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Weekly Employment Brief

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Are Companies Still Strictly Liable For Supervisor Harassment?

In a landmark opinion for employers, the Ninth Circuit Court of Appeals (the federal court that covers California) ruled in *Kohler v. Inter-Tel Technologies, Inc.* that an employee failed to establish a valid sexual harassment claim because she failed to complain to the company's management about the harassment allegedly committed by her supervisor. Prior California state court decisions appeared to hold that employers are strictly liable for sexual harassment committed by a supervisor regardless of whether the company knew about the harassment. This ruling provides employers with an additional defense that previously appeared unavailable as to sexual harassment allegations aimed at supervisors. Although lower federal courts are required to follow this case, it remains to be seen whether California state courts will as well.

Written At-Will Overrides Verbal Promises

In *Starzynski v. Capital Public Radio, Inc.*, a California court recently dismissed an employee's contract claim that he was wrongfully terminated after his supervisor promised he would be terminated only for "good cause." The employee previously signed an agreement that stated that he was an at-will employee. Although it is possible to orally modify a written at-will agreement, this particular agreement provided that it could only be modified through "affirmative action" by the board of directors. The court enforced this limitation on how the contract could be modified and dismissed the claim because the employee could point to no action by the board of directors to modify the agreement. This case highlights the importance of drafting an at-will agreement with specific limitations on how the agreement may be modified. Most commonly, at-will agreements provide that they may be modified only pursuant to a written agreement signed by both a high-level officer of the company and the employee.

Employee Consent Not Required To Search Employee Email Under Electronic Communications Privacy Act

A federal court in Pennsylvania recently held in *Fraser v. Nationwide Mutual Ins. Co.* that employee consent is not required for an employer to access employee emails stored on its computer system under the Electronic Communications Privacy Act of 1986 ("ECPA"). Under the ECPA "consent" is generally required before a person or entity may accesses the stored electronic communications of another. However, the court held that the EPCA was intended to apply only to electronic messages that were in "temporary storage" during the process of transmission. In other words, the EPCA does not apply to stored electronic communications that have already been received by the recipient. Although it is not clear whether other courts will follow the Fraser decision, the case provides support for the proposition that an employer is entitled to search stored emails on its computer system without employee consent. Given the current uncertainty in this area, however, employers are well advised to establish and publish a policy warning employees that the company reserves the right to search emails with or without prior notice.