SEYFARTH SHAW

MANAGEMENT ALERT

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California Supreme Court Recognizes Limited Defense For Employers In Hostile Environment Cases

On November 24, 2003, the California Supreme Court decided two important questions of employment law: (1) whether an employer is "strictly liable" for a hostile environment created by a harassing supervisor, and (2) whether that employer is entitled to stop damages from accruing if the harassed employee failed to promptly complain about the harassment. In this respect, the court reviewed the so-called *Ellerth/Faragher* affirmative defense recognized in federal claims under Title VII of the Civil Rights Act of 1964. The court ruled:

- An employer is strictly liable wherever a supervisor, acting in the capacity of supervisor, unlawfully harasses an employee. Strict liability means that the employer is liable for the harassment even though the employer did nothing wrong.
- An employer with a harassing supervisor is not entitled to assert the *Ellerth/Faragher* defense. That defense is based on federal law, which is not as specific as California's Fair Employment and Housing Act in terms of creating employer liability for hostile work environments.
- The California employer nonetheless is entitled to a defense similar to the federal *Ellerth/Faragher* defense, the chief difference being that the federal defense allows employers to avoid liability altogether, while the California defense affects only the amount of damages that the harassed employee could have avoided by reporting the harassment more promptly.
- To establish the affirmative defense, a California employer must prove that (1) the employer took reasonable steps to prevent and correct workplace 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.

State Department of Health Services v. Superior Court (McGinnis), (Cal. Sup. Ct. Nov. 24, 2003).

Factual Background Of The McGinnis Case

Theresa McGinnis, a government office worker, alleged that her supervisor sexually harassed her from early 1996 until late in 1997, through inappropriate comments and unwelcome touching. She did not formally report any harassment to management until November 1997. Management then investigated and the supervisor decided to retire. When Ms. McGinnis sued anyway, the employer moved for summary judgment, arguing that it could avoid liability because of two U.S. Supreme Court decisions — *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). These decisions permit an employer sued under Title VII for a hostile work environment to establish a partial or complete defense by proving: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." (*Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at. 807.)

Lower Court Rulings In McGinnis

Both the trial court and the appellate court in *McGinnis* held that the federal *Ellerth/Faragher* defense did not apply to harassment claims made under the California FEHA. The California Supreme Court agreed, but noted that the lower courts had overlooked the existence of a similar defense, made available by the California doctrine of "avoidable consequences." This doctrine, like the *Ellerth/Faragher* defense, makes a plaintiff responsible to take reasonable steps to avoid the consequences of a wrongdoer's acts. Unlike the *Ellerth/Faragher* defense, the "avoidable consequences" doctrine affects only the amount of damages a plaintiff can recover. It does not affect the employer's liability for the harassment. The California Supreme Court in *McGinnis* explained: "An employee's failure to report harassment to the employer is not a defense on the merits to the employee's action under the FEHA, but at most it serves to reduce the damages recoverable. And it reduces those damages only if, taking account of the employer's anti-harassment policies and procedures and its past record of acting on harassment complaints, the employee acted unreasonably in not sooner reporting the harassment to the employer."

Practical Implications Of The McGinnis Decision

By recognizing an affirmative defense similar to the federal *Ellerth/Faragher* defense, the California Supreme Court has empowered California employers to control much of the exposure for monetary liability that they face for workplace harassment. While the ruling in *McGinnis* involved sexual harassment, its analysis would also apply in any case of harassment based on any protected status. A California employer still will be liable for the harassing acts of a supervisor, but can avoid much of the ensuing damages if the employer lays the groundwork for application of the defense.

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Steps Employers Should Take In Light Of The McGinnis Decision

To take advantage of the ruling in the *McGinnis* decision, employers are well served to consider undertaking the following five steps:

Distribute And Post The Appropriate FEHA Materials. The *McGinnis* court took special note of the FEHA provision requiring employers to give their employees a copy of educational material regarding sexual harassment law and company procedures. This one-page, two-sided document, sometimes called the DFEH "fact sheet" (DFEH Form 185), needs to be given to each employee, through a payroll envelope stuffing or otherwise. Further, employers must display posters in the workplace describing employee rights under the FEHA.

