

# Federal and State Discrimi

By Karl Gerber

**N**ot long ago, an employment attorney with a California Fair Employment and Housing Act case could look to federal Title VII or Americans with Disabilities Act law in order to interpret the state statute. *Sandhu v. Lockheed Missiles & Space Co.*, 26 Cal.App.4th 846 (1994); *Mixon v. Fair Employment & Housing Comm'n.*, 192 Cal.App.3d 1306 (1987).

While California courts can look to federal decisions when interpreting and applying the FEHA, federal case law does not bind them. *Johnson Controls v. Fair Employment & Housing Comm'n.*, 218 Cal.App.3d 517 (1990); Government Code Section 12993(a).

In the last few years, changes in state law have shown that federal discrimination laws are not always analogous to the FEHA; in these situations, state courts should not rely on them. This divergence is most prevalent in the area of sexual harassment and disability discrimination. The state Legislature and the California courts have drawn into question whether state courts may rely on the federal disabilities act and Title VII when interpreting the FEHA.

In 2001, the Legislature adopted strong language indicating that the FEHA is much more expansive than federal disabilities law. "The legislature finds and declares as follows: (a) The law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 ... this state's law provides additional protections." Government Code Section 12926.1(a).

Sections 12926.1(c) and 12926.1(d)(2) only require that the disability "limit" a person's activity. They do not require a "substantial" limitation (*Colmenares v. Braemar Country Club*, 29 Cal.4th 1019

(2003)), as does the federal disabilities law. Section 12926.1(c) specifically says that this distinction is intended to result in broader coverage under state law than under federal law.

Issues also have arisen as to whether courts can use federal Equal Employment Opportunity Commission regulations when interpreting the FEHA. In *Cassista v. Community Foods Inc.*, 5 Cal.4th 1050 (2002), the court held that EEOC regulations are useful when the state statute is molded on the federal law upon which the EEOC regulations are based. However, where the particular FEHA statute is not sufficiently molded on the federal law, the federal regulations cannot control the meaning under state law. *Bagatti v. Department of Rehab.*, 97 Cal.4th 344 (2002).

One example of a nonanalogous EEOC regulation occurred in *Carter v. California Dep't of Veteran's Affairs*, 2003 DJDAR 6009 (June 4, 2003). *Carter* held that EEOC regulations making employers liable for the sexual harassment of employees by a non-employee are based upon federal regulations that have no equivalent in the FEHA.

In the sexual-harassment arena, the divergence in state and federal law regarding the requirement of a loss of tangible job benefits and the issue of strict liability for supervisors has led to entire lines of nonanalogous authority.

Before *Burlington Industries Inc. v. Ellorh*, 524 U.S. 742 (1998), the federal courts had held that Title VII did not make employers strictly liable for harassment by supervisors. See *Miller v. Mansell's Int'l Inc.*, 901 F.2d 583 (9th Cir. 1993).

During the window between *Miller* and *Burlington*, California courts went in a different direction, interpreting the FEHA, holding that employers were strictly liable for the

harassing acts of supervisors. See *Kelly-Zurian v. Wohl Shoe Co.*, 22 Cal.App.4th 397 (1994); *Matthews v. Superior Court*, 34 Cal.App.4th 598 (1995); *Page v. Superior Court*, 31 Cal.App.4th 1206; *Janken v. GM Hughes Elecs.*, 46 Cal.App.4th 55 (1996); *Fiol v. Doellstedt*, 50 Cal.App.4th 1318 (1996), rev. denied, 1997 Cal.LEXIS 838 (Cal. Feb. 19, 1997).

In 1998, the state Supreme Court's decision in *Reno v. Baird*, 18



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Cal.App.4th 640 (1998), adopted the logic of the state appellate courts and held that Government Code Section 12940(h)(1) (now Section 12940(f)(1)) applied a strict-liability standard to employers where a supervisor sexually harasses an employee.

