

# Sexual Harassment: Employer Defenses

By Kelly Armstrong

The careers of many public figures have been affected by women who came forward with claims of sexual harassment, sometimes years after the fact. Oregon Republican Senator Bob Packwood resigned in 1995 amidst multiple complaints of sexual harassment.<sup>i</sup> Two years ago, Georgia's Tea Party candidate, Herman Cain, suspended his presidential campaign after facing similar allegations.<sup>ii</sup> Former San Diego Mayor Bob Filner resigned this year after several women accused him of sexual harassment.<sup>iii</sup> Sexual harassment continues to occur throughout the United States despite being featured regularly in the national media as the basis for professional demise. Whether or not a claim is viable often depends on the application of federal versus California law.

## **Employee Versus Independent Contractor Rights**

Last month, a New York judge ruled that unpaid interns cannot bring claims for sexual harassment because they are not employees.<sup>iv</sup> Title VII of the Civil Rights Act of 1964 does not allow individuals to bring sexual harassment claims unless they are employees, in contrast to California's Fair Employment and Housing Act (FEHA).<sup>v</sup> While independent contractors are technically not eligible to bring sexual harassment claims under federal law, it can be difficult to establish they are not actually employees based on the strict legal requirements. If an employer attempts to avoid liability by claiming the plaintiff was an independent contractor, an attorney may seek to establish they were actually an employee in order to bring a sexual harassment claim under Title VII.<sup>vi</sup>

## ***Ellerth/Faragher* Defense Versus Avoidable Consequences Doctrine**

Employers also rely on federal law to circumvent liability when employees do not make sexual harassment complaints to the employer before filing a lawsuit. The *Ellerth/Faragher* defense allows the employer to avoid liability altogether under federal law for a supervisor's harassment of an employee by proving: (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of the preventive or corrective opportunities provided by the employer, or to avoid harm otherwise.<sup>vii</sup> Under Title VII, an employee must complain of sexual harassment by a coworker or manager to their employer and provide them with an opportunity to stop the unlawful conduct. A lawsuit may not be filed unless the unlawful acts continue after an employee complains.

Practitioners may review their state sexual harassment laws to see if they are more favorable to employee rights. FEHA provides more protections to California employees than Title VII. California Government Code section 12940(j)(1) provides that an employer is strictly liable for acts of sexual harassment committed by a supervisor.<sup>viii</sup> Therefore, an employer's strict liability arises regardless of an employer's own lack of knowledge or its attempts to remedy the situation.<sup>ix</sup>

While California law does not include the *Ellerth/Faragher* defense, it does have the avoidable consequences doctrine. However, the avoidable consequences doctrine is not a defense to liability under California law. An avoidable consequences defense requires that the employer show that: (1) the employer took reasonable steps to correct and prevent the harassment; (2) the employee unreasonably failed to use those corrective and preventive measures; and (3) reasonable use of the employer's procedures could have prevented at least some of the alleged harm.<sup>x</sup>

Even if the avoidable consequences doctrine applies, it would only potentially reduce a plaintiff's damages against an employer and does not preclude damages altogether. Under the doctrine, employers are still strictly liable for compensable harm by a supervisor that a sexually harassed employee could not have avoided through reasonable effort.<sup>xi</sup> "An employee's failure to report harassment to the employer is not a defense on the merits to the employee's action under FEHA, but at most it serves to reduce the damages recoverable. And it reduces those damages only if, taking account of the employer's anti-harassment policies and procedures and its past record of acting on harassment complaints, the employee acted unreasonably in not sooner reporting the harassment to the employer."<sup>xii</sup> An employer can avoid liability only for the harm an employee incurred after the point which the company proves that she, by taking reasonable steps to utilize the company's established complaint procedures, could have caused the harassing conduct to cease. The company remains liable for any compensable harm a plaintiff suffered before the time at which a manager's harassment would have ceased. Moreover, when other managerial employees are aware of a supervisor's harassing acts toward female employees who do not take action to prevent the harassment, the avoidable consequences doctrine is unavailable to employers.

Reasonableness of an employee's efforts is judged in light of the situation existing at the time and not with the benefit of hindsight.<sup>xiii</sup> "The standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other areas of law."<sup>xiv</sup> "Deciding when a harassed employee first suffered compensable harm and when a reasonable employee would have reported the harassment will in many instances present disputed factual issues to be resolved by application of practical knowledge and experience."<sup>xv</sup>

Another way to establish that the avoidable consequences doctrine does not apply is to argue that the employer failed to fulfill its responsibilities in maintaining a workplace free of sexual harassment. Even if an employer has anti-harassment policies in place, many employers do not: (1) ensure that their policies are enforced; (2) encourage employees to come forward with complaints of unwelcome sexual conduct; or (3) respond effectively to complaints. A remotely-located human resources department, not in the same place where the plaintiff works, suggests a weaker presence. Witnesses who complained of any type of unlawful conduct, including sexual harassment, which human resources failed to adequately address further illustrates ineffectual policies and a pattern and practice of inappropriate response in general. It also explains why employees would hesitate to make subsequent complaints.

