Ever Stricter Liability
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Can an employer be strictly liable for sexual harassment committed by a supervisor if the harassment occurred outside of the employer's premises and while the supervisor and victim were engaged in an activity not authorized by the employer? Can a supervisor's intelligence and maturity determine whether an employer may be liable for punitive damages for that supervisor's misconduct?

Employers may be surprised to learn that the answer to both of these questions is "yes," according to a recent California Court of Appeal decision.

In *Myers v. Trendwest Resorts Inc.*, 148 Cal. App. 4th 1403 (Cal. App. 3d, Feb. 28, 2007), Alissia Myers sued her employer, Trendwest Resorts Inc., under the Fair Employment and Housing Act for hostile-environment sexual harassment committed by her supervisor, among other claims. Myers worked as salesperson for Trendwest, which develops resorts and sells timeshares.

Myers claimed that throughout her three-year employment at Trendwest, a co-worker who later became her supervisor repeatedly harassed her. The purported conduct included groping, sexual advances, sexually explicit comments, and offers of gifts and money in exchange for sexual favors.

California courts have interpreted the FEHA to impose strict liability on an employer for sexual harassment committed by a supervisor against a subordinate. Therefore, it is difficult for an employer to obtain dismissal of a sexual harassment claim before trial because allegations of ongoing inappropriate conduct by a supervisor are generally enough to defeat summary judgment.

However, a twist in *Myers* is that most of the alleged harassment occurred offsite while Myers and the supervisor were not working and arose during a relationship that had evidence of becoming consensual after the initial advances by the supervisor.

The trial court in *Myers* granted Trendwest's motion for summary adjudication of the sexual harassment claim on the grounds that none of the alleged inappropriate acts were committed at Trendwest's office and none of the incidents occurred while Myers and the supervisor were working. The trial court held that the case fell within the scope of *State Dept. of Health Servs. v. Superior Court*, 31 Cal. 4th 1026 (2003), in which the California Supreme Court determined that "an employer is not strictly liable for a supervisor's acts of harassment resulting from a completely private relationship unconnected with the employment and not occurring at the workplace or during normal working hours."

The Court of Appeal reversed, focusing on the fact that two of the alleged incidents occurred while Myers and the supervisor were returning to the office after driving to customers' homes to close deals. Once, the supervisor allegedly parked his car on an isolated road and tried to kiss Myers, touched her breasts and groin area, and said he would like to sleep with her. On the other occasion, Myers claimed the supervisor made a detour to stop at his home to pick up some work-related documents and, once inside his garage, made sexual advances and inappropriately touched her.

Based on these allegations, the Court of Appeal disagreed with the trial court's findings that the supervisor's actions were "no longer related to his employment when he diverted from returning to the office and instead went to an isolated road or to his garage." Rather, the court held that the excursions did not stop being work-related once the harassing conduct began because if that were so, "an employer would never be liable for sexual harassment by a supervisor, because the act of sexual harassment is never work-related."

The court also rejected another basis for finding that the supervisor's alleged conduct was not work-related: company policy forbade employees from traveling to customers' homes to make sales. The court determined that even if Trendwest disapproved of this practice, the excursions provided an obvious benefit to the company. Further, there was evidence that Trendwest was aware its salespeople engaged in the practice and did nothing to stop it.
The court did not indicate whether the case's outcome would have been different had there been evidence that the company made an effort to stop employees from driving to customers' homes.

The court also disregarded evidence of a possible consensual relationship between Myers and the supervisor. For example, Myers once invited the supervisor to her apartment when they stopped there on the way to meet co-workers at a nightclub. Another time, she accompanied him on a vacation in Lake Tahoe. Dismissing this evidence as "at best" creating a triable issue of fact precluding summary adjudication, the court instead based its ruling on the fact that there was no evidence that Myers and the supervisor had a private relationship unconnected to work during the two times that the supervisor allegedly groped Myers on their way back from customers' homes.

The court therefore avoided the interesting legal issue of whether a less-than-strict liability standard should apply where there is evidence that harassment occurred outside of work premises and in the course of a consensual relationship.

Of particular significance to employers, the Court of Appeal refused to consider either remedial measures instituted by Trendwest to prevent harassment or Myers' failure to complain about the alleged harassment until after she no longer worked for the company.

Federal courts recognize a complete defense to claims of hostile-environment harassment committed by supervisors when the employer acts reasonably to prevent and correct the harassment and the employee unreasonably fails to utilize those remedies. In federal cases, a successful assertion of this defense on a motion for summary judgment can result in dismissal of the sexual harassment claim.

However, the California Supreme Court in *State Dept. of Health Servs.*, held that for FEHA claims, the existence of an employer's harassment prevention policy and an employee's failure to report harassment can only limit the damages a plaintiff can recover. They do not affect a decision on the employer's liability.
Relying on *State Dept. of Health Servs.*, the Court of Appeal in *Myers* concluded that it did not need to consider whether Trendwest's anti-harassment policy was adequate or whether Myers had knowledge of it because this was not relevant on a motion for summary judgment.

The *Myers* decision underscores the fact that even if an employer has a comprehensive harassment-prevention policy with clear complaint procedures and even if the employee knew of them but failed to use them, the employer still faces the costly decision between settlement or jury trial when the employee sues for sexual harassment by a supervisor.

Therefore, it is in employers' best interests to do as much as possible to prevent harassing behavior from occurring in the first place. In addition to instituting an anti-harassment policy and providing harassment-prevention training to employees, employers should make efforts to actively monitor the actions of their supervisory employees and thoroughly investigate any signs of behavior unsuitable for someone working in a managerial capacity. Employers should also promptly address inappropriate conduct and should discipline or even terminate supervisors who are found to have engaged in misconduct.

Myers also provides another important reason for companies to retain only professional and competent supervisors: A supervisor who is found to have engaged in sexual harassment and who was known by the company to be unfit to work in a managerial capacity exposes the company to punitive damages.

A plaintiff may recover punitive damages from a wrongdoer by establishing "clear and convincing" evidence of "malice, oppression, or fraud." California Civil Code Section 3294(a). Punitive damages are available for an employee's wrongdoing, only if the employer had "advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice." Section 3294(b).

With respect to corporate employers, the statute further requires that the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." Section 3294(b). The purpose is to avoid punishing the corporation for misconduct by lower-level employees whose behavior does not reflect the intentions of corporate leaders. *Cruz v. Homebase*, 83 Cal. App. 4th 160 (2000).

The *Myers* court held that the trial court erroneously granted summary adjudication on the punitive damages claim to Trendwest because there was evidence that upper management knew the supervisor was a "loose cannon" and that he "lacked judgment, intelligence, maturity and management skills." Even though there was no evidence that management had knowledge that Myers' supervisor ever engaged in any harassing behavior, the mere evidence of his general unfitness for the job was enough to take the punitive damages claim to trial.

Importantly, the *Myers* court again refused to consider Trendwest's remedial measures in evaluating whether the company could be liable for punitive damages. In *Kolstad v. American Dental Assoc.*, 527 U.S. 526 (1999), the U.S. Supreme Court held that under Title VII of the Civil Rights Act of 1964, the federal equivalent of California's FEHA, an employer has an affirmative defense against a punitive damages claim based on actions by its managers when the employer has made good-faith efforts to comply with the federal anti-discrimination statutes, such as prompt and fair investigations of harassment or discrimination complaints.

In a subsequent decision, the California Supreme Court noted that future California decisions would need to consider whether the affirmative defense established in *Kolstad* would apply to claims for punitive damages sought for FEHA claims. *White v. Ultramar Inc.*, 21 Cal.4th 563 (1999). To date, no California decision, including *Myers*, has taken up the California Supreme Court's directive.

The *Myers* court's failure to consider the existence of Trendwest's anti-harassment policy in denying summary adjudication of the punitive damages claim is a blow to employers who have devoted significant resources to implementing effective anti-harassment policies.

With an award of millions of dollars in punitive damages potentially at stake in a FEHA lawsuit, the *Myers* decision highlights the importance for California employers of making sure they promote and retain only supervisors who are professional, knowledgeable and capable in a managerial role. Otherwise, knowingly employing a supervisor who has a track record of bad judgment and poor managerial skills will leave an employer vulnerable to punitive damages liability.