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## 'Supervisor' Defined Broadly in Harass Case

By: Jenna Ward
Reporter

A California appellate court has for the first time defined what makes someone a supervisor when it comes to sexual harassment – and not in the way employers were hoping.

The Second District Court of Appeal on Tuesday rejected a narrow definition that would have confined the description to a person who has the power to hire, fire and promote. Instead, the court laid out a broad, five-point standard to help determine what makes someone a boss, as opposed to a co-worker.

Trial courts were instructed to consider whether the person:

- Supervises the day-to-day work environment.
- Has the title "supervisor" or "manager."
- Oversees, evaluates or trains an employee.
- Recommends discipline.
- Has the power to increase or decrease work duties.

The distinction between supervisor and co-worker is crucial:

Under the state's Fair Employment and Housing Act, employers are strictly liable for quid pro quo sexual harassment or a hostile work environment when the actions are committed by a supervisor. But when a co-worker is the offending party, the issue becomes what the company knew and what it did about it.

Federal courts have held employers strictly liable for quid pro quo offenses only, a discrepancy that California defense attorneys have repeatedly pointed out. But Tuesday's ruling in *Lai v. Prudential Insurance*, 98 C.D.O.S. 1923, reiterates that state courts also hold employers liable for hostile environment claims.

Amicus curiae briefs from the California Chamber of Commerce and the California Employment Law Council argued that state courts have "misconstrued" the language of FEHA, and employers should not automatically be held liable for hostile work environment claims.

The court flatly rejected the argument.

"The assertions are simply incorrect," wrote Long Beach Municipal Court Judge G. William Dunn, sitting by designation. "The reasoning which underlies the FEHA is solid." Justices Vaino Spencer and Reuben Ortega concurred.

"The employer has a duty to provide a safe workplace," wrote Dunn. "A strict liability role provides added incentive for the employers to police the conduct of its supervisory employees and, in addition, increases the probability that the harassed victim will be compensated for the harm suffered."

*Lai* began in 1990, when two female sales agents filed claims of rape and sexual harassment against the male "sales manager" in the Alhambra office of Prudential Insurance co. of America.

The company investigated, found the man had sexual contact with the women, and fired him one week later. But Prudential maintained he was not a supervisor because he had no authority to hire, fire or transfer the 17 agents he oversaw on a day-to-day basis.

The dispute made federal case law in 1994, when the Ninth Circuit U.S. Court of Appeals held that Prudential could not force the women into arbitration because the agreement to do so had not been knowing.

Prudential lawyer Kenwood Youmans of Seyfarth, Shaw, Fairweather & Geraldson in Century City did not return a call seeking comment Tuesday. But a*micus* author Paul Grossman of Paul, Hastings, Janofsky & Walker called the sexual harassment policy in California "preposterous."

"There is absolutely no reason for the California rule to be different from the federal rule," he said. "The [California] Supreme Court has never ruled on strict liability. Hopefully this will be the case they do….The issue cries out for resolution."

Plaintiffs attorney, Carla Barboza, a Los Angeles solo practitioner, said she was pleased the court weighed in on the supervisor issue.

"It's such a common defense to suggest the alleged perpetrator is not a supervisor and escape liability," she said.

But she added, "The decision should not be a surprise. It's based on what has been California authority for some time."

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