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Strict Liability Not As Strict: California Supreme Court Acknowledges Affirmative Defense To Damages For Employers In Sexual Harassment Cases

For several years, while employers sued under Title VII could escape liability for a supervisor's sexual harassment by establishing an affirmative defense, employers sued under California's FEHA were automatically liable for such harassment. In a significant positive development for California employers, California law now provides a mechanism to limit–or even preclude–damages for supervisor harassment. In *State Department of Health Services v. Superior Court (McGinnis)*, the California Supreme Court has held that sexual harassment plaintiffs may not recover damages they could have avoided by timely reporting incidents of harassment to the company.

Plaintiff Therese McGinnis claimed her supervisor harassed her beginning in early 1996, but she did not report the harassment to management until November 1997. When she finally reported the harassment, the company promptly investigated the allegations and determined the supervisor had violated the company's sexual harassment policy. The company began disciplinary actions against the supervisor, prompting him to retire. McGinnis sued the company and the supervisor for sexual harassment, and the lower courts denied the company's summary judgment motion.

On appeal, the California Supreme Court concluded that although the company remains strictly liable for sexual harassment by a supervisor, "a plaintiff's own conduct may limit the amount of damages recoverable or bar recovery entirely" based on the doctrine of "avoidable consequences." This defense applies if "(1) the employer took reasonable steps to prevent and correct workplace harassment; (2) the employee unreasonably failed to use the preventive and corrective measures the employee provided; and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered." The defense allows companies to escape liability for those damages that the employee "could have prevented with reasonable effort and without undue risk, expense, or humiliation" by taking advantage of the company's internal anti-harassment policies and reporting procedures. The court recognized that some delay by employees in reporting harassment may be reasonable if a company does not have an adequate anti-harassment policy and enforcement mechanism that it communicates to employees, or if employees reasonably fear retaliation. Companies can increase the effectiveness of the avoidable consequences defense by investigating promptly harassment claims in a manner that protects the reporting employee's confidentiality to the extent practical, and by prohibiting retaliation against employees who report harassment.

The Sky Is No Longer The Limit: California Appellate Court Applies Federal Due Process Limits To Slice California Punitive Damages Verdict

A California Court of Appeal reduced a $290 million punitive damage award to under $24 million based on a recent U.S. Supreme Court case which set constitutional limitations on the size of such awards. In *Romo v. Ford Motor Co.*, three members of the Romo family were killed and three were injured when their 1978 Ford Bronco rolled over due to a design defect. A jury awarded $5 million in compensatory damages. The plaintiffs' attorney had argued that the punitive damages award should be "large enough to force Ford to recall all remaining 1978-1979 Broncos still on the road," and the jury responded with a $290 million punitive damages award. Historically, California law has allowed juries to impose punitive damages awards large enough to deter similar future bad conduct, even if the actual damages in a particular case were not substantial. Juries also have been allowed to assess the reprehensibility of a defendant's

conduct, including whether the conduct affected other, similarly-situated individuals. Earlier this year, however, in *State Farm Mutual Automobile Insurance Co. v. Campbell*, the U.S. Supreme Court held that punitive damages awards must be more closely related to the harm actually suffered, and should rarely, if ever, exceed nine times the amount of compensatory damages awarded. (See April 28, 2003 WEB Update). After Ford appealed the Romos' $290 million punitive damages verdict to the U.S. Supreme Court, the Court sent the case back to the California Court of Appeal to reconsider the award in light of *State Farm*. The California court then reduced the Romos' punitive damages award to approximately five times the compensatory damages (or approximately only $24 million in this case: a reduction of over a quarter of a billion dollars). The court held that California juries must now limit their consideration to punishment and deterrence based solely on the harm to the plaintiffs in the case before them. Employers in California should benefit greatly from this ruling, as it significantly diminishes the risk of outrageous punitive damages awards should they fight a case through to trial.

Employer Faces Fraud Claim For Failing To Tell Applicant Position Likely Would Be Relocated

The Ninth Circuit allowed an individual to maintain a fraud claim based on his former employer's failure to tell him during the recruitment process that it might relocate the position. In *Arboireau v. Adidas-Salomon AG*, plaintiff Pierre Arboireau sued Adidas-Salomon AG ("Adidas") for breach of contract and fraud after he accepted a position as Head of Worldwide Footwear Costing and relocated his family from France to Oregon, but then was terminated six months later when his position was relocated to Germany. Arboireau claimed Adidas had committed to a minimum two-year fixed term, based on Adidas' emphasis on the importance of staying with the company for at least two years and Arboireau's inclusion of the notation "Minimum duration: 24 months" in his e-mail acceptance. Citing his offer letter's explicit at-will provision, the court rejected Arboireau's breach of contract claim. However, the court reversed the district court's dismissal of his fraud claim. The appellate court concluded a jury might find Adidas intentionally misrepresented the nature of the position by failing to reveal a "likely, material contingency"–namely, that Adidas might relocate the position to Germany. Arboireau convinced the court locational stability was a material factor in his acceptance of the position. Even though no final decision had been made to relocate the position at the time of the interview process, the court held that a jury could find such a move was highly possible based on Arboireau's evidence that he received "constant pressure" to relocate starting in his first month of employment. While the Ninth Circuit decided this case under Oregon law, employers should note that California law also prohibits employers from intentionally misrepresenting the terms or conditions of employment to induce employees to accept employment and relocate to California. Employers should train their interviewers to avoid making any representations that could later be found misleading.

Announcement

Please join us in our San Francisco office on Tuesday, January 13, 2004, or in our Mountain View office on Thursday, January 15, 2004 for another installment of our Employment and Labor Group Breakfast Briefing Series, entitled:

Conducting Effective "In-House" Investigations

Registration and Continental Breakfast start at 7:30 a.m. The briefing is from 8:00 a.m. to 10:00 a.m. RSVP via e-mail to registration@fenwick.com and indicate whether you will attend the San Francisco or Mountain View presentation.

Registration is free and MCLE credit will be provided. For directions to our offices, please visit: http://www.fenwick.com/fenwickfocus/1.5.1.asp#svc.