Punitive Damages May Be Suitable Where Employee Complaints were Ignored, California Court Finds

By Mark S. Askanas

October 14, 2013

A female construction worker who repeatedly complained about inadequate and unclean toilet facilities, and whose complaints were not addressed or remedied by her employer, could pursue her claim for punitive damages under the California Fair Employment and Housing Act, the California Court of Appeal has ruled. *Davis v. Kiewit Pacific Co.*, No. D062388 (Cal. Ct. App. Oct. 8, 2013). Reversing summary judgment in favor of the employer, the Court ruled that sufficient questions of fact existed regarding whether the project manager on a $170-million construction project and the employer's equal employment officer were "managing agents" who participated in or ratified the discriminatory conduct, thereby warranting the imposition of punitive damages against the employer.

Background

Lisa Davis worked as a box grader operator for Kiewit Pacific Company ("Kiewit") on a $170-million contract to excavate a 12-mile segment of the All American Canal in Imperial County in 2007 and 2008. Davis was one of the two women who worked on the project's day shift excavation crew. While at work, Davis often had difficulty accessing portable toilets that were located miles from her work area and often were unsanitary. She asked her foreman, the day shift superintendent, the night shift superintendent, and the safety officer to resolve the problem, but her requests for convenient and clean facilities were disregarded. Davis ultimately spoke to Kyle Preedy, Kiewit's project manager, the company's highest-ranking employee on the site, about the issue, but he too failed to address her concerns.

In January 2008, Davis went to use the woman's portable toilet and found feces smeared all over the toilet seat and a pornographic magazine placed on the toilet paper dispenser. Davis complained to her foreman and day shift supervisor; however, no investigation occurred. Thereafter, in February 2008, Davis filed a complaint regarding the unsanitary conditions with Cal-OSHA, the state occupational safety and health agency, and complained to Kiewit's equal employment opportunity (EEO) officer John Lochner regarding Kiewit's failure to provide appropriate sanitary facilities and to investigate her complaint about the January 2008 incident. Davis told Lochner she was afraid of losing her job or other retaliation because of her complaint.

In March 2008, Kiewit laid off most of the excavation crewmembers, including Davis. One week later, Kiewit began selectively rehiring crewmembers and, within three weeks, a complete day shift was rehired, except for Davis. Davis subsequently sued Kiewit for discrimination, harassment and retaliation in violation of the state Fair Employment and Housing Act ("FEHA"), among other things. Davis also sought a punitive damages award because, she claimed, Kiewit's conduct, which the company's managing agents committed or ratified, was malicious and oppressive. Kiewit moved for summary judgment on the punitive damages claim, arguing that no managing agent committed or ratified the unlawful conduct. The trial court granted the motion, and Davis appealed.

Applicable Law

Under California law, an employer may be held liable for punitive damages for the malicious acts or omissions of employees with sufficient discretion to determine corporate policy, such as officers, directors or managing agents. Cal. Civ. Code § 3294(b). Managing agents are employees who "exercise substantial independent authority and judgment in their corporate decision-making so that their decisions ultimately determine corporate policy." *White v. Ultramar, Inc.*, 21 Cal. 4th 563, 566-67 (Cal. 1999). Thus, to demonstrate that an employee is a true managing agent, the employee must show that such individual exercised "substantial discretionary authority over significant aspects of a corporation's business." *White*, 21 Cal. 4th at 577. This is "a question of fact for decision on a case-by-case basis." *Id.* at 567.

Appeal Granted

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Kiewit argued that Preedy, the project manager, was not a "managing agent" because he did not draft corporate policy or have "substantial discretionary authority over decisions that ultimately determine Kiewit's corporate policy." The Court rejected this assertion, finding it merely restated the applicable legal standard, but failed to provide any factual support for the assertion. By contrast, Davis presented evidence demonstrating that Preedy was Kiewit's top on-site manager, the Court said. Preedy had the responsibility to oversee and manage the $170-million canal project, including over 100 Kiewit employees working on the site. Preedy's duties included interfacing with stakeholders, contract administration, operations and personnel oversight, and making sure the project was completed according to the contract. The Court found that a trier of fact could reasonably infer that Preedy exercised substantial authority and discretion regarding a broad range of issues on the project, including compliance with Kiewit's policies and the hiring, supervision and laying off of employees, and thus has had authority over significant aspects of Kiewit's business.

Similarly, Kiewit argued that Lochner, its EEO officer, was not a managing agent because he did not have "substantial discretionary authority over decisions that ultimately determine Kiewit's corporate policy" and did not write or recommend any human resources policies. The Court again found these statements were conclusory and lacked factual support. On the other hand, Davis offered evidence showing that Lochner had responsibility for enforcing Kiewit's policies against discrimination, harassment and retaliation. The Court said that a trier of fact could find that Lochner exercised discretion regarding enforcement of Kiewit's policies because he never conducted an investigation into the January 2008 incident and took no action to protect Davis from retaliation after she complained about the incident and sanitary conditions. Further, the Court concluded that a trier of fact could find Lochner created an "ad hoc formulation" of corporate policy. Accordingly, the Court reversed summary judgment and returned the case for trial on the punitive damages issue.

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This case reminds employers that they can risk significant liability when employee complaints are ignored and their own policies are not followed. The employer here had clear non-discrimination and non-retaliation policies and required its EEO officer or his or her designee to investigate employee complaints. By failing to investigate in the face of these protocols, both the project manager and EEO officer undercut the argument that they had no discretionary authority to make policy or impact the employer's business. If they had no real authority, according to the Court, they would have followed the employer's policy, investigated the complaints, and remedied the problem. Instead, by doing nothing, they created their own "ad hoc" policies and thereby opened the door to punitive damages liability.

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