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Enforce Policies to Halt Harassment in Workplace

by J. Kevin Lilly

It will surprise no one that California charts its own course in defining an employee's rights under sexual harassment laws. Our state courts and Legislature frequently reject federal restrictions on damages and employer liability. It is, therefore, imperative that firms and other employers institute and enforce appropriate and effective sexual harassment policies.

The extent to which state courts allow employers faced with a harassment claim to rely upon its anti-harassment policies, even when the individual charged was a supervisor, has big implications for law firms and other employers. The U.S. Supreme Court has addressed this issue in two famous decisions, *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In *Faragher*, the court drew a distinction between harassment involving "tangible employment action," such as terminations, demotions and the like, and harassment where the victim suffered no such loss.

Under *Faragher*, employers in the former situation are considered liable. In the latter circumstances, however, the court allowed employers that exercised reasonable care to prevent and correct promptly any sexually harassing behaviors, and whose employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer, to not suffer any liability. Where there is no "tangible employment action," however, the United States Supreme Court approved a defense where the employer (a) exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer.

Although, federal liability for sexual harassment by a supervisor may depend upon an employer's response to the claim, in California, liability can be automatic. The state Supreme Court recently addressed this issue in *State Department of Health Services v. Superior Court (McGinnis)*, decided on November 24, 2003.

The plaintiff in *McGinnis* had allegedly been harassed by her supervisor from early 1996 until late 1997 but never reported it to Management until November of 1997. The state Supreme Court rejected the employer's argument that it should apply the defense in *Faragher* on the ground that California law "makes the employer strictly liable for harassment by a supervisor."

But after doing so, the court reached back to the common law to provide another means by which an employer can limit its liability, even where its own supervisor is accused of harassment.

The state Supreme Court accomplished this by resurrecting the common law doctrine of "avoidable consequences" to a claim for damages under statutory harassment law. Quoting the Second Restatement of Torts, the court noted "one who is injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after commission of the tort."

Thus, under *McGinnis*, the victim of harassment, even when the perpetrator was a supervisor, may lose the right to recover damages if he or she could have avoided the situation by promptly reporting the offending conduct. "The community's notions of fair compensation

to an injured plaintiff do not include wounds which in a practical sense are self-inflicted."

Though the court may have believed it was fashioning a rule similar to the one crafted by the U.S. Supreme Court, this "common law" approach may play itself out in unpredictable ways. On the one hand, the absence of a complete defense like the one in *Faragher* may make it easier for a harassment plaintiff to obtain a judgment ,along with attorney fees, even if he or she never reported harassment.

Firms and employers should keep this in mind when evaluating possible offers of judgment, unconditional offers of reinstatement, or other procedural steps to limit the effect of a limited-damages harassment case.

On the other hand, using a broad common law concept like the doctrine of avoidable consequences is sure to result in new arguments some creative, some legitimate based upon the attitude and conduct of the victim.

There are, therefore, many arguments employers could use to limit their liability. In cases in which the harassment involves at least some consensual conduct, employer should consider arguing that the victim's conduct and attitude should be evaluated in determining what he or she could have avoided. However, counsel should evaluate how this argument interacts with statutes like Evidence Code Section 783, that limits inquiry into a sexual harassment victim's sexual conduct except with the alleged harasser.

Moreover, there is little reason to limit the doctrine to reporting misconduct in sexual harassment cases. Many victims of discrimination or other types of harassment could do something to limit the injury that they suffer. An employee "whistleblower" might avoid termination or other adverse action by using the employer's ethics hot line. Also, the failure to submit to necessary treatment by a doctor has been held to be subject to the avoidable consequences doctrine. Employers could, therefore, try to argue that failure to obtain crisis intervention limits psychiatric damages.

Jurors are frequently keenly interested in what the plaintiff could or should have done faced with a bad situation in the workplace. Employer's counsel, therefore, could ask jurors what they would have done in similar circumstances in order to get them thinking about the employee's culpability.

In the meantime, what should employers do to ensure that doctrine of avoidable consequences is available when needed? The Court in *McGinnis* stated that an employer should show that it adopted appropriate anti-harassment policies and communicated essential information concerning the policy to its employees.

With this in mind, firms and employers should ensure that it has appropriate written harassment policies with clear provisions prohibiting all types of prohibited harassment and that spells out procedures for making and investigating harassment complaints. These policies should stress that the employer will not tolerate any retaliation because an individual makes a harassment complaint or cooperates with a harassment investigation. The policies also should make clear that confidentiality will be preserved to the maximum extent possible.

In addition to having adequate written policies and procedures, it is critical that they be clearly communicated to all employees. It is advisable that employers obtain signed acknowledgements from employees stating that they have received and understand the policies and procedures.

Finally, it is imperative that all employers consistently and firmly enforce their policies, and that they respond expeditiously to any complaints.