

Manager/Supervisor Risk Management

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A twice weekly e-mail training for YCPARMIA members

TOPIC: EMPLOYMENT LIABILITY – WHO CAN BE LIABLE?

Under the federal and state laws employment claims can be made by employees, applicants, and in some cases independent contractors and even non-employees. The plaintiffs in a civil suit would come from one of these classes.

The suit would be brought against the defendants, and the list of who can be sued varies depending on whether the claim is brought under the federal EEOC or the State's DFEH. It also varies depending on whether you are suing for discrimination, retaliation, or harassment. The common theme is that the employer can always be sued, and the individuals that did the discriminating, retaliating and harassing usually cannot. This is a great generality, and there are significant exceptions. The EEOC is directed at "employers"; the DFEH is broader. A real distinction comes in the area of harassment. The DFEH allows the plaintiff to sue, in addition to the employer, the individual supervisor that allegedly harassed them. There are also tort theories in addition to DFEH or EEOC that can be brought against co-workers.

What duty does an employer have to defend and indemnify an employee named as a defendant in an employment action? An earlier topic pointed out that the California Government Code creates a duty for the employing entity to defend and indemnify its employees for civil actions that arise out of their employment. A 1995 California Supreme Court case held that a Sheriff Sergeant's sexual harassment of two female deputies, while happening at work, did not fall within the scope of his employment, and therefore the County had no duty to defend or indemnify him. His job duties, in effect, did not include sexually harassing employees, and the county received no benefit from his on-the-job conduct. The County was not off the hook; the law made them strictly liable for the inappropriate acts of their supervisor, and they had to pay their share of the damages and expenses. But the harassing supervisor's personal assets were also exposed.

As a practical matter YCPARMIA has consistently defended both the employer and individuals that are sued for discrimination, harassment and/or retaliation. While it has never happened, if later discovery revealed that there were inappropriate actions that fell outside the scope of employment we would reconsider our position on defense and indemnification.

What should be taken from this? It is important to understand that these claims are very different than, for instance, a car accident where insurance covers the adverse damages. Employment actions can be very destructive to all involved. Careers are ended because of inappropriate activities or groundless accusations. Relationships at work and away can be adversely affected. The productivity and teamwork of the involved unit can be destroyed. Personal assets can be lost to legal expenses and judgments. And, often the conflict never seems to end.

Next topic: Retaliation