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DISCRIMINATION vs HARASSMENT
A SUPERVISOR'S LIABILITY?

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One of the hottest topics recently debated in the area of employer/employee relations has been the question of the personal responsibility of supervisors for discrimination or harassment, either perpetrated by or condoned by that supervisor.

It has been well accepted, of course, that actionable conduct of this nature engaged in by supervisors is the responsibility of the employer because the supervisor is, in effect, the "employer" with respect to dealing with an individual under their supervision. The personal responsibility, however, of the supervisor who engages in conduct determined to be discriminatory or is characterized as harassment has been an issue.

In the first place, we must make a distinction between conduct that is "discriminatory" and conduct which is regarded as "harassment" since they are distinct even though there are some classes of conduct which would fall into both categories simultaneously.

In discussing discrimination, a brief look at the statutory background is required. The 1964 Civil Rights Act, Title VII, prohibited discrimination on the basis of race, color, creed, gender, or national origin. To these, of course, have been added further federal regulations prohibiting discrimination on the basis of disability and age.

This provides plaintiffs with a federal forum with respect to discrimination claims. Residents of California additionally are protected under the California Fair Employment and Housing Act (FEHA) which likewise prohibits such conduct. The question of a supervisor's direct liability to an employee under their supervision really became a hot issue a little over two years ago when the California Supreme Court rendered a decision in a case in which they declined to address what they described as the "broad and difficult" issue of whether the California Act was intended to saddle personal liability for employment discrimination on supervisors.

Well, when the Supreme Court recognizes the problem and decides that they don't want to grapple with it you can bet that there will be a split of opinion in the courts of appeal. Sure enough, in the *Janken* case, (*Janken v GM Hughes Electronics 46 Cal.App. 4th 55 (1996)* the Appellate Court held that supervisors had no personal liability for discrimination. This had been the finding under earlier federal cases interpreting the liability of an individual under Title VII and therefore was consistent with them. In fact, the federal courts had indicated that since Title VII only applied to employers with 15 or more employees that they could not imagine that Congress intended for individuals who were supervisors in larger organizations would have personal responsibility while those in smaller organizations would not. (*Miller v Maxwell's International Inc. 991 Fed. 2d 583 (1993)*

In the *Janken* case, the court made the observation that it would constitute a serious impairment to effective management:

"If every personnel manager risked losing his or home, retirement savings, hope of children's college education, etc., whenever he or she made a personnel management decision"

The court went on to say that if the supervisors were personally held liable that this would add "mostly an in terrorem quality to the litigation, threatening individual supervisor(s) with the specter of financial ruin and court correspondingly enhancing a plaintiff's possibility of extracting a settlement on a basis other than the merits." It was felt by the court additionally that adding personal responsibility on the part of the supervisors did not add any appreciable protection to the victims of discrimination since they can recover from the employer and they

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felt that an employer would take effective action "in-house" to discipline a supervisor for such activity and that that would be sufficient.

In the other relatively recent case, however, of *Reno v Baird 57 Cal.App. 4th 1121 (1997)* the Court of Appeal in another district disagreed and rejected the findings in the *Janken* case. (A San Francisco court, of course!) The court in that case expressly stated that those in a supervisory capacity "know ahead of time what behavior is illegal." It was felt by that court that with potential personal liability hanging over their heads, supervisors would be much more cautious in developing or implementing policies or actions which were discriminatory in nature.

The *Reno* court spent quite some time discussing the distinctions they felt existed between the FEHA and Title VII regarding discrimination. They indicated that there had been multiple cases in which supervisors had been held individually liable up until the *Janken* decision and spent a considerable time trying to poke holes in the *Janken* court's logic. They particularly disagreed with the very logical determination in *Janken* that there was a distinction to be drawn between discrimination and harassment which they claimed was "untenable."

In *Janken*, the court had concluded:

"Every supervisory employee can insulate himself or herself from claims of harassment by refraining from such conduct. An individual supervisory employee cannot, however, always refrain from engaging in the type of conduct, which could later give rise to a discrimination claim. Making personnel decisions is an inherent and unavoidable part of the supervisory function. Without making personnel decisions, a supervisory employee simply cannot perform his or her job duties." The court had gone on to indicate that labeling the supervisors as a "agent" of the employer either defined every supervisor as an "employer" for the purpose of the statute providing personal liability risk or that the inclusion of that language was intended by the legislature only to ensure that employers would be held liable if the supervisors engage in conduct later found to be discriminatory. Following the decision made in the *Reno* case by the Court of Appeal we thus had one appellate district who indicated that a supervisor would be personally liable for harassment but not discriminatory conduct that did not constitute harassment while the other district would impose liability on the supervisor for either conduct indicating that there was little distinction to be drawn.

