by law.

McGinnis subsequently sued DHS for sexual harassment in violation of the California Fair Employment and Housing Act (the "FEHA"). DHS attempted to dismiss the lawsuit by arguing that it had implemented and trained employees on its anti-harassment policies and procedures, but McGinnis failed to promptly report the harassment as required. The lower courts rejected this argument and DHS appealed to the California Supreme Court.

The Avoidable Consequences Defense

The California Supreme Court agreed with the lower courts in part and disagreed in part: it confirmed that employers are strictly liable for "all acts of sexual harassment by a supervisor," but held that strict liability does not preclude all defenses. According to the California Supreme Court, a victim must prove some injury to recover damages and under the "avoidable consequences doctrine" a victim of sexual harassment will not be

compensated for damages that could have been avoided by the victim's reasonable effort to avoid harm. The California Supreme Court explained that applying the avoidable consequences doctrine to sexual harassment cases furthers one of the main purposes of the FEHA - to encourage both the employer and the victim to take preventive action.

To assert the avoidable consequences defense, an employer must prove that (1) it 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.

Strategy For Implementing An Effective Anti-Harassment Policy

The first step to preventing sexual harassment is an effective anti-harassment policy that should include the following elements:

- **The Policy Must Be in Writing:** An anti-harassment policy must be in writing. It should state that the employer has a zero tolerance for sexual harassment and describe the types of conduct that may be considered harassing including sexual comments and unwelcome physical contact. The policy must also provide procedures for reporting harassment including the names of the managers responsible for receiving complaints and a procedure for making anonymous complaints in case a victim is embarrassed or afraid.

- **Training:** Employers must communicate the policy and procedures to employees. Holding regular, mandatory training classes and distributing written copies of the policy to employees are very effective ways of communication. Employers should keep a record of attendance at the training and collect signed acknowledgments when distributing the written policy.

- **No Retaliation:** The policy must prohibit retaliation against employees who report harassment so that employees are not afraid to complain.

- **Privacy:** The policy must protect employee privacy to the extent possible. The only persons who should be involved in an investigation are those who need to know to do their job and employees interviewed during the investigation. All witnesses should be instructed to keep the information confidential.

- **Consistent and Firm Enforcement:** Employers must demonstrate that they consistently and firmly enforce their anti-harassment policies including promptly investigating complaints and taking corrective action. These actions should be well documented.

- **Encourage Reporting:** To assert the avoidable consequences defense, employers must show -- through their policies, procedures, training programs, and past actions -- that they encourage victims to report sexual harassment and that they respond promptly and effectively to complaints. A victim could preclude the defense by arguing that she delayed in reporting the harassment because she was embarrassed or feared retaliation by the employer. To foreclose any delay, employers must encourage victims to immediately report unwelcome sexual conduct, guarantee employee privacy to the extent possible, and prohibit retaliation.

Conclusion

The California Supreme Court has given employers further incentive to implement an effective sexual harassment policy. An effective policy educates employees about sexual harassment and helps prevent it before it occurs. Should an employer get sued for sexual harassment, an effective policy may also provide a defense to the amount of damages that can be recovered by the victim. According to the old maxim, the best defense is a good offense. An effective sexual harassment policy is both.

Endnote: *On January 1, 2004, a recent amendment to the FEHA takes effect making employers liable for sexual harassment by non-employees if the employer knew or should have known of the harassment and failed to take corrective action. The amendment eliminates prior uncertainty over whether employers are liable for sexual harassment of their employees by customers or clients. Based on the amendment, employers should be sure that their sexual harassment policies instruct employees to report unwelcome sexual conduct by non-employees*

including customers, clients or anyone doing business with the employer.

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