Develop Adequate Policies. The *McGinnis* court cited the FEHA requirement that an employer "take all reasonable steps to prevent harassment from occurring." Written anti-harassment policies, whether separately published or as part of an employee handbook, constitute one such "reasonable step." While a policy is necessary, it is also essential that employees perceive that the policy is effective. It is of paramount importance that the policy has a meaningful complaint procedure that is as "user friendly" as possible.

Create An Atmosphere Of Respect For The Policy. Having an anti-harassment policy is only the first step. Employers also must create an atmosphere of respect for the policy, to satisfy language from the *McGinnis* decision stating that "the employer [can] escape liability for those damages, and only those damages, that the employee more likely than not could have prevented with reasonable effort and without undue risk, expense, or humiliation, by taking advantage of the employer's internal complaint procedures appropriately designed to prevent and eliminate sexual harassment." Plaintiffs suing employers, and seeking to evade the defense recognized in *McGinnis,* obviously will emphasize any risk, expense, or embarrassment that employees in the relevant workplace have experienced in reporting harassment. The best way for employers to anticipate and refute that litigation tactic is through creating a record of meaningful training.

Workplace Training. Training (of all employees, not just supervisors) will be key to an employer's successful use of the defense recognized in *McGinnis*. After *McGinnis*, training of this kind will be important, if not essential, for various reasons:

- California law, unlike federal law, makes supervisors and co-workers personally liable for perpetrating harassment. The prospect of personal liability, combined with the uncertain definition of an unlawfully "hostile environment," ought to make all participants in training especially attentive.
- An employer can lay the foundation for a strong "avoidable consequences" defense by training all new hires and by training incumbent employees periodically. Contemporaneous documentation of the training is important, and can be decisive in litigation. The training must cover the anti-harassment policy and complaint procedures, the methods by which to bring problems to the attention of management, and the employer's commitment to prohibiting any form of retaliation. Implementing this training will position an employer to use the *McGinnis* defense to its fullest potential. (Supervisors also need special training to be alert to signs of harassment and to know how to respond to complaints in accordance with company policy.)
- An employer can create, through training, a record that employees face no "undue risk, expense, or humiliation" in reporting a concern about harassment. The training, if done properly, will send a clear message that supervisory or peer pressure to keep quiet about harassment problems is unacceptable. A chief aim of training is to encourage reports of unwelcome conduct before it ever reaches the level of an actionable hostile environment.

Follow Investigation Protocols. Because an employer invoking the *McGinnis* defense must establish that it "took reasonable steps to prevent and correct workplace harassment," a plaintiff seeking to evade the defense will seek to put the employer's methods of investigation on trial, often with the help of a "human resources expert." It is therefore important for an employer to establish a protocol for responding to reports of harassment, a protocol with flexibility for adjustment as appropriate on a case-by-case basis. Likewise, human resource professionals and corporate counsel need to be trained on how to conduct effective workplace investigations and to follow the investigation protocol in a consistent fashion.

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ATLANTA
One Peachtree Pointe
1545 Peachtree Street , N.E., Suite 700
Atlanta, Georgia 30309-2401
404-885-1500
404-892-7056 fax

BOSTON
Two Seaport Lane, Suite 300
Boston, Massachusetts 02210-2028
617-946-4800
617-946-4801 fax

CHICAGO
55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
312-346-8000
312-269-8869 fax

HOUSTON
700 Louisiana Street, Suite 3850
Houston, Texas 77002-2731
713-225-2300
713-225-2340 fax

LOS ANGELES
One Century Plaza
2029 Century Park East, Suite 3300
Los Angeles, California 90067-3063
310-277-7200
310-201-5219 fax

NEW YORK
1270 Avenue of the Americas, Suite 2500
New York, New York 10020-1801
212-218-5500
212-218-5526 fax

SACRAMENTO
400 Capitol Mall, Suite 2350
Sacramento, California 95814-4428
916-448-0159
916-558-4839 fax

SAN FRANCISCO
101 California Street, Suite 2900
San Francisco, California 94111-5858
415-397-2823
415-397-8549 fax

WASHINGTON, D.C.
815 Connecticut Avenue, N.W, Suite 500
Washington, D.C. 20006-4004
202-463-2400
202-828-5393 fax

BRUSSELS
Boulevard du Souverain 280
1160 Brussels, Belgium
(32)(2)647.60.25
(32)(2)640.70.71 fax