### **Informal Efforts to Stop Harassment Mitigates Complaint Delays**

An employee's delay in complaining to the company resulting from their own informal efforts must be evaluated in determining whether the employee acted reasonably.<sup>xvi</sup> If an employee knows that other employees complained of unlawful conduct to managers who did not take any action in response, it mitigates delays in complaining. Many employers have workplace cultures which discourage complaints by employees. An employee may also complain to the harasser directly that their conduct makes them uncomfortable such that they should cease all inappropriate conduct immediately. If the harasser is a manager who does not stop acting in an inappropriate sexual manner after the employee complains to them, the employee may be deemed to have complained to management preventing an avoidable consequences defense.

### **Failure to Prevent Sexual Harassment**

The FEHA also creates an affirmative duty for employers to prevent or remedy the sex harassment. Cal. Gov. C. § 12940(k). California law requires employers to take "all reasonable steps necessary to prevent discrimination and harassment from occurring." *See* Gov. C. §12940(k). Moreover, employers are required to display information regarding their sexual harassment policies, as well as distribute such information to employees. *See* Gov. C. §19950. Managers' knowledge regarding the hostile work environment created by the harasser places the employer on notice of the harassing conduct. An employer's failure to conduct any investigation or take any action despite their knowledge of the unlawful conduct subjects it to liability due to its failure to prevent subsequent harassment. It also portrays an indifferent company culture, which can mitigate an avoidable consequences doctrine defense.

### **Proving Credibility Due to Delays in Reporting Sexual Harassment**

Employers routinely claim that employees' sexual harassment complaints are not credible due to the length of time from when the alleged sexual harassment occurred to when the employee complained. Many employees are afraid to complain because they do not want to lose their jobs. A number of female employees who are sexually harassed by their bosses are single parents who need to continue to support their children by keeping a roof over their head and food on the table. Since many employees who complain are ultimately terminated, their fears are not misplaced. Even if an employee delays complaining to management, their harasser may have already subjected them to significant unlawful conduct early in their employment, which was sufficiently severe and/or pervasive to cause emotional distress.

Employers attempt to establish that complaining employees are not credible because they took so long to report the sexual harassment. Retaining a psychological expert to explain how the history of the plaintiff and their psychological mindset prevented them from complaining earlier can reinforce the plaintiff's credibility. Many sexual harassment victims come from backgrounds of victimization and abuse. They are susceptible to predators often allowing themselves to be taken advantage of due to low self esteem and fear of losing their jobs. A psychological expert can examine the client to determine if they are able to explain the backgrounds and mindset of the victim. Their behaviors and attitudes may be explained through Stockholm Syndrome. Four conditions "serve as the foundation for the development of

Stockholm Syndrome.”<sup>xvii</sup> The factors are: (1) “The presence of a perceived threat to one’s physical or psychological survival and the belief that the abuser would carry out the threat;” (2) “The presence of a perceived small kindness from the abuser to the victim;” (3) “Isolation from perspectives other than those of the abuser;” and (4) “The perceived inability to escape the situation.”<sup>xviii</sup> A significant amount of time, effort and expense may be required to explain the psychological circumstances of the emotional distress of the victim, but is ultimately valuable in maximizing client recovery.

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<sup>i</sup> (September 8, 1995) “The Packwood Resignation”. *New York Times*.

<sup>ii</sup> Oliphant, James (December 3, 2011). “Herman Cain drops out of presidential race”. *Los Angeles Times*.

<sup>iii</sup> Davis, Rob and Nagourney, Adam (October 15, 2013). “Ex-Mayor of San Diego Pleads Guilty to Charges of Sexual Harassment”. *New York Times*.

<sup>iv</sup> Beekman, Daniel (October 10, 2013) “Unpaid interns cannot sue for sexual harassment: judge” *New York Daily News*.

<sup>v</sup> *Lutcher v. Musicians Union Local 47* (9thCir.1980) 633 F.2d 880, 883; California Govt. Code section 12940(j)(1); CACI No. 2521A.

<sup>vi</sup> *Donovan v. Sureway Cleaners* (9thCir.1981) 656 F.2d 1368, 1370; *see also*

<http://www.eeoc.gov/policy/docs/metropol.html>.

<sup>vii</sup> *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 764-65; *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 806.

<sup>viii</sup> 2 CCR § 7286.6(b); *State Dept. of Health Services v. Superior Court (McGinnis)* (2003) 31 Cal.4th 1026, 1041.

<sup>ix</sup> *See e.g. Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1003.

<sup>x</sup> *State Dept. of Health Services v. Superior Court (McGinnis)* (2003) 31 Cal.4th 1026, 1043; *see also* CACI No. 2526.

<sup>xi</sup> *Myer v. Treatwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421.

<sup>xii</sup> *State Dept. of Health Services v. Superior Court (McGinnis)* (2003) 31 Cal.4th 1026, 1049.

<sup>xiii</sup> *Id.* at 1043-44; *see also* CACI No. 2526.

<sup>xiv</sup> *Id.* at 1044 (citing *Green v. Smith* (1968) 261 Cal.App.2d 392, 396).

<sup>xv</sup> *Id.* at 1044.

<sup>xvi</sup> *Id.* at 1044-45.

<sup>xvii</sup> Daniel Goleman (October 22, 1991) “Sexual Harassment: It's About Power, Not Lust” *New York Times*.

<sup>xviii</sup> *Id.*