



Discrimination and Harassment Update

There have been a number of decisions this year in the state and federal courts that have further defined the legal requirements with regard to discrimination and harassment.

Retaliation

For some time now, claims of retaliation have been on the rise. In the most significant case this year the California Supreme Court has found that a supervisor's refusal to obey an order that he or she reasonably believes to be discrimination is protected under the California Fair Employment and Housing Act (FEHA). [In this case the supervisor had been told to terminate a female employee who was thought not to be physically attractive or "hot" enough.] Thus the employer cannot retaliate against the supervisor for engaging in such action if the employer knows that the supervisor believes the order to be discriminatory. Of particular note in this case was that the court found that the employer had retaliated even though the employee did not explicitly state that she thought that the order was discriminatory. Additionally in this case the court determined that the actions taken by the employer – being critical of the employee; soliciting negative information about her; auditing her expense reports and screaming at her at a meeting – were sufficient to constitute adverse actions that supported her claim of retaliation.

Discrimination – "Same Actor" Inference

In discrimination cases, the plaintiff must first show that he is a member of a protected class; was qualified for the position at issue; was terminated or denied the position; and the position was given to an individual outside the protected class. The burden then shifts to the employer to show evidence that there was a legitimate, nondiscriminatory reason for the decision. The burden then shifts back to the plaintiff to nonetheless show discrimination. However, the Ninth Circuit recently upheld the "strong inference" that there is no discrimination if the person who has hired (or promoted) the employee is the same person who then fires (or demotes) the employee within a reasonable period of time. Although a "reasonable period of time" is not specifically defined, this ruling is especially helpful for smaller employers for whom most employment decisions are made by the same individual.

Favoritism as Harassment

The California Supreme Court has held that widespread sexual favoritism in the workplace can result in a hostile work environment and thus a claim for sexual harassment. [In this case the warden of a prison was having sexual affairs with a number of subordinates and gave them preferential treatment.]

The court found that these actions, if severe and/or pervasive enough can result in an environment demeaning to women and conveys a message that a way to get favorable treatment in the workplace is to engage in sexual conduct. The court did also state, however, that an isolated incidence of favoritism toward a single employee with whom the supervisor was engaged in a sexual affair would not, by itself, support a claim of sexual harassment.

Harassment by Customers

In a claim under Title VII, the Ninth Circuit affirmed the potential liability for employers for harassment of its employees by customers when it ratifies or condones such conduct by failing to take steps to remedy it. Additionally, the employer must take such steps whether a complaint is made by a supervisor or other employee. Thus, there is no requirement for a supervisor or manager to handle the situation on his/her own.

Action Steps:

- Review employment decisions and directives to employees to ensure that they neither are nor will be construed as discriminatory
- Do not use physical attractiveness or sex as a basis for employment decisions (subject to a very rare exception when it would be a bona fide requirement – e.g., actor)
- Do not ignore concerns regarding decisions that may be raised by those required to implement them
- Review with supervisors the potential liability for themselves and the company if they engage in harassment and the potential problem if they have sexual relationships with employees
- Remind employees (and supervisors in particular) of their obligation to report actual or perceived discrimination or harassment to avoid a claim of employer knowledge
- Investigate and take immediate action if an employee complains about harassment – whether the conduct is claimed to be by an employee or a customer or other non-employee



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