

## EMPLOYMENT LAW UPDATE

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### ***The Amendment To The California Fair Employment and Housing Act Did Not Impose Retroactive Liability On Employer For Sexual Harassment By Non-Employee.***

***Carter v. California Department of Veterans Affairs***  
04 C.D.O.S. 7511 (August 17, 2004, Cal.App. 4th Dist.)

*By Jason A. Geller*

Plaintiff Helga Carter worked as a nurse in a veterans residence facility administered by the Department of Veterans Affairs. Carter sued the VA for sexual harassment based on conduct of one of the patient residents of the facility.

The trial court granted judgment in favor of Carter from which the VA appealed. The Court of Appeal reversed on the basis that the Fair Employment and Housing Act ("FEHA") did not impose liability on an employer for the harassment perpetrated by a client or customer, not an employee. Eventually, the California Supreme Court agreed to consider that decision. While this case was pending before the California Supreme Court, the California legislature amended FEHA to expressly impose liability on an employer for the harassment by *non*-employees. In view of the amendment, the issue in this case was whether the amendment would apply retroactively to this case, which was pending before the amendment was made.

The Court of Appeal concluded that the amendment did *not* apply retroactively to Carter's lawsuit. The Court reviewed provisions of FEHA that existed before the amendment, including the amendment itself in reaching its decision. The Court of Appeal rejected Carter's arguments in holding that the amendment did not clarify existing law but rather created a significant change in the law. The Court of Appeal concluded that the amendment could not be applied retroactively because it imposed new and significant liabilities on employers of which the VA had no knowledge at the time Carter had filed her lawsuit. Had the VA been aware of this new potential liability, it may have acted differently to prevent the alleged harassment from occurring. The Court reasoned that it would be unfair to impose a substantial new liability on the VA about which it had no prior notice.

This decision is welcomed by California employers who are facing pending lawsuits based on alleged harassment by third parties that the plaintiff had filed

before 2003 when the amendment was enacted.

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