When such a split of opinion is present, it is the California Supreme Court's job to step in and resolve the dispute so that some degree of certainty might be present in the work place. Within the last several weeks, the California Supreme Court has rendered a decision. They reversed the finding of the Court of Appeal in *Reno* and, in effect, upheld the *Janken* rationale. In a newspaper report of the decision, employers were reported as being elated with the news and it was noted that Justice Chin was quoted as stating "until the legislature provides for punishing individual employees, we should leave that task to the employers." Labor's counsel, of course, was visibly upset feeling that this decision (which they, of course, think was made by a reactionary right-wing court) would allow supervisors to engage in discriminatory conduct without fear of consequences. One of the attorneys was quoted as stating, "It promotes personal irresponsibility and disregard for the law."

Frankly, that is a preposterous statement to make. Since the employer is held liable for the effects of discriminatory conduct engaged in by his supervisors, it is clear that the employer will keep a close eye on such activities and take appropriate action in-house to limit their financial exposure. It is in the self-interest of the employer whether or not they might personally agree or disagree with the underlying law.

In the decision that was reached, the court indicated that the FEHA prohibited both harassment and discrimination but that they were treated differently. Justice Chin who wrote the opinion indicated that the FEHA "prohibits an employer, or any other person from harassing an employee the FEHA, however, prohibits only 'an employer' from engaging in improper discrimination."

Justice Chin evidenced familiarity with the corporate structure noting that personnel decisions "often are made collectively" and therefore if a decision is discriminatory, some participant "might have acted innocently, others less so." He then indicated that "imposing individual liability for collective decisions might place the individuals in an adversarial position to each other [as well as to the corporation]. Out of caution, they might feel compelled to dissent from that decision or attempt to disassociate themselves from it,

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merely to protect their pocketbooks. For these reasons, imposing liability on the corporate whole rather than each individual who participated in the corporate decision is sensible." He finally pointed out that the other court decisions cited by the *Reno* court which preceded the decision in *Janken*, were administrative decisions based on outdated federal law and he dismissed their significance.

Interestingly, in spite of the controversy concerning this concept before it got to the court, the ruling did not draw a dissent even from Justice Mosk who filed a concurring opinion. He wanted to make a couple of things clear, one was that an employer could not avoid liability for discrimination, "by claiming it was a result of a rogue supervisor's personal prejudices. A supervisor making such decisions is per se acting within the scope of his or her employment."

Additionally, if the factor of harassment is added where a supervisor for instance creates a hostile work environment then, personal liability may attach.

In summary, as a result of the California Supreme Court's recent finding, it would appear that the following principles apply:

Harassment is the responsibility of both the employer and a supervisor who either condones or engages in conduct which creates a hostile work environment which, as is specified in the FEHA, includes (but is not limited to) verbal communications, physical contact, visual objects such as posters, cartoons, or drawings, and sexual favors. The supervisor may be personally liable for such conduct. Conduct which constitutes both harassment and is discriminatory in nature is the responsibility of the employer and to the extent that harassment is involved, the individual supervisor.

If, in such a fashion as to not be construed as harassment under the FEHA, a supervisor is instrumental in taking discriminatory action, that individual will be insulated from personal responsibility but the actions of the supervisor will be imputed to the employer where responsibility for damages may be assessed.

The opinion of the California Supreme Court appears to be reasonable and realistic and employers should applaud their efforts to provide workable guidelines in this difficult and complex field of law.

Next month: Horseplay

In Memoriam

Stephan G. Thompson
1948-1998

We are very saddened at the loss of our valued colleague and good friend, Stephan G. Thompson, who passed away suddenly on July 6, 1998. Steve was not only an exemplary lawyer but he was a wonderful and warm person and we were proud to have him as a member of our firm. His fund of knowledge, attention to detail and common sense approach to the workers' compensation practice set a wonderful example for many young lawyers and it is indeed a significant loss in this area of practice. Steve leaves surviving him, his wife, Shelley, and two fine young sons, Benjamin and Andrew.

This newsletter contains only personal opinions and suggestions by the writer which may be of general application in the subject area being discussed. This letter is not intended as specific legal advice as applied to any factual situation and it is recommended that if legal advice is desired concerning the application of any of the information contained herein to a particular factual situation that