

REORGANIZING AND DOWNSIZING

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In an age of corporate mergers and reorganizations, major reductions in a company's work force are becoming headline grabbing news throughout the country. Often left in the wake of those reductions are competent, senior employees who feel their company loyalty has been betrayed and who are taking their anger to lawyers. Even those who have shorter track records with companies are crying foul when they become victims of a lay-off. As a result, allegations of wrongful termination are keeping court dockets busy with claims that the employer's given reasons for termination are a pretext for impermissible discrimination and/or harassment and constitute a breach of an implied-in-fact contract to terminate only for cause or a breach of the covenant of good faith and fair dealing. It is also increasingly common to find allegations of negligent hiring and retention of the supervisor responsible for terminating the plaintiff. While the great majority of such cases settle, the cost of defense can mean further cuts into an employer's work force to cover unwieldy legal fees; if a case does not settle, there is often the threat of punitive damages and attorneys fees.

Bearing in mind that reductions in the size of the work force always carry a risk of potential litigation, it is important to structure reductions in force ("RIFs") with particular business goals in mind. Employers may also be able to limit the costs of defending wrongful termination claims through predispute releases or mandatory arbitration agreements. What follows are some practical hints on conducting reductions in force and on how to maximize the chances that releases will be upheld by the courts. As discussed below, the courts are split on whether an employee can be made to forego his or her day in court by waiving various statutory protections.

Objective Criteria for Termination

Reductions in force often rely less on an employee's longevity with the company or on his past performance, than on an assessment of the skills and specialized knowledge which the company will need to survive and/or thrive in tomorrow's market. (Note that this generalization does not apply to most employees who are protected by labor unions, which dictate that less senior employees must be terminated first.) The focus is first and foremost on the needs of the company and only then on whether particular individuals are a good "fit."

It is particularly important that employers develop objective criteria by which to assess each employee's value to the company and that these criteria be consistently applied to all employees who are eligible for the RIF. Such criteria may range from interpersonal relations to technical versatility. Whatever the factors are by which employees are evaluated, the factors should advance a legitimate business objective and be developed and analyzed with the help of experienced human resource personnel.

In developing a set of criteria by which to rank employees, employers should not assume that their meaning is self-explanatory to all affected employees. Those who are evaluating others for possible lay-off should be clear about what the company is looking for in its inclusion of particular factors. For example, a general category concerning "people skills" may include judgments about customer relations, co-worker interactions, or ability to manage. If all of these types of relations are subsumed by the overarching category of "people skills," this assumption should be explained to those applying the criteria to individual employees. If the category proves too broad, it may require refinement, or the development of sub-sets of factors. Employers should encourage feedback on problems which the ranking personnel are having in using the proposed evaluation matrix.

When employees are being assessed to predict their relevance to a company's future needs, employers should try to validate the consistent use of the ranking criteria. This can be done by making sure that lay-off decisions are not left in the hands of just one person or evaluator. Management teams or groups of supervisors who are in a position to best determine what the company's future project or market needs require should have a collective say in the retention or dismissal of various individuals. Such round-table discussions can best capture what the impact of particular personnel decisions may be on the organization as a whole. For example, an employee whose continuing usefulness to the company may not be apparent to one project manager may have a particular skill set which is very much in demand by another project manager. The goal is to maximize the company's business purpose of retaining an effective work force, while minimizing the chances that lay-off decisions can be viewed as arbitrary or somehow impermissibly discriminatory.

It is important for employers to try to show that their reductions in force have a business neutral purpose and to assure that employees themselves understand why they are being terminated. Each employee should have an opportunity to appeal the lay-off decision and the method of appeal should be clearly delineated and consistently applied. When terminated employees complain about any perceived unfairness in their termination, the basis for that perception should be explored. Claims of discrimination or harassment should be investigated and the result recorded. The absence of any complaint about impermissible discrimination or

harassment can help defeat later claims that the company somehow knew of and ratified a supervisor's allegedly discriminatory animus in selecting a particular worker for termination.

