

## EMPLOYMENT LAW UPDATE

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***Holly D. v. California Institute of Technology (9<sup>th</sup> Cir., August 18, 2003)  
03 D.J.D.A.R. 9217***

***Employer Is Entitled To Summary Judgment Where It Shows That It Exercised  
“Reasonable Care” To Prevent Harassment.***

*By Jason A. Geller and Juan C. Araneda*

The Ninth Circuit evaluated the sufficiency of evidence to support relief under a “tangible employment action” theory against an employer under Title VII of the Civil Rights Act, finding that the plaintiff had not presented sufficient evidence to withstand summary judgment. The Court observed that, even though a tangible employment action was not proven, the plaintiff could still recover for severe and pervasive sexual harassment that results in a hostile work environment. However, the employer was able to avoid liability by establishing the elements of the “reasonable care” affirmative defense.

Plaintiff Holly D. was employed by California Institute of technology (“Caltech”) as a Senior Administrative Secretary. In October 1996, she was promoted to Senior Division Assistant for Professor Wiggins. The move entailed a six month probationary period. Holly D. claimed that during the probationary period Wiggins occasionally looked at her breasts, buttocks, and made sexual comments -

although he eventually ceased these activities when Holly D. told him she was not interested. Two months after her probationary period, Holly D. received a negative job evaluation. She claimed that she received the negative evaluation because of her failure to respond positively to Wiggins’s sexual advances. She subjectively believed that if Wiggins were to request sex with her, she would have to comply to keep her job. A month after her evaluation, Holly D. began to engage in sexual relations with Wiggins that continued for more than a year.

On June 15, 1999, Holly D. filed a sexual harassment claim with the EEOC. Although she knew that Caltech had a sexual harassment policy, she did not report the harassment to Caltech before she filed with the EEOC. Once notified from the EEOC of her allegations, Caltech promptly formed a neutral committee to conduct an internal investigation, and ultimately found insufficient evidence of sexual harassment.

On August 24, 1999, Holly D. filed suit against Wiggins and Caltech in California state court, alleging, among other things, sexual harassment in violation of Title VII and the California Fair Employment and Housing Act. Caltech removed the case to the Federal District Court and moved for summary judgment, contending that Holly D. had no evidence of any “tangible employment action” to support her claims. Caltech also asserted an affirmative defense that it exercised reasonable care to prevent harassment.

The District Court granted partial summary judgment. It found that Holly D. had not suffered a “tangible adverse employment action” because she remained in her position, received salary increases and was not denied any tangible employment benefit. Since there was no “tangible employment action,” the affirmative defense that the employer exercised reasonable care to prevent harassment was available to Caltech and barred her claims. Holly D. appealed.

The Ninth Circuit Court of Appeal found that Holly D. did not present sufficient evidence of Wiggins’ implicit threats to discharge her or condition her employment on her submission to his sexual demands. There was no evidence that Wiggins used physical force to coerce sex or that he explicitly threatened her with job-related consequences if she did not have sex with him.

The Ninth Circuit also found that Caltech was not liable under a “hostile work environment” theory because it established the elements of the “reasonable care” affirmative defense.

To avail itself of the defense, Caltech had to show both that (a) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by it to avoid the harassment.

Caltech showed that it had promulgated a written policy which defined prohibited behavior, identified contact personnel and established procedures to investigate and resolve any claims. Caltech also showed that it publicized this policy and that it conducted periodic training on sexual harassment. Moreover, the Court found that Caltech’s investigation of the alleged harassment was prompt and reasonable.

Further, Caltech showed that Holly D. sought no relief from Caltech for more than a year after the alleged harassment started. The Court observed that such a showing of an unreasonable failure to use the complaint procedure normally suffices to satisfy the employer’s burden under the second prong of the “reasonable care” defense.

This case is instructive to California employers who are evaluating hostile work environment claims for potential summary judgment. The existence of a written policy describing prohibited conduct in the workplace, coupled with established procedures and a prompt response to claims of harassment, may avail employers of the “reasonable care” affirmative defense when a plaintiff employee does not take advantage of complaint procedures.

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