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Employment Law Commentary

Five Years of AB 1825: Is Two Hours of Prevention Worth a Pound of Cure?

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As of January 2011, the sexual harassment training requirements for supervisory employees imposed by California Assembly Bill 1825 ("AB 1825") will have been in place for five years. At the time of AB 1825's passage in 2004, however, the concept of harassment or sensitivity training was not novel. By one account, seven out of 10 large employers provided harassment training to their employees in the late 1990s.[1] Today, most employers dutifully anticipate their biannual compliance requirements under AB 1825 and develop sophisticated policies and procedures to prevent sexual harassment in the workplace. With so much emphasis placed on preventive measures, it may have come as a surprise recently to see the headlines document how the CEO of a major Fortune 100 company was felled by a sexual harassment claim. News like this seems an appropriate catalyst for reexamining what we have learned from the past five years, if not several decades, of harassment training.

AB 1825 directs employers having 50 or more employees to provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all California supervisory employees once every two years.[2] The training "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."[3] Regulations promulgated under the training law, approved in 2007, set forth detailed requirements for the form, content, and duration of the training program, as well as the qualifications to be a "trainer" under the statute.[4]

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Compliance Mechanisms Under AB 1825 and Sexual Harassment Law Generally

AB 1825 does not purport to operate as a complete antidote to workplace sexual harassment. It expressly states that its two-hour requirement should serve as a minimum threshold and "should not discourage or relieve an employer from providing for longer, more frequent, or more elaborate training and education . . . in order to meet its obligations to take all reasonable steps necessary to prevent and correct harassment and discrimination."[5]

The statute further provides that compliance with its terms "does not insulate the employer from liability for sexual harassment of any current or former employee or applicant."[6] Likewise, "a claim that the training and education required by this section did not reach a particular individual or individuals shall not in and of itself result in the liability of any employer to any present or former employee or applicant in any action alleging sexual harassment."[7] Indeed, it is as if AB 1825, by its own terms, intends to be neutral as to its effect on employer liability for sexual harassment.

Moreover, AB 1825 does not strictly penalize noncompliance, providing that "[i] f an employer violates this section, the [Fair Employment and Housing Commission] shall issue an order requiring the employer to comply with these requirements."[8] According to the regulations interpreting AB1825, such an order may specifically direct a non-complying employer to complete the training requirements within 60 days of issuance of the order.

From a damages perspective, the impetus to conduct harassment training seems to flow less from AB 1825 itself than from the panoply of state and federal authorities that incentivize the practice of harassment training, even if the employer in question is not specifically covered by AB 1825. For example, the passage of the Civil Rights Act of 1991 authorized plaintiffs to recover punitive damages for intentional discrimination claims; this increased the potential exposure from a charge of sexual harassment and encouraged employers to develop preventive measures.[9] The EEOC has also directed that employers train employees in harassment and discrimination prevention for all protected categories, including sexual harassment, first in the early 1980s and again in 1999.[10] Finally, both federal and state case law expressly recognizes that employer training programs may help to offset employer liability or damages for a sexual harassment claim.

Availability of "Reasonable Care" Defense Under Federal Law.

The *Ellerth* and *Faragher* decisions of the United States Supreme Court allow an employer to defend itself against liability or damages if the employer can prove that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[11]

The federal courts applying this affirmative defense have expressly acknowledged that training employees to prevent sexual harassment and to be familiar with the employer's complaint process can help establish the first prong of this two-prong defense.[12] Conversely, the courts have held that an employer who does not provide harassment training, even when mandated by corporate policy, cannot establish the defense.[13]

Application of the "Avoidable Consequences" Doctrine Under California Law.

Under the avoidable consequences doctrine as recognized in California, "a person injured by another's wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure."[14] California courts extend this doctrine to apply to discrimination claims brought under the Fair Employment and Housing Act ("FEHA"); "in a FEHA action against an employer for hostile environment . . . harassment by a supervisor, an employer may plead and prove a defense based on the avoidable consequences doctrine."[15]

In *Department of Health Serices v. Superior Court*, more commonly known as the *McGinnis* case, the court rejected the *Faragher*/*Ellerth* defense to acts of sexual harassment by a supervisor because the FEHA provides that employers are strictly liable for such conduct. However, it held that, to the extent the Supreme Court grounded the *Faragher*/*Ellerth* defense on the doctrine of avoidable consequences, its reasoning also applies to California's FEHA actions.

To establish the defense, the employer must prove (1) the employer took reasonable steps to prevent and correct workplace sexual harassment, (2) the employee unreasonably failed to use the preventive and corrective measures, and (3) reasonable use of the procedures would have prevented at least some of the harm that the employee suffered.[16] If so, the employer will be able to avoid liability for that portion of the harm that the complainant more likely than not could have prevented with reasonable effort and without undue risk, expense, or humiliation.[17] In other words, while not a complete defense to liability, an employer who can prove avoidable consequences shall be subject to lower damages than would otherwise be the case.

The *McGinnis* court specifically stated that an employer that invokes the avoidable consequences defense should be prepared to show "that it has adopted appropriate anti-harassment policies and has communicated essential information about the policies and the implementing procedures to its employees."[18] It further held that whether a harassed employee would have reported the harassment will "in many and perhaps most instances present disputed factual issues" to be resolved, which unquestionably include the

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extent and effectiveness of the employer's harassment training.[19]

How Has AB 1825 Affected the Prevalence of Workplace Sexual Harassment?