The Threat of Age Discrimination

Despite a company's best efforts to make objective, and consistently apply, its termination criteria, reductions in force may have a disparate impact on older workers, especially when there is a need for workers with newer technological skills. That older workers are disproportionately affected, however, does not, in and of itself, defeat an employer's claim that a reduction in force was motivated by business necessity. Indeed, many courts disavow the usefulness of disparate impact analysis in the context of age discrimination claims. See, e.g., *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (an employer does not violate the Age Discrimination in Employment Act if its sole reason for terminating an employee is to avoid paying pension benefits, even if such action disproportionately affects old workers); *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S.Ct. 1307 (1996) (ADEA prohibits discrimination on the basis of age and not class membership); *Marks v. Loral Corp.*, 66 Cal.Rptr.2d 46 (1997) (employers may prefer lower paid workers to higher paid ones, even if the preference falls disproportionately on older workers). As one court has recently noted, one should not confuse "a quarrel with the merits of the company's business decision--a quarrel in which the ADEA plays no role--with a case of illegal age discrimination." *Equal Employment Opportunity Commission v. Texas Instruments Inc.*, 100 F.3d 1173, 1187 (5th Cir. 1996). However, another court recently granted class status to employees in an ADEA suit, noting that if the matrix used to evaluate employees for lay-off selection was found to violate the ADEA, all of the plaintiffs would have been victims of a discriminatory policy or plan. *Schwed v. General Electric Co.*, 1997 Westlaw 204394 (N.D.N.Y. 1997).

Human resource personnel and others who do exit interviews or who are part of the appeals process that an employee uses should be sensitive to the employee's concerns. They also need to be careful about their use of language, whether in formal communications or in casual conversation. So, for example, an employee due to be laid off for genuine business reasons may be off-handedly referred to as "excess baggage," "set in his ways," "out of touch" or "inflexible," or there may be allusions to the need for an infusion of "new blood." While these phrases are ambiguous and may be purely innocent when expressed, they can fuel an older employee's claim that the real reason for his termination was age discrimination. Indeed, the plaintiff's expert is likely to argue that such phrases are typical code words or euphemisms to describe workers who are viewed as "too old." Even if a jury does not believe that this is enough to establish liability for age discrimination, it is often enough to give the court a material issue of fact with which to deny an employer's otherwise strong motion for summary adjudication.

While most employers are aware that stereotyping women and minorities or making unflattering remarks about an employee's sex, ethnicity, or religion are unacceptable, this same awareness and sensitivity does not always exist with respect to age. As a result, employers should be urged to include such sensitivity training for their employees. This is important not only to create a proper working environment, but to avoid liability under federal or state statute.

Under the amended federal Age Discrimination in Employment Act, 29 U.S.C. §621, *et seq.*, an employee who proves age discrimination is entitled to lost wages; if a willful violation is established, he or she may collect liquidated damages equal to those lost wages. In California, state law allows workers to recover not only lost wages, but damages for emotional distress, punitive damages, and attorneys fees.

No matter how carefully a reduction in force is planned, employers know that at least some former employees will begin to think about a lawsuit, especially if they have had difficulty in securing new, satisfactory employment. The time to limit the potential for such lawsuits is before a dispute over termination arises. Releases and arbitration agreements are two possible means of curtailing court action and of eliminating the threat of punitive damages or an award of attorneys' fees.

Releases of Employers from Liability

Releases are used to "purchase" an employee's right to pursue legal claims against an employer. To be enforceable, the employer must, among other benefits, offer the terminated employee something of value to forego legal rights of action growing out of the employment relationship. Thus, employers will often offer laid-off employees an enhanced severance package in exchange for a signed release and waiver of claims.

