No Employer Liability If There is No Actionable Harassment or Discrimination, California Court Rules

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March 12, 2015

An employer cannot be held liable for failure to prevent sexual harassment under the California Fair Employment and Housing Act ("FEHA") if there is no actionable sexual harassment, the California Court of Appeal has ruled. *Dickson v. Burke Williams, Inc.*, No. B253154 (Cal. Ct. App. Mar. 6, 2015). Likewise, a jury's finding that an employer is not liable for sex discrimination precludes liability for failure to prevent discrimination.

Background

Domaniqueca Dickson, a massage therapist at a spa, sued her employer, Burke Williams, Inc. ("BWI"), for alleged sexual harassment by two customers. She asserted claims for sexual harassment, sexual discrimination, and the failure to prevent sexual harassment and sexual discrimination under the FEHA, among other things.

At trial, BWI asked the court to use a special verdict form that directed the jury to skip deliberations on the claims for failure to prevent sexual harassment and discrimination if there were no corresponding findings of underlying liability. The trial court declined to use the proposed form and instructed the jury on the elements of a failure to prevent claims.

The jury found that BWI was not liable for sexual harassment because the alleged harassing conduct was not severe or pervasive. It also found no liability for sexual discrimination because Dickson did not suffer any adverse employment action. Notwithstanding those findings, the jury held BWI liable for failure to prevent harassment and discrimination and awarded the plaintiff $35,000 in compensatory damages and $250,000 in punitive damages.

BWI asked the trial court to set aside the jury verdict, but the court declined to do so. BWI appealed.

Applicable Law

The FEHA prohibits employers from discriminating on the basis of sex and from engaging in sexual harassment. It also makes employers liable for failing to take all reasonable steps necessary to prevent discrimination and harassment from occurring. Cal. Gov't Code §§ 12940(a), (j)(1) & (k).

To establish a claim for his employer's failure to prevent harassment or discrimination, an employee must show that actual harassment or discrimination occurred. *Trujillo v. North County Transit Dist.*, 63 Cal. App. 4th 280 (Cal. Ct. App. 1998). California courts have ruled "there's no logic that says an employee who has not been discriminated against can sue an employer for not preventing discrimination that didn't happen, for not having a policy to prevent discrimination when no discrimination occurred."

No Actionable Harassment or Discrimination

Although Dickson conceded that a finding of actual harassment was required for her to prevail on her failure-to-prevent claim, she argued that the harassing conduct need not be actionable, i.e., "sufficiently severe or pervasive so as to alter the conditions of employment and create a work environment that qualifies as hostile or abusive." The appellate court disagreed. The Court found that it would be "anomalous" to hold BWI liable for failing to prevent conduct that was not unlawful under the FEHA. The Court observed that, under Dickson's theory, "an employee could maintain an action for failing to take reasonable steps necessary to prevent any conduct that the employee perceives is harassing even if that conduct amounts to nothing more than non-actionable teasing, an offhand

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comment, or an isolated incident." Such a position was unsupported by California law and would result in punitive damages being awarded for not preventing legally permissible conduct, the Court concluded.

Dickson also argued that the jury's verdict followed California's approved jury instruction for a failure-to-prevent claim. However, the Court noted the instructions for using the approved form specifically state that a jury should not be instructed on a failure-to-prevent claim "unless it finds that the underlying claim is proved." Accordingly, the Court concluded that Dickson's failure to prevent harassment claim failed because the jury did not find BWI liable for unlawful sexual harassment.

Addressing the failure-to-prevent discrimination claim, the Court applied the same reasoning and found that BWI could not be held liable for failing to prevent discrimination where the jury found that the employer has not engaged in unlawful discrimination. The Court reversed the judgment against BWI on the failure-to-prevent harassment and discrimination claims.

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This case confirms what common sense would suggest: an employer cannot be held liable to prevent harassment or discrimination if there is no actionable harassment or discrimination in the first instance. That being said, employers should have clear harassment and discrimination prevention policies with appropriate complaint procedures and should respond promptly to address such concerns in the workplace. Employers also should train, and periodically retrain, their supervisors and employees regarding their policies and complaint procedures.

California's AB 1825 (codified at Cal. Gov. Code § 12950.1) requires employers with at least 50 employees to provide two hours of classroom or other effective interactive training and education regarding sexual harassment prevention to supervisory employees every two years (the first training deadline was December 31, 2005). The next deadline for training under AB 1825 is December 31, 2015.

Jackson Lewis has built its practice and reputation by helping clients reduce employment litigation through management education on legal trends, judicial developments, and statutory and regulatory compliance. We have developed management training programs for minimizing sexual harassment, and we regularly conduct educational conferences and training programs nationwide for employers and their management teams, in-house attorneys and human resource professionals on a wide range of issues.

Jackson Lewis' training programs are tailored to meet AB 1825 compliance rules. For more information or to schedule training on-site, please contact the Jackson Lewis attorney with whom you regularly work.