

California Reaffirms Strict Liability for Supervisory Sexual Harassment

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The phrase, "you know, we're different here in California," rolls off the tongue of a California employment law practitioner with alarming ease. After all, we've said it to hundreds of non-California based employers over the years. Whether the discussion concerns a wage-and-hour matter, or the prima facie standard for sexual harassment liability, California law is often different than sister-state and federal law concerning the identical topics. A recent, significant California appellate decision, Department of *Health Services v. Superior Court (McGinnis)*, has had us repeating the refrain over the last several months.

In 1998, the United States Supreme Court identified an affirmative defense available to employers accused of sexual harassment pursuant to Title VII. Specifically, in the companion cases of *Burlington Industries v. Ellerth* (1998) 524 U.S. 742, 764-765, 141 L.Ed.2d 633 and *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 807-808, 141 L.Ed.2d 662, the Court held that if the offending conduct was committed by a supervisor, and if no tangible employment action was taken against the employee, the employer may defend against liability or damages by demonstrating that (1) the employer exercised reasonable care to prevent and promptly correct sexually harassing behavior, and (2) the plaintiff employee unreasonably failed to take advantage of corrective or preventive opportunities provided by the employer.

Ellerth and *Faragher* appeared to have little significance to California practitioners because the vast majority of sexual harassment actions were filed pursuant to the California Fair Employment and Housing Act (known as the "FEHA," pronounced "FEE-HAH"), codified

at California *Government Code* Section 12940, *et seq.* The FEHA makes clear that employers are strictly liable for supervisory sexual harassment, irrespective of employer knowledge of, or reaction to, the harassment.¹ Thus, the test set forth in *Ellerth* and *Faragher* was manifestly inconsistent with the FEHA standard. While considered draconian in the minds of most defense counsel, the California standard was not the subject of significant debate.

Then, a year after the *Ellerth* and *Faragher* decisions, the Ninth Circuit delivered a bombshell. In *Kobler v. Inter-Tel Technologies* (2001) 244 F.3d 1167, 1174, the Court held that the *Ellerth* and *Faragher* "affirmative defense is compatible with the FEHA scheme." In so doing, the Ninth Circuit affirmed summary judgment on a FEHA claim for an employer which had satisfied the provisions of the affirmative defense, despite the fact that a supervisor had engaged in the harassing conduct. The Court analyzed the language, history and interpretation of the FEHA and concluded that the Supreme Court's decisions and the California statutory scheme were consistent. The Court also found that the majority of state and federal courts which had considered the same question had adopted the federal standard.²

Thus, for a few glorious months, defense counsel filed dispositive motions in a great many California state court actions arguing that, pursuant to *Kobler*, it was now apparent that the *Ellerth* and *Faragher* affirmative defense applied to actions advanced under the FEHA. In some instances, trial court judges agreed and in many more cases, the argument was utilized to leverage favorable settlements. Those halcyon days were numbered, however,



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¹ California Government Code Section 12940(j)(1), see also, *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 58 Cal.Rptr.2d 122, 127 and *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 77 Cal.Rptr.2d 12, 17.

² "We note also that the majority of states that have addressed the question whether the affirmative defense applies to their antidiscrimination laws have adopted it. *Boudreaux v. Louisiana Casino Cruises, Inc.*, 762 So. 2d 1200, 1204-05 (La. Ct. App. 2000) (stating that state statute should be construed in conformity with Title VII and evaluating application of affirmative defense under both statutes); *Bartkowiak v. Quantum Chem. Corp.*, 35 S.W.3d 103, 108-109 (Tex. App. 2000) (same); *Sangster v. Albertson's, Inc.*, 99 Wn. App. 156, 991 P.2d 674, 679-80 (Wash. Ct. App. 2000) (same); *Peterson v. Buckeye Steel Casings*, 133 Ohio App. 3d 715, 729 N.E.2d 813, 818 (Ohio Ct. App. 1999) (same); *Parker v. Warren County Util. Dist.*, 2 S.W.3d 170, 176 (Tenn. 1999) (holding that federal affirmative defense conforms with state statutory scheme). But see *Chambers v. Tretco, Inc.*, 463 Mich. 297, 614 N.W.2d 910, 922 (Mich. 2000); *Pollock v. Wetterau Food Distrib. Group*, 11 S.W.3d 754, 767-68 (Mo. Ct. App. 1999); *Webb v. Lustig*, 298 Ill. App. 3d 695, 700 N.E.2d 220, 227, 233 Ill. Dec. 119 (Ill. App. Ct. 1998). In addition, a number of federal courts have determined that the affirmative defense applies to various state antidiscrimination statutes. See *Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151, 1156 (8th Cir. 1999) (applying affirmative defense to Missouri antidiscrimination statute); *Lidwell v. University Park Nursing Care Ctr.*, 116 F. Supp. 2d 571, 581 (M. D. Pa. 2000); *Childress v. Petsmart, Inc.*, 104 F. Supp. 2d 705, 709 (W. D. Tex. 2000); *Sedotto v. Borg-Warner Protective Servs. Corp.*, 94 F. Supp. 2d 251, 268 (D. Conn. 2000); *Henderson v. Heartland Press, Inc.*, 65 F. Supp. 2d 991, 998 n. 8 (N. D. Iowa 1999). But see *Newsome v. Admin. Office of the Courts of N.J.*, 103 F. Supp. 2d 807, 821 (D. N.J. 2000); *Myrick v. GTE Main St. Inc.*, 73 F. Supp. 2d 94, 98 (D. Mass. 1999); *Grozdanich v. Leisure Hills Health Ctr., Inc.*, 25 F. Supp. 2d 953, 975 (D. Minn. 1998). While the antidiscrimination laws of other states may differ from FEHA in some particulars, that a significant number of jurisdictions have incorporated the federal affirmative defense into their state schemes strengthens our conclusion that the California Supreme Court will read FEHA in conformity with Title VII." *Kobler, supra*, at 1175.