In that releases are meant to prevent an employee's direct access to the courts or various administrative forums to pursue statutory and other legal rights, they must be carefully crafted to withstand legal scrutiny. To maximize their chances of enforceability, most state and federal jurisdictions minimally require the following three elements:

First, the release should be in writing and executed by the releasing party.

Second, the release should offer some benefit or consideration independent of that to which the employee is already entitled. So, for example, a terminated employee might be offered an enhanced pension or separation package which is contingent on a release of the right

to bring claims against the employer. By contrast, individuals who wish to preserve their right to sue an employer might still receive an ordinary severance package, but would not receive the additional benefits that those who sign the release would receive. The language of the release should make it clear that the enhanced package is in consideration of the released claims.

Third, there must be a knowing and voluntary waiver of legal rights. Whether the waiver has been voluntary and with knowledge will ultimately depend on the totality of the circumstances, with the courts looking to the following kinds of factors: (1) the releasing party's education and business sophistication; (2) the clarity and specificity of the agreement; (3) the amount of time the employee has to examine the release; (4) whether the employee had an opportunity to seek legal advice or other independent counsel; (5) whether the employee had an opportunity to negotiate the terms of the release; and (6) what the employee received in return for the waiver.

The employee should be afforded complete information on differences in the benefits which accrue to those who do or do not sign the release. The employer, in turn, should have written acknowledgement from the employee that he has reviewed and understood those differences. The more complete the information that an employee has before him or her at the time the release is signed, the more likely it is that the courts will find that the release was knowing and voluntary.

Because a release asks an employee to forfeit important legal rights, it should be expressly marked as such and placed in a distinct document; it should not be buried in other material such as an employee handbook. Similarly, the language of the release should be clear and unmistakable. Waivers of particular statutory protections should be explicitly posed, rather than alluded to in broad references to "all claims" or of all claims of discrimination or harassment.

Some statutes that protect employees' rights impose additional requirements for a valid release of the right to pursue claims. For example, under the federal Older Workers Benefit Protection Act of 1990, a release and waiver ordinarily is not binding under the Age Discrimination in Employment Act unless it minimally provides for the following, as stated at 29 U.S.C. 626(f):

- (1) the waiver is in a clearly understood writing between the employer and the releasing party and expressly references the releasing party's rights or claims under the ADEA;
- (2) the waiver does not affect claims arising after the date of the release;

- (3) there is consideration for the release beyond that to which the employee is already entitled;
- (4) the employee is advised, in writing, to seek the counsel of an attorney before executing the agreement;
- (5) the employee has at least 21 days to consider the agreement;
- (6) if the waiver is part of a termination incentive or other employment termination program offered a group of employees, the employee has at least 45 days to consider the release and the employee must be afforded information concerning the age and job titles of employees eligible for the programs;
- (7) the employee must have at least a seven day "cooling off" period to reconsider the agreement once signed; and,
- (8) the agreement does not waive the EEOC's rights and responsibilities to enforce the ADEA.

While releases theoretically preclude terminated employees from suing their former employers, employees are increasingly challenging their validity in the courts. Such changes of heart are not only exasperating for the employer, but encourage frivolous litigation by employees who believe they have nothing to lose, especially when their cases are taken on contingency. As a result, at least one court in New York has ordered that plaintiffs promise, up front, to return benefits received from their employer if the release is later found to be invalid. *Kristoferson v. Otis Spunkmeyer, Inc.*, 965 F. Supp. 545 (S.D.N.Y. 1997) (alleging sex discrimination). Thus, even if the plaintiff should fail to prevail on his Title VII (of the Civil Rights Act of 1964) claim, he would forfeit any consideration he was earlier paid. As the *Kristoferson* court stated, the purpose of this rule "is to place formerly released plaintiffs at some potential economic risk if they choose to breach the facial terms of the release," and to assure that "neither side gets a completely free ride on the expensive conveyance of legal process." 965 F.Supp. at 549.

