

Law Report

LEGAL NEWSLETTER

VOLUME 10, ISSUE 4

PREVENTION OF SEXUAL HARASSMENT CLAIMS

California Requires Larger Employers to Regularly Train Supervisors

In a twist to the “traditional” sexual harassment court action, nationwide optician LensCrafters settled a suit from the U.S. Equal Employment Opportunity Commission (EEOC) on behalf of a male employee who alleged a female co-worker sexually harassed him. Federal and state law protects workers of either gender from sexual harassment in the workplace. Thus, a business can be liable to a male employee who establishes that the company condoned a sexually hostile or offensive work environment.

LensCrafter’s male lab technician William Sheard claimed his employer subjected him to a sexually hostile work environment by ignoring his concerns about the continuing sexual advances of female colleague Melissa Brandt. The EEOC’s suit in Michigan federal court charged Sheard was repeatedly subjected to unwelcome sexual advances, comments and

touching. Brandt allegedly touched him repeatedly, including his private parts, made lewd sexual remarks, frequently propositioned him for sex, and made sexual displays toward him. EEOC attorney Nedra Campbell stated, “LensCrafters failed to take seriously the sexual

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harassment complaints of Mr. Sheard, apparently because he is a man. Federal law protects the civil rights of men as well as women. The EEOC is committed to protecting all employees, including men, from being subjected to a sexually hostile work environment.”

In the recent 2011 EEOC consent decree, LensCrafters agreed to settle Sheard’s claims by paying him \$195,500. The consent decree also requires LensCrafters to conduct annual training for its managers, supervisors and team leaders on sex discrimination. In addition to its current training, the company must now incorporate examples regarding the prohibition of sexual harassment against male employees and emphasize that it is no different than the prohibition of sexual harassment against female employees. LensCrafters further agreed to regularly submit to the EEOC the names and contact information of every Michigan-based company employee who complains about sex discrimination, sexual harassment or retaliation for the next three years.

Such consequences can make employers understandably nervous about workplace behavior.

Please see “SEXUAL HARASSMENT PREVENTION” page 2

CALIFORNIA AND FEDERAL AGENCIES POLICE WORKPLACE DISCRIMINATION

Two government agencies have the power to oversee workplace anti-discrimination laws in California: the U.S. Equal Employment Commission (EEOC) and the California Department of Fair Employment and Housing (DFEH).

Laws Each Agency Enforces: The EEOC enforces federal laws prohibiting employment discrimination by private, state and local government employers; employment agencies; and labor organizations. These federal laws are:

(i) Title VII of the Civil

Please see “CALIFORNIA AND FEDERAL” page 3

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“SEXUAL HARASSMENT PREVENTION”

Continued from page 1

One of the most effective ways to prevent sexual harassment is to regularly conduct training with managers and workers.

Larger California Employers Must Provide Training Every Other Year: California requires mandatory sexual harassment training for all supervisors in companies with 50 or more employees or independent contractors. California Government Code section 12950.1. Companies must provide a minimum two hours of training for all supervisors every other year. For any person hired as or promoted to supervisor after the company’s last training, the employer must provide training within six months of the hire or promotion. As the training must include information and practical guidance on the applicable federal and state statutory laws and case decisions, it is best conducted by a qualified legal professional.

LensCrafters failed to take seriously the sexual harassment complaints of Mr. Sheard, apparently because he is a man

Nature of the Required Training: Government Code section 12950.1 specifies the required training is “at least two hours of classroom or other effective interactive training

and education regarding sexual harassment.... The training and education required by this section shall include information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment. The training and education shall also include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation.”

Definition of “Supervisor” Under the Law: California’s Fair Employment and Housing Act (FEHA) defines “supervisor” as any individual entrusted with authority and independent judgment: (i) “to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees”; (ii) to direct employees or to adjust their grievances; or (iii) to effectively recommend any action in (i) or (ii) above. Government Code section 12926(r). Thus, administrative assistants with the ability to make recommendations to their managers must receive such training.

Employers Covered by the Law: For this training requirement only, FEHA defines “employer” as any person “regularly employing 50 or more persons or regularly receiving the services of 50 or more

persons providing services pursuant to a contract.” Government Code section 12950.1(c). Thus, the law directs that an employer with fewer than 50 employees but with more than 50 independent contractors providing it services (for example, a general building contractor regularly hiring 50 or more independently licensed subcontractors) would still have to provide the required harassment training for its employed supervisors.

One of the most effective ways to prevent sexual harassment is to regularly conduct training with managers and workers

Consequences for Non-Compliance: The law does not provide any particular penalty for non-compliance. If the California Fair Employment and Housing Commission finds an employer in violation, it is required to “issue an order requiring the employer to comply with these requirements.” Government Code section 12950.1(e).