After five years of mandatory sexual harassment training requirements, what effect can we say AB 1825 has had upon the prevalence of harassment claims? One possible metric, the number of administrative complaints filed alleging workplace sexual harassment, shows little in the way of impact. Workplace sexual harassment claims filed with California's Department of Fair Employment and Housing have increased more than 15 percent over a recent five-year period, from 3,345 individual claims in 2003 to 3,863 claims in 2008.[20] By contrast, the volume of sexual harassment charges filed with the federal Equal Employment Opportunity Commission held relatively steady over the same period of time, with 13,566 claims in 2003 and 13,867 claims in 2008.

However, it may be inaccurate to pronounce AB 1825 a failure on the basis of these statistics. A recent study on California's Fair Employment and Housing Act issued by the UCLA/RAND Center for Law and Public Policy sheds a different light on these statistics by attributing the generally similar rise in race, age, disability, and sex discrimination claims from 2006 through 2008 to the economic slowdown and increasing unemployment.[21]

In short, AB 1825's value as a deterrent to workplace sexual harassment claims cannot readily be ascertained by looking to the number of administrative complaints filed. Without more compelling proof that the training requirement is contributing to a reduction in sexually harassing behavior in the workplace, the measurable value of having an AB 1825-compliant training program really only comes to light in an *ex post* context, when defending a claim of sexual harassment. This may be cold comfort to employers, for whom even unfounded allegations of sexual harassment may come at great cost, as underscored by the recent resignation of the above-mentioned CEO. It also reflects one limitation of AB 1825—it attempts to regulate the content of the training, but it cannot require that is meaningful or effective.

However, the positive effects of harassment training are substantial, if not easily quantifiable. It is well settled that conducting harassment training supports a defense to liability or reduction in damages in the event of a sexual harassment claim, and AB 1825 translates this public policy into clear marching orders for California employers. A thoughtfully conducted training teaches supervisors how to navigate the thornier issues of spotting harassment and taking remedial measures, and encourages a more professional and tolerant workplace. To maximize this benefit, employers would be well served to consider harassment trainings as more than something that must appear on the company calendar every other year. AB 1825 provides a general framework from which employers and trainers can develop a program whose form and content engages their supervisory employees and addresses their unique concerns about workplace harassment.

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[1] Frank Dobbin & Erin Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112:4 Am. Journal of Sociology 1203, 1204, 1228 (Fig. 3) (Jan. 2007). Dobbin and Kelly argue that HR specialists began to advocate for harassment training during the 1970s and early 1980s, in stated reliance on "judicial actions [that] have placed strong reliance on such measures," although Dobbin and Kelly found only one opinion offering any discussion of harassment training. *Id.* at 1212 (*citing Arnold v. City of Seminole*, 614 F. Supp. 853 (1985)).

[2] Cal. Gov't Code § 12950.1(a) (2010). The statute adopts the definition of supervisor set forth in section 12926, subdivision (r), of the California Government Code. 2 Cal. Code Regs. § 7288.0(a)(8).

[3] Cal. Gov't Code § 12950.1(a).

[4] *See generally* 2 Cal. Code Regs. § 7288.0.

[5] Cal. Gov't Code § 12950.1(f).

[6] Cal. Gov't Code § 12950.1(d).

[7] Cal. Gov't Code § 12950.1(d).

[8] Cal. Gov't Code § 12950.1(e).

[9] 42 U.S.C. § 1981a(b) (2010). For a discussion of the impact of the Civil Rights Act of 1991 on employer harassment training practices, see Dobbin & Kelly, 12:4 Am. Journal of Sociology at 1218-20.

[10] For example, in 1999, the EEOC issued enforcement guidance on vicarious liability for harassment by supervisors, stating, "[i]f feasible, the employer should provide training to all employees to ensure that they understand their rights and responsibilities." *See* Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (Jun. 18, 1999), *available at* http://www.eeoc.gov/policy/docs/harassment.html.

[11] *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998) (*discussing Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)).

[12] *Holly D. v. California Inst. of Tech.*, 339 F.3d 1158, 1177 (9th Cir. 2003). *See also Cadena v. Pacesetter Corp.*, 224 F.3d 1203, 1210 (10th Cir. 2000) (evidence that an employer has made an effort to "educate its employees about its policies and the statutory prohibitions" may preclude punitive damages in such cases).

[13] *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 510 (6th Cir. 2001).

[14] *Green v. Smith*, 261 Cal. App. 2d 392, (Cal. App. 1968).

[15] *State Dept. of Health Services v. Superior Court.* 31 Cal. 4th 1026, 1044 (Cal. 2003) (providing effective sexual harassment training may help limit or even eliminate damages for sexual harassment by supervisors).

[16] *Id.* at 1044.

[17] *Id.*

[18] *Id.* at 1045.

[19] *Id.* at 1044.

[20] *See* DFEH 2008 Annual Report, *available at* http://www.dfeh.ca.gov/DFEH/AnnualReport/2008%20annual%20report%20REVISED%20FINAL%205-20-09%20(4).pdf. 2008 is the most recent calendar year for which the DFEH has publicly released data on the number of sexual harassment claims filed. The DFEH's 2009 annual report indicates that 3,835 cases were filed during its 2008 – 2009 fiscal year. *See* DFEH 2009 Annual Report, *available at* http://www.dfeh.ca.gov/DFEH/AnnualReport/2009%20annual%20report%20FINAL%208-3-10.pdf.

[21] *Id.* at 28.

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