Similarly, another court recently found that a terminated employee had ratified the terms of a release by accepting a cash payment from her former employer, even though she had not signed the release. *Somervell v. Baxter Healthcare Corp.*, 966 F.Supp. 18 (D.D.C. 1997) (alleging disability discrimination). There, the court held that an employee may not "have it both ways," by retaining both the consideration paid for a waiver of claims *and* the right to sue. In a like mode, both the Fifth and Fourth Circuits have held that while waivers found defective under the Older Workers Benefit Protection Act are voidable, they can be ratified if a worker accepts payments from a former employer. See *Hines v. ABB Vetco Gray Inc.*, ___ S.Ct. ___, No. 96-546, January 13, 1997 (letting stand Fifth Circuit opinion that failure to return severance money precluded employee from suing employer under ADEA, (See 85 F.3d 624 (1996)); *Blisten v. St. John's College*, 74 F.3d 1459 (4th Cir. 1996). In an unreported age discrimination case, a federal

district court in New York has also recently found ratification of a release by an employee who accepted and failed to return its benefits. This was despite claims of undue influence and duress. *Reid v. IBM Corp.*, 1997 Westlaw 357969, 74 FEP Cases 332 (N.D.111. 1997) (release found to meet requirements of the OWBPA).

The federal circuits are divided, however, on whether employees must tender back payment in order to pursue statutory claims. In split decisions, both the Third and Sixth Circuits have recently ruled that an employee could pursue ADEA claims when the release he signed failed to comply with the provisions of the OWBPA. *Long v. Sears Roebuck & Co.*, 105 F.3d 1529 (3d Cir. 1997); *Raczak v. Ameritech Corp.*, 103 F.3d 1257 (6th Cir. 1997). Likewise, the Seventh Circuit has held that a release which failed to comply with the legal requisites of the OWBPA was void and could not bar a subsequent ADEA suit, even though the plaintiff had not returned the payments he had received in exchange for the release. *Oberg v. Allied Van Lines, Inc.*, 1994 Westlaw 494704, 63 FEP Cases 470 (7th Cir. 1994). The Eleventh Circuit also rejected a tender-back requirement as a prerequisite to challenging the validity of a release in an ADEA case. *Forbus v. Sears Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992).

Nevertheless, in jurisdictions which have favored tender-back requirements, employers may now wish to put terminated employees on notice that they have something tangible at stake if they wish to renounce a waiver of claims which are facially addressed in a release. Ratification of even a defective release may become a basis upon which to seek a motion for summary judgment. See *Somervell v. Baxter Healthcare Corp.*, supra, 966 F.Supp. at 21-23.

Conclusion

Reductions in force are a disruptive, but necessary, fact of life for many companies today. They should be conducted with particular care so that they maximize the employer's needs and minimize claims of wrongful termination. Predispute agreements like releases and mandatory arbitration contracts can also help curtail costly litigation.

WHAT CONDUCT CONSTITUTES ACTIONABLE SEXUAL HARASSMENT?

I. DEFINITIONS.

Most sexual harassment cases are brought under two statutes: (1) Title VII, 42 U.S.C., § 2000(e) *et seq.* and (2) the Fair Employment and Housing Act, Cal. Gov. Code, § 12940, *et seq.* (FEHA). Sexual harassment is defined as unwelcome verbal, physical, or sexual behavior directed at an individual because of her, or his, gender. Such behavior includes verbal epithets, derogatory comments or slurs, as well as physical and visual insults. *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 65, 106 S.Ct. 2399; *Michaelian v. State Comp. Ins. Fund* (1996) 50 Cal.App.4th 1093, 1107, 58 Cal.Rptr.2d 133, 142, citing to *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476-477, 4 Cal.Rptr. 522, 528.

In the employment context, courts generally recognize as actionable two categories of sexual harassment: (1) "*quid pro quo*" sexual harassment; and (2) "hostile work environment" harassment.