and unfortunately for employers, the California Court of Appeal for the Third Appellate District (Sacramento) did not agree with the Ninth Circuit.

On November 29, 2001, in *Department of Health Services v. Superior Court (McGinnis)* 94 Cal.App.4th 14, 113 Cal.Rptr.2d 878, the Court held that the *Ellerth* and *Faragher* affirmative defense is inconsistent with the FEHA scheme and does not apply to actions pursuant to that statute. Plaintiff McGinnis had been sexually harassed by her supervisor for a period of more than two years prior to reporting the conduct. Upon her report, Department of Health Services ("DHS") conducted an investigation and concluded that the supervisor had in fact violated its policy.

In the subsequent state court action filed by McGinnis, DHS argued that, because (1) there had been no adverse employment action, (2) DHS had a comprehensive policy in place to prevent and combat sexual harassment, and (3) McGinnis had not timely availed herself of those measures, it should not be liable for sexual harassment, i.e., that the *Ellerth* and *Faragher* affirmative defense applied and had been satisfied. The trial court disagreed and ruled that:

"[DHS] here seeks to assert an 'affirmative defense' articulated for application in Title VII actions by the U.S. Supreme Court in [*Ellerth* and *Faragher*]. The parties agree that no California appellate decision has considered the principle under California law. The Supreme Court's reasoning in the respondeat superior setting of Title VII is persuasive. At least in the absence of appellate authority, the application of that same reasoning to a FEHA harassment claim, grounded in strict liability against the employer, is a policy decision best left for the legislature. Therefore, the Court will not apply [*Ellerth* and *Faragher*] to this case." *Id.* at 18.

On review, the appellate court noted several of the specific differences between Title VII and the FEHA. Among those differences is the FEHA's specific prohibition of harassment (Title VII's prohibition is defined by case law, not the actual statutory language). More importantly, the Court noted that the FEHA

language itself must be read to impose strict liability for supervisory harassment:

"[The language of the FEHA] clearly indicates that, while an employer's knowledge and action may be relevant in assessing employer liability for harassment by a nonsupervisory employee, these factors are irrelevant when determining employer liability for harassment by a supervisor. Courts, administrative agencies, and commentators have consistently interpreted [California Government Code] section 12940, subdivision (j)(1) in this manner." *Id.* at 23.

The Court went on to examine policy reasons behind the imposition of strict liability and concluded that application of the *Ellerth* and *Faragher* affirmative defense would violate them:

"California law exhibits a clear intent to hold employers strictly liable for the harassing conduct of supervisory employees, even though the employer did not know, and did not have reason to know, of the supervisor's conduct, and essentially makes the obligation to provide a harassment-free workplace the nondelegable obligation of the employer. The jurisprudence relating to employer liability for harassment by a supervisor under FEHA has developed differently from that under Title VII. Permitting the [*Ellerth* and *Faragher*] defense to be applied to FEHA cases would undermine the clear language of section 12940, subdivision (j)(1) and legislative intent." *Id.* at 26.

Department of Health Services v. Superior Court (McGinnis), therefore, appears to decisively affirm strict liability under the FEHA for supervisory sexual harassment. The reasoning of the decision is sound and the case has not, at least as of press time, become the subject of California Supreme Court review. Further, one unpublished decision, *Campise v. Morrison Health Care, Inc.* (2001) 2001 Cal.App. LEXIS 3935, has cited it with approval. We hasten to add, however, that in California, we never assume an issue has been fully resolved. After all, there is an election just around corner.

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