LOS ANGELES
Daily Journal
www.dailyjournal.com
TUESDAY, MARCH 17, 2015
PERSPECTIVE

Employers can't stop harassment if it doesn't exist

By Timothy D. Reuben
and Michael N. Hirota

The 2nd District Court of Appeal's recent decision in *Dickson v. Burke Williams Inc.,* B253154 (March 6, 2015), provides welcome guidance about when an employer is liable for failing to prevent sexual harassment or discrimination under the Fair Employment and Housing Act (FEHA).

Plaintiff Domaniqueca Dickson, a massage therapist, filed an employment action against her employer, Burke Williams Inc., alleging that two customers sexually and racially harassed and discriminated against her. Dickson brought six causes of action: (1) sex discrimination, (2) sexual harassment, (3) racial harassment, (4) retaliation, (5) failure to take reasonable steps to prevent harassment and discrimination based on sex, and (6) failure to take reasonable steps to prevent harassment based on race.

At trial, Burke Williams proposed a special verdict form directing the jury to skip deliberations on Dickson's claims for failure to prevent sexual harassment/discrimination if there was no corresponding finding that Burke Williams was liable for harassment or discrimination. The trial court rejected the proposal, and instructed the jury that Dickson only had to prove that she was "subjected to harassment or discrimination because she's a woman" in connection with the failure to prevent a sexual harassment/discrimination claim.

The jury found that Dickson was "subjected to unwanted harassing conduct" because she was a woman, that Burke Williams failed to take reasonable steps to prevent the harassment, and that Dickson suffered harm as a result. But the jury also determined that any harassing conduct suffered by Burke Williams was *not* actually "severe or pervasive," a requirement for liability under FEHA. Thus, while the jury returned a special verdict finding that Burke Williams was not liable for sexual harassment or sex discrimination, it nevertheless found Burke Williams liable for failing to prevent harassment and discrimination based on sex. The jury awarded Dickson $35,000 in compensatory damages and $250,000 in punitive damages. The trial court denied Burke Williams' motion for judgment notwithstanding the verdict, and Burke Williams appealed.

The Court of Appeal reversed, finding that an employer cannot be held liable for failing to prevent sexual harassment that is not independently actionable. Thus, the court found that the trial court erred in failing to provide the jury with Burke Williams' special verdict form and in denying Burke Williams' judgment notwithstanding the verdict motion. Dickson conceded that a finding of actual harassment was required for her to prevail on her claim based on the failure to take reasonable steps to prevent sexual harassment. However, Dickson contended there is no requirement that the harassing conduct amount to actionable harassment under FEHA, and that any finding of harassing conduct, regardless of whether that conduct is severe or pervasive, can support a finding of liability for failure to prevent sexual harassment.

Applying *Trujillo v. North County Transit Dist.*, 63 Cal. App. 4th 280 (1998), the Court of Appeal noted that the absence of actionable harassment precluded the cause of the cause of action for failure to take reasonable steps necessary to prevent the harassment. "It would be anomalous to provide a remedy for failure to prevent acts that are not 'unlawful' under the FEHA," reasoned the court, "Otherwise, as occurred here, punitive damages could be awarded for not preventing underlying conduct that is legally permissible."

The court further analogized to the "Ellerth-Faragher" affirmative defense in federal law, which provides a full defense to a claim for harassment or discrimination where a defendant can show "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." As this defense only applies when a plaintiff establishes that an actionable sexual harassment claim occurred, the court reasoned that an actionable underlying claim is an essential element of a failure to prevent harassment cause of action.

In rejecting Dickson's argument that the jury's verdict "strictly follows" Judicial Council of California Civil Jury Instructions (CACI) entry No. 2514, the applicable entry for a failure to prevent harassment, discrimination or retaliation cause of action, the court clarified that the jury should not reach the question of a failure to prevent harassment or discrimination unless it finds that the underlying claim is proved. The court further pointed to CACI No. 2527, which provides that a failure to prevent instruction should be given only after the appropriate instructions on the underlying claim for harassment or discrimination have been provided. The court reasoned that such an instruction is meaningless if a failure to prevent claim could be based on anything other than actionable harassment under FEHA.

While the Court of Appeal's ruling seems intuitive to the casual observer, it patches a loophole in the FEHA enforcement scheme that could be construed to hold employers liable for failing to prevent otherwise lawful conduct in the workplace. The Dickson ruling further reinforces that harassment in the workplace must be sufficiently severe and pervasive to sustain a cause of action, and that offhanded comments, isolated incidents, and teasing that an employee perceives as harassing are not actionable if they fail to reach this level.

Timothy D. Reuben *is the founding principal of Reuben Raucher & Blum, a litigation boutique located in Westwood. He handles matters at both the trial and appellate level and in arbitration and specializes in complex matters including employment, real estate, intellectual property, unfair competition, and related business disputes. You can reach him at treuben@rrbattorneys.com.*

Michael N. Hirota *is an associate with Reuben Raucher & Blum. He practices in the area of employment law.*


TIMOTHY D. REUBEN
Reuben Raucher & Blum


MICHAEL N. HIROTA
Reuben Raucher & Blum

RRB
REUBEN RAUCHER & BLUM
ATTORNEYS AT LAW