- (1) *Quid pro quo*: This type of harassment occurs when submission to sexual conduct is made a condition for receiving concrete employment benefits.* For example, in *Nichols v. Frank* (9th Cir.1994) 42 F.3d 503, a deaf postal worker was approached by her supervisor for sexual acts. She agreed because she was afraid of losing her job. When she finally asked for a leave of absence to deal with her marital problems, her supervisor asked for oral sex before approving the leave. In this case, the Ninth Circuit found this type of conduct to be *quid pro quo* sexual harassment because there was a conditioning of the employment benefit upon some sexual act. Once *quid pro quo* harassment is established, the employer is strictly liable.
- (2) "Hostile Work Environment": In the sexual harassment context, a hostile work environment occurs when unwelcome sexual conduct (e.g. sexual advances, request for sexual favors, verbal or physical conduct of a sexual nature), has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57.

*A *prima facie* case for *quid pro quo* harassment is established if the employee shows that (1) she was a victim of a pattern or practice of sexual harassment attributable to her employer; and (2) the plaintiff applied for and was denied an employment benefit for which she was technically eligible, and for which she had a reasonable expectation. *Bundy v. Jackson* (D.C. Cir. 1981) 641 F.2d 934, 951.

II. WHAT IS THE STANDARD FOR DETERMINING WHETHER A HOSTILE WORK ENVIRONMENT HAS BEEN CREATED? - THE REASONABLE WOMAN'S PERSPECTIVE.

The Ninth Circuit Court of Appeals has held that determining whether a hostile or offensive working environment exists depends on the perspective of the reasonable victim under Title VII. In most sexual harassment cases involving female plaintiffs, this means the perspective of the “reasonable woman.” *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 875. The court found that it does not matter whether or not the harasser realized that his or her conduct creates a hostile work environment. It is the perspective of a reasonable victim of the same sex as the plaintiff that is the standard for examining whether a hostile work environment has been created. This is because Title VII is not a fault based tort scheme and is aimed at the *consequences* of an employment practice instead of the defendant's motivation. *Ellison v. Brady, supra*, 924 F.2d at 880. This focus on consequences recognizes that men and women often have different perspectives relating to sexual conduct.

Thus, a plaintiff states a *prima facie* case of sexual harassment based on hostile environment if she alleges conduct that a reasonable woman would consider sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment. This standard places the burden on the employer to educate and sensitize its work force to eliminate conduct which a reasonable victim would consider unwelcome sexual harassment. *Ellison v. Brady, supra*, 924 F.2d at 880.

Further, the conduct at issue need not be sexual in the sense of relating to sexual advances. Under EEOC guidelines, actionable sexual harassment could also include verbal or physical conduct of a sexual nature. Under cases interpreting the FEHA, actionable conduct can arise if the conduct creates a discriminatory and hostile environment based on gender. *Accardi v. Superior Ct.* (1993) 17 Cal.App.4th 341, 347-348, 21 Cal.Rptr.2d 292; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608, 262 Cal.Rptr. 842.

III. WHEN HAS A HOSTILE WORK ENVIRONMENT BEEN CREATED?

The critical issue in hostile work environment cases is the severity or pervasiveness of the unwelcome sexual conduct. Such incidents of sexual conduct should be viewed in their totality to determine whether the terms, conditions or privileges of employment have been altered to create a hostile work environment. *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 114 S.Ct. 367. In each case, the court should inquire into the overall composite effect of all the incidents on the working environment. *Hillen v. Merit Systems Protection Bd.* (Fed.Cir. 1994) 21 F.3d 1572.

Generally, the requisite severity or seriousness of the offensive conduct varies inversely with the pervasiveness or frequency of the conduct. Thus, a single extremely severe action, such as an offensive touching, may be enough to establish sexual harassment, but generally, repeated incidents create a stronger claim for hostile work environment. *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872. Verbal harassment alone may constitute a hostile work environment. It is up to the trier of fact to determine whether the nature, frequency, context, and intended target of the remarks rise to the level of harassment. Factors to be considered as a whole include the following: 1) whether the alleged harasser singled out the victim; 2) whether the victim participated in the activity; 3) the relationship between the victim and the alleged harasser; and 4) whether the remarks were hostile and derogatory.

