

## Reminder: Employers Face Liability For Sexual Harassment Committed By Non-Employees

In *M.F. v. Pacific Pearl Hotel Management LLC*, Case No. D070150 (October 26, 2017), the California Court of Appeal revived a case in which an employee, who had been raped by a trespasser on the employer's premises, sued her employer under the California Fair Employment and Housing Act (FEHA) for sexual harassment by a non-employee and for failure to prevent such harassment. The court concluded that the allegations overcame the workers' compensation exclusivity doctrine.

### Governing Law

The FEHA prohibits employers from harassing employees based on a protected characteristic and, in some circumstances, attributes liability to the employer when the harassment is committed by a co-worker. The FEHA also specifically makes employers liable for the sexual harassment of its employees committed by non-employees "where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action." The FEHA also provides that when claims involve the acts of non-employees, "the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered." (Govt. Code § 12940(j)(1).)

The FEHA also requires employers to take all reasonable steps to prevent harassment from occurring. (Govt. Code § 12940(k).)

### The Case Facts

The plaintiff/housekeeper alleged particularly egregious facts: A trespasser went to the hotel room where she was working and raped her. The assault continued for more than two hours. During that time, no one came to check on her whereabouts.

Prior to the rape, a hotel engineering manager had seen a drunk trespasser wandering around the hotel buildings, but did not ask the trespasser to leave or report him to the police or housekeeping management. The trespasser approached housekeeping staff while he walked around the hotel property. On the first two occasions, the trespasser offered housekeepers money in exchange for sexual favors. After the second instance,



by Lisa M. Pooley & Emily Leahy



the housekeeper reported the incident to housekeeping management. In response, a housekeeping manager notified other housekeeping managers of the trespasser's activities and location. The managers checked certain areas of the hotel, but did not check the floor where the plaintiff was working.

The employee sued for sexual harassment and failure to prevent sexual harassment. The crux of the complaint was that the employer violated the FEHA by allowing the trespasser to sexually harass the employee and by failing to take reasonable steps to prevent the sexual harassment from occurring. The employer sought to have the case dismissed on the ground that the employee had not pleaded sufficient facts to show the employer knew or should have known about any conduct by the trespasser requiring action by the employer or putting the employer on notice a sexual assault might occur. The employer argued that the claims were barred by the workers' compensation exclusivity doctrine. The trial court agreed and dismissed the case.

### **The Appellate Court Decision**

The appellate court reversed the trial court as to both claims. To start, the court found that even if the employer may not have had any responsibility to its housekeeping employees under the FEHA before the trespasser appeared on the hotel property, it could have such responsibilities after the trespasser appeared, particularly after the trespasser began confronting and aggressively propositioning housekeeping employees for sexual favors.

Likewise, the court ruled that even though the trespasser's initial harassment was not directed at the employee, the employer still could have responsibilities under the FEHA toward her. The court stated that: "If an employer knows a particular person's abusive conduct places employees at unreasonable risk of sexual harassment, the employer cannot escape responsibility to protect a likely future employee victim merely because the person has not previously abused that particular employee."

Accordingly, the court reversed the dismissal of both the sexual harassment claim and the failure to prevent harassment claim and sent the case back to the trial court for further proceedings. The court did not opine on whether the claims ultimately had merit.

### **Employer Takeaway**

Although the facts of this case are extreme, the case serves as a reminder that employers may be responsible for sexual harassment committed by non-employees, including customers, passengers, clients, and patients. Especially given the recent string of high profile examples of sexual harassment, employers should seek to prevent and address all sexual harassment in the workplace, including by non-employees. Employers should review their sexual harassment policy to make sure it includes non-employee harassment, and train supervisors regarding how to respond to employee complaints about non-employees in the workplace. As this case underscores, employers must take appropriate action promptly to address non-employee sexual harassment.

For more information, please contact:

**Lisa M. Pooley**, Partner  
415-995-5051  
lpooley@hansonbridgett.com

**Emily Leahy**, Counsel  
415-995-5155  
ELeahy@hansonbridgett.com