

One Minute Memo®



Court Rubs Out Masseur's Claim For Failure To Prevent Harassment

By David D. Kadue and Christina F. Jackson

The Court of Appeal, in *Dickson v. Burke Williams, Inc.*, has held that an employee who is sexually harassed at work, but not to an actionable degree, cannot successfully claim that her employer failed to take reasonable steps necessary to prevent sexual harassment. Rather, a claim for failure to prevent requires a finding that unlawful conduct has occurred.

The Facts

Domaniqueca Dickson, a massage therapist, sued her employer under the California Fair Employment and Housing Act for the unwelcome conduct that she experienced from her employer's customers. She claimed sexual harassment and sex discrimination, in addition to a claim that her employer had failed to take reasonable steps necessary to prevent sexual harassment and sex discrimination. The case went to a jury. The defendant proposed a special verdict form that would have the jurors skip deliberations on the failure to prevent claims if they did not find any liability for sexual harassment and sex discrimination. But the trial court rejected this proposal and had the jury answer all the questions.

The jury found the defendant not liable for either sex discrimination or sexual harassment, even though Dickson had suffered some unwelcome conduct because of her sex. The jury reached this conclusion because the customers' conduct, though unwelcome and discriminatory, was not severe or pervasive, and because Dickson had not suffered any adverse employment action.

Despite these findings, the jury still found the defendant liable for a failure to take reasonable steps necessary to prevent sexual harassment or sex discrimination, and awarded Dickson compensatory and punitive damages. The trial court, in denying the defendant's motion for judgment notwithstanding the verdict, held that the finding of sexually harassing conduct was sufficient to uphold the claim for failure to prevent sexual harassment.

The Appellate Court Decision

The Court of Appeal, applying precedent and common sense, held that a claim for failure to prevent sexual harassment requires an underlying finding of actionable harassment. That is, to create a hostile or abusive work environment, the conduct must have been sufficiently severe or pervasive to alter the conditions of employment for a reasonable person. Likewise, for there to be a claim for failure to prevent sex discrimination, there must be an underlying finding of unlawful sex discrimination.

What *Dickson* Means for Employers

Dickson is a reminder that employers need to have policies prohibiting unlawful discrimination and harassment, as well as procedures to timely investigate claims and, where appropriate, remediate. However, *Dickson* also serves as a reminder that employer efforts to prevent unlawful harassment and discrimination can succeed in avoiding liability even if those efforts are not a complete success, so long as no actionable harassment and discrimination actually occurred.

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