It is always an issue as to where to draw the line between conduct that creates a hostile work environment and conduct that may be bothersome, but does not constitute a hostile work environment. The outcome of these cases are fact specific and depend on the totality of the circumstances. What follows are a few cases where the facts supported a finding of hostile work environment and cases where they did not.

In *Page v. Superior Court (3NET Systems, Inc.)* (1995) 31 Cal.App.4th 1206, 37 Cal.Rptr.2d 529, plaintiff's supervisor regularly asked the plaintiff to perform oral sex on him, masturbated in front of her and asked if it turned her on. When the plaintiff complained to the company president, nothing was done. After taking a one month leave of absence for stress, she was terminated. The court held that such conduct was harassment and constituted retaliation against the plaintiff.

In *Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 27 Cal.Rptr.2d 457, plaintiff's supervisor repeatedly touched the plaintiff on her breasts, grabbed her buttocks and her crotch, and made many sexual comments about her over a period of three years. In this case, the court said that the conduct was not just limited to verbal abuse, or isolated episodes. Therefore, it easily met the test of a workplace permeated with discriminatory intimidation, ridicule and insult so severe and pervasive as to alter the conditions of the victim's employment and to create an abusive working environment.

In *Steiner v. Showboat Operating Co.* (9th Cir.1994) 25 F.3d 1459, plaintiff worked as a floor person in a Casino. Her supervisor, and vice president of the casino called her names such as "dumb f____ broad", and "c__t." By his own admission, he once yelled at her for giving a free breakfast to two casino customers, saying "Why don't you go in the restaurant and suck their d____s while you are at it if you want to comp them so bad." The court held that although simple insults would not suffice, insults such as these that are sexual and public, constituted harassment and were therefore actionable. Also, the court found that a hostile working environment exists when a supervisor frequently makes sexual advances and comments to the female employees, calling the female employees "dogs" and "whores." *EEOC v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504. By contrast, a mere isolated epithet usually fails to support a claim of hostile work environment based on sexual harassment. *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57.

A supervisor's two suggestive remarks and a single proposition of a plaintiff was not considered to have created a hostile work environment. *Rabidue v. Osceola Refining Co.* (6th Cir. 1986) 805 F.2d 611, disapproved of in *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 114 S.Ct. 367. Isolated winks, suggestive remarks and a co-worker's single request for a date have also not been considered to have created a hostile work environment. *Scott v. Sears, Roebuck & Co.* (7th Cir. 1986) 798 F.2d 210, 214.

Similarly, a romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim under the FEHA or the public policy of California. Thus, a plaintiff's claim that the defendant showed favoritism toward another employee with whom he had a romantic relationship does not state a cause of action for the plaintiff who was not part of the romantic relationship. *Proskel v. Gattis* (1996) 41 Cal.App.4th 1626, 49 Cal.Rptr.2d 322.

IV. IS AN EMPLOYER LIABLE FOR THE CONDUCT OF ITS HARASSING EMPLOYEES?

In *quid pro quo* types of sexual harassment, cases under both Title VII and FEHA have held that the employer is strictly liable for the conduct of its harassing supervisory employees whether or not the employer knew or should have known about the harassing conduct of the employee. See *Nichols v. Frank, supra*, 42 F.3d at 510. See also Cal. Gov. Code, § 12940(h)(1).

However, in hostile environment types of cases, Title VII and FEHA differ as to employer liability. Under Title VII, the standard used to determine employer liability is whether management level employees knew or should have known of the harassment and remedied it. *EEOC v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1515-16, *Nichols v. Frank, supra*, 42

F.3d at 508. Therefore, an employer is not strictly liable for a hostile work environment created by its employees unless it knew, or should have known about the hostile work environment. This differs from cases under the FEHA which have held that an employer is strictly liable for the hostile work environment created by its supervisors whether or not it knew, or should have known, about the harassing conduct. All plaintiff needs to show is the fact that the harasser is a supervisor. *Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 419, 27 Cal.Rptr.2d 457, 468, *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1052-1053, 58 Cal.Rptr.2d 122.

However, even under the FEHA, an employer is not strictly liable for punitive damages for a supervisor's conduct unless the employer had advanced knowledge of the unfitness of the harassing employee and employed him or her with a conscious disregard of the rights of others, or authorized the wrongful conduct for which the damages were awarded, or was personally guilty of oppression, fraud, or malice. See *Kelly-Zurian v. Wohl Shoe Co., Inc.*, *supra*, 22 Cal.App.4th at 419, 27 Cal.Rptr.2d at 468. See, also, Cal. Civ. Code, § 3294(b). With a corporate employer, such advanced knowledge, conscious disregard, authorization or act of oppression, fraud or malice must be on the part of an *officer, director, or managing agent* of the corporation. Whether an employee is a managing agent of a corporation for purposes of imposing punitive damages upon the corporation hinges upon the degree of discretion the employee possesses in making decisions that will ultimately determine corporate policy. *Kelly-Zurian v. Wohl Shoe Co., Inc.*, *supra*, 22 Cal.App.4th at 421, 27 Cal.Rptr.2d at 469-70. Therefore, just because a harassing supervisor has the authority to terminate an employee does not necessarily make that supervisor a managing agent of the corporation.

The employer is also not strictly liable for harassment of a plaintiff by her co-workers. See *Kelly-Zurian v. Wohl Shoe Co., Inc.*, *supra*, 22 Cal.App.4th 397, 27 Cal.Rptr.2d 457. It is only liable for co-worker harassment if the company knew, or should have known, of the conduct and failed to take immediate corrective action.

V. CAN AN INDIVIDUAL BE HELD LIABLE FOR SEXUAL HARASSMENT?

Under Title VII, individuals are not personally liable for damages. *Miller v. Maxwell's International, Inc.* (9th Cir. 1993) 991 F.2d 583, 587-88. However, the FEHA extends liability to "any person," in addition to employers, their agents, and others. Therefore, a supervisor can be held individually liable for harassment under FEHA. *Page v. Superior Court (3NET Systems, Inc.)* (1995) 31 Cal.App.4th 1206, 37 Cal.Rptr.2d 529, 535. State law is divided, however, as to whether individual supervisors can be held individually liable for claims of **discrimination** as opposed to **harassment**. *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 53 Cal.Rptr.2d 741; (supervisor not liable for discrimination); *contra, Reno v. Baird* (1997) 57 Cal.App.4th 1211, 67 Cal.Rptr.2d 671.

In 1999, the California Supreme Court determined that a non-supervisory employee could *not* be held personally liable under the FEHA for sexually harassing a co-worker. See *Carrisales v. Dept. of Corrections*, 21 Cal.4th 1132 (1999). However, because the California legislature did not like this interpretation of the FEHA, it amended FEHA, effective January 1, 2001, to expressly provide that all employees, whether or not in a supervisory position, can be held personally liable for the unlawful harassment of a co-worker. Further, the employee can be held liable regardless of whether the employer knew or should have known of the alleged harassing conduct.

Under certain circumstances, an employer may be required to indemnify an alleged harasser/employee for all costs and expenses associated with his/her defense in a harassment lawsuit. Further, based on the recent amendment of Labor Code section 2802, if the employer improperly refuses to indemnify the employee, it could be held liable for all attorneys' fees and costs incurred by the employee in a suit to obtain indemnification for expenses incurred by the employee in the harassment suit.

Under FEHA, individual defendants