**W**hen *Burlington* came before the U.S. Supreme Court, the court intended for federal Title VII law to catch up to state law (such as that of California) by creating vicarious liability if a supervisor sexually harassed a subordinate. However, the court did not want to make any drastic strides. So the court adopted Title VII vicarious liability with certain limitations not present in state court constructions

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discrimination laws. The limitations include requiring of tangible job benefits if the plaintiff did not complain about the harassment and allow the employer the opportunity to stop it or if the harassment was minimal. The *Burlington* limitations make sense because the states intended that legislation similar to Title VII be more inclusive remedial and offer more options than did Title VII. This is because the states adopted such legisla-

Title VII cases, since the federal statute has no specific language about supervisors, the case does not apply to the FEHA because the state law contains specific language about supervisors and was intended to make employers strictly liable for supervisory harassment.

In *Murray v. Oceanside Unified School District*, 26 Cal.App.4th 1062 (2000), a FEHA harassment case, the court held that "[u]nder 12940 subdivision (h)(1) [now (j)(1)], 'Loss of tangible job benefits shall not be necessary in order to establish harassment.' To benefit from the statutory protections, there is no requirement that adverse employment consequences such as termination of employment be suffered first."

AB2222, enacted on Sept. 30, 2000, adds an expanded definition of "supervisor" to Section 12926(r) to make companies strictly liable for a supervisor's sexual harassment, whether or not the harassment resulted in loss of tangible job benefits. As a result, a *Burlington* defense — requiring loss of a tangible job benefit in a no-complaint case against a supervisor — is in direct conflict with the plain meaning of Section 12926(r).

Thus, *Burlington* conflicts with *Murray*, the FEHA's legislative intent, the declaration of Section 12940 and the appellate cases holding employers strictly liable for the sexually harassing acts of supervisors.

The state Supreme Court is set to review *McGinnis v. State Department of Health Services*, 113 Cal.Rptr.2d 878 (Cal. App. 2001), rev. granted, 117 Cal.Rptr.2d 166 (Cal. Feb. 13, 2002). *McGinnis* held that an employer's knowledge of a supervisor's harassment was irrelevant. The appellate court quoted Section 12940(j)(1) and decided that interpre-

tations of Title VII were not analogous. Thus, under the appellate decision in *McGinnis, Burlington* is not an affirmative defense to such a cause of action. It will be interesting to see if the court affirms *Murray* and decides with finality that Title VII analogies are inappropriate when considering FEHA strict liability sexual harassment issues.

Attorneys also should note that Title VII differs from Section 12940 in that Title VII does not mention sexual harassment specifically but Section 12940(j) does. As early as 1984, in an amendment to the FEHA, the Legislature clearly declared that the statute was intended to eliminate harassment in the workplace. The FEHA guidelines further reflect these principals by declaring sexual harassment unlawful. See 2 C.C.R. Sections 7291.1(f)(1), 7287.6(b). Additionally, Title VII does not mention supervisory liability for harassment, but Section 12940(j)(1) does.

Furthermore, California courts have interpreted the FEHA to be broader than Title VII. *Murillo v. Rite Stuff Foods*, 65 Cal.App.4th 833 (1998). Thus, it is questionable whether a federal interpretation of Title VII limiting liability in a sexual-harassment context would apply to the FEHA.

As Title VII, the Americans with Disabilities Act and the FEHA mature with every case, legislative enactment and regulation, they are becoming like brothers who are looking less and less alike as they grow — and have less and less in common.

**In federal and state discrimination law, it is prevalent of sexual harassment and disability on.**

See, for example, Section 12940(a) (courts should construe the statute as liberally as possible to accomplish its purposes).

California courts should not conflict with federal decisions when interpreting the FEHA when the state's language indicates a distinct legislative intent that is different from federal law. *Page v. Superior Court*, 31 Cal.4th 1206 (1995).

Usually, Title VII cases should be consulted when dealing with supervisory liability sexual harassment under the FEHA. The Legislature added Sections 12940(h)(1) (now (j) and 12926(r) specifically to make supervisors liable for harassment. Title VII does not have a similar counterpart. The *Burlington* is good law for

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