FEHA makes it unlawful for any employer “to fail to take all reasonable steps necessary to prevent discrimination and harassment for occurring.” Government Code section 12940(j), (k). However, while failure to provide the harassment training required by Government Code section 12950.1 could contribute to a finding that the employer failed to take

all reasonable steps necessary to prevent FEHA discrimination or harassment, such failure “shall not in and of itself result in the liability of any employer ... [for] sexual harassment.” Government Code section 12950.1(d). On the other hand, an employer’s provision of such training does not insulate that employer from sexual harassment liability. *Id.*

Nevertheless, it would be foolish for an employer to ignore these training requirements on the assumption there are no immediate consequences for a violation. The law also specifies that the required training and education “is intended to establish a *minimum threshold* and should not discourage or relieve any employer from providing for longer, more frequent, or more elaborate training and edu-

California companies with 50 or more employees or independent contractors must provide a minimum two hours of training for all supervisors every other year. FEHA makes it unlawful for any employer “to fail to take all reasonable steps necessary to prevent discrimination and harassment for occurring”

cation regarding workplace harassment or other forms of unlawful discrimination in order to meet its obligations to take all reasonable steps necessary to prevent and correct harassment and discrimination.”

Government Code section 12950.1(f) (emphasis supplied). Thus, an employer’s program to ensure that its supervisors receive appreciably more training than this new statutory minimum is the best policy to reduce to near zero the potential for allegations the company failed to take its expected steps to prevent workplace discrimination and harassment.

If you would like any further information regarding our ongoing provision of the training required by California law, please contact our office. ■



“For the last time, Crawford, our firm is ‘warm and fuzzy,’ not ‘touchy-feely.’”

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“CALIFORNIA AND FEDERAL”

Continued from page 1

Rights Act of 1964, prohibiting employment discrimination based on race, color, sex, religion or national origin; (ii) the Age Discrimination in Employment Act (ADEA), prohibiting age discrimination against persons age 40 or older; (iii) the Americans with Disabilities Act (ADA), prohibiting employment discrimination because of an actual or perceived physical or mental disability; and (iv) the Equal Pay Act (EPA), prohibiting payment of disparate wages to men and women who perform substantially the same work in the same establishment.

The DFEH enforces:

(i) the California Fair

Employment and Housing Act (FEHA), prohibiting workplace discrimination, harassment and retaliation because of race, color, religion, sex (gender), sexual orientation, marital status, national origin (including language use restrictions), ancestry, disability (mental and physical, including HIV and AIDS), medical condition (cancer/genetic characteristics), age (40 and above), pregnancy, denial of medical and family care leave, or pregnancy disability leave; (ii) Unruh Civil Rights Act, which prohibits unlawful discrimination by a business establishment, including housing and public accommodations; and (iii) the Ralph Civil Rights Act, which

***FEHA
anti-harassment
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prohibits hate violence or threats of violence based on an individual’s race, color, religion, ancestry, age, disability, sex, sexual orientation, political affiliation, or position in a labor dispute.

Sizes of Businesses

Subject to Agency Jurisdiction: An employer must have a certain number of employees to be subject to a given agency’s jurisdiction.

This number can vary depending on the type of employer and kind of discrimination alleged. For example, an employer is subject to federal Title VII or the ADA if 15 or more employees have been on payroll for at least 20 calendar weeks in either one of the past two calendar years. However, only businesses with 20 or more on payroll either of the past two years are subject to the age discrimination requirements of the federal ADEA. The federal EPA covers virtually all employers.

Only a California employer with five or more on payroll is subject to this state’s FEHA anti-discrimination laws.

Please see “CALIFORNIA AND FEDERAL” page 4

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IN THIS ISSUE

*Prevention of Sexual
Harassment Claims*

*California and Federal
Agencies Police Workplace
Discrimination*

“CALIFORNIA AND FEDERAL”

Continued from page 3

However, FEHA anti-harassment protections apply to a California employer with as few as a single employee.

Deadline to File Agency Complaints or Charges:

The deadline to file an EEOC charge is generally 180 days from the day the alleged wrongdoing took place. However, the EEOC deadline is 300 days if alleged wrongful action occurred in a workplace also covered by state or local anti-discrimination laws, i.e., virtually everywhere in the United States.

The deadline to file a DFEH complaint is usually one year from the alleged wrongdoing. For cases

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alleging hate violence under the Ralph Civil Rights Act, complaints must be filed within one year of the day the victim becomes aware of the perpetrator's identity, but not more than three years from the date of injury.

For more information on the EEOC, including addresses and telephone numbers, visit www.eeoc.gov. For more information on the DFEH, see www.dfeh.ca.gov. ■

SEXUAL HARASSMENT PREVENTION TRAINING SEMINARS

For the upcoming bi-annual training season, we have scheduled two afternoon seminars in Pasadena:

**Friday, September 30,
2011 and**

**Friday, November 4,
2011**

Please contact our office soon if you are interested in having supervisors attend either session. Seating is limited. We also deliver these seminars for supervisors on company

location at flat rates.

Again, please contact us promptly as available dates are also limited.

The seminars are updated with the most recent changes in state and federal law as well as new quizzes and practical scenarios. These interactive sessions meet California's AB 1825 sexual harassment training requirements.

Please see www.tbowleslaw.com for more information. ■