

Employer Not Liable for Harassment by Others



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Under California's Fair Employment and Housing Act, Govt. Code Secs. 12940 et seq. ("FEHA") employers can be liable to employees for sex harassment and discrimination. But what about harassment by a customer, vendor or someone else an employee must work with? Bus drivers could be harassed by passengers. Office workers could be victims of leers, jokes or solicitations from delivery personnel or visiting service technicians; or vice versa. The issue is also emerging in other business arenas: franchising, membership associations and other arrangements where continuing business relationships between independent contractors or staff and members, create potential for sex harassment claims.

In an important case of first impression, a divided Second District Court of Appeal took a narrow view of FEHA, deciding it does not create employer liability when a nonemployee client or customer sexually harasses an employee. Salazar v. Diversified Paratransit 2002 Daily Journal D.A.R. 12361 (Oct. 30, 2002). Salazar was a newly hired driver for a company that provided daily transportation for developmentally disabled adults. One of the passengers on her route had a history of misbehavior, which three male drivers reported to the company. The passenger also had a history of exposing himself, which three female drivers reported to the company.

During Salazar's training the passenger touched her hair, called her "bonita" (which means "beautiful"), grabbed her purse and generally made Salazar scared and uncomfortable. Later, Salazar reported more incidents and asked for a transfer to a different route. The drama that led to the lawsuit occurred when the passenger attacked Salazar, exposed him-

self to her, and touched her all over.

Salazar sued her employer for sex harassment. After presenting her evidence, the trial court granted nonsuit in favor of the employer. On appeal, the appellate court carefully analyzed the language and legislative history of FEHA and found its wording did not create employer liability for sex harassment by clients or customers. Rather, the two-justice majority said an employer is liable only for harassment the employer commits. The majority also noted an exception in which an employer can be liable for harassment by an employee other than the company's agents or supervisors. This extended scope of the law did not go beyond liability for co-worker harassment.

The court of appeal said if the Legislature intended to expand employer liability to encompass harassment by clients and customers, it would have done so clearly. The court also noted that employers have managerial and disciplinary power over employees, but questioned whether employers can control behavior of clients and customers. Expansion of liability as sought by Salazar, the majority said, would be a policy judgment to be made by the Legislature.

The majority noted that some cases decided under the federal antidiscrimination law known as Title VII, 42 U.S.C. Secs. 2000e et seq., have held employers liable for harassment by clients. For example, in Lockard v. Pizza Hut (10th Cir. 1998) 162 F3d 1062, 1073, a Pizza Hut franchisee was held liable to a server victimized by crude remarks from some customers culminating in a customer pulling her hair, grabbing her breast, and putting his mouth on her breast. However, the court found the franchisor, as a separate corporation, was not the employer and could not be held liable to the employee.

The Salazar court noted some other decisions under the Federal law, referring to, Rodriguez-Hernandez v. Miranda-Velez (1st Cir. 1998) 132 F3d 848, 854 (under Title VII, employers can be liable for unwanted sexual advances by customers if employer ratifies or acquiesces in customer's demands.); Crist v. Focus Homes (8th Cir. 1997) 122 F3d 1107, 1111 (residential home for developmentally-disabled individuals was liable when resident sexually assaulted plaintiff; employer controlled and had the ability to alter conditions that resulted in the incident); Powell v. Las Vegas Hilton Corp. (D.Nev. 1992) 841 F.Supp. 1024, 1027-1028 (refusing employer's request for summary judgment in casino worker's claim of harassment by customers). However, differences in the language between FEHA and Title VII led the Salazar court to decide that the Title VII decisions were not controlling in this case. Also, the court added, employee victims of harassment by customers have non-FEHA remedies, such as claims for sexual battery and other torts, as well as for a restraining order and injunctive relief.

A detailed dissent by Presiding Justice Klein would have extended liability to provide Salazar a remedy against the employer. The vigor of the dissent and the growing importance of the issue raised by the Salazar case suggest that further developments can be expected on the question of the scope of employer liability under FEHA. ↵