



## **Submitting to Sexual Acts Under Explicit or Reasonably-Perceived Implicit Threat of Discharge is a “Tangible Employment Action” That Makes a Company Strictly Liable for Sexual Harassment Under Title VII**

The Ninth Circuit Court of Appeals has held that a sexual harassment plaintiff who alleges he or she was coerced under threat of discharge to perform unwanted sexual acts with a supervisor, has alleged a “tangible employment action,” which, if proven, results in strict liability for the employer under Title VII. In *Holly D. v. California Institute of Technology*, Holly D. sued her employer, the California Institute of Technology, alleging that a professor forced her to have and maintain a sexual relationship with him to keep her job. Under Title VII, if an employee suffers a “tangible employment action,” such as a termination or a demotion, the employer is strictly liable. Absent a tangible employment action, however, the employer can avoid liability by proving it took “reasonable care” to prevent and promptly correct any sexually harassing behavior, and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided or otherwise to avoid harm. The Ninth Circuit held that acceding to a supervisor’s sexual demands to keep one’s job constitutes a “tangible employment action,” the supervisor successfully uses his/her position of authority to achieve the unlawful purpose. Under the particular facts of this case, however, the court found that a reasonable person in Holly D.’s position would not have believed that her job depended on complying with the professor’s sexual demands. There was no evidence to connect the professor’s requests for sex with any discussion of her job duties or a potential change in her employment status. Finding no tangible employment action, therefore, the court considered CalTech’s affirmative defense argument and affirmed summary judgment based on CalTech’s reasonable efforts to prevent and correct any harassment, and Holly D.’s failure to take advantage of opportunities to avoid harm. Despite the outcome, this case reminds all employers of the risks they incur when supervisors become involved in a sexual relationships with employees, and of the importance of having a harassment policy in place. Employers should also note that the Title VII affirmative defense used in this case is not available under California law—an employer is strictly liable under state law for sexual harassment perpetrated by a supervisor, regardless of the company’s efforts to prevent and immediately correct any harassment.

## **Generalized Threats of Workplace Violence Sufficient for Employer to Obtain Relief to Protect a Particular Employee**

A California Court of Appeal recently held that an employer subjected to generalized threats of workplace violence may obtain relief on behalf of an employee who is a logical target of the threats, even if the employee was not specifically identified by the threat. In *USS-Posco Industries v. Edwards*, an employee made generally threatening

statements to supervisors and in the lunchroom. When the comments persisted, the company terminated his employment and obtained a restraining order preventing the employee from coming near company premises or the department manager. California law permits an employer to seek a temporary restraining order and injunction on behalf of an employee who has received a credible threat of violence from any individual. The court held that an employer may invoke this law even if the threats of violence are not directed at a particular employee, because the intent of the law was to prevent workplace violence as a whole. The court ruled that to interpret the law in any other manner would prevent an employer from protecting its employees from generalized threats of violence. This decision reminds California employers that statutory relief is readily available to prevent workplace violence, and that courts take these threats seriously. Employers should be prepared to seek legal assistance immediately upon learning of threatened violence.

## **Adverse Employment Action Closely Following a Protected Act can be Evidence of Unlawful Retaliation**

Mere proximity between an employee’s complaints and his termination provides strong circumstantial evidence of retaliation, according to the Ninth Circuit. In *Bell v. Clackamas County*, plaintiff Carmichel Bell was the first African-American deputy ever hired by the Clackamas County Sheriff’s Office. At the start of Bell’s employment, he successfully completed the first two phases of a training program with strong reviews. During the next two phases, Bell’s training officers began to make racially derogatory comments. In May 1998, Bell complained to a sergeant about these comments. In response, the sergeant told Bell he simply would have to put up with them. Less than a week later, Bell’s training scores from his instructors fell precipitously. Within a month, the sergeant recommended Bell’s termination. After a series of forced administrative leaves, Bell was terminated formally in December 1998. The Ninth Circuit upheld the jury’s verdict in favor of Bell on his retaliation and discrimination claims, finding that the close temporal proximity between Bell’s complaints and the adverse actions that culminated with his termination, together with evidence that the sergeant was displeased with Bell’s complaints, were strong circumstantial evidence of retaliation. Employers should remember that even legitimate disciplinary actions and employee terminations may seem retaliatory if they occur soon after an employee complains of discriminatory acts. In such cases, employers should weigh carefully the reasons for the adverse actions, and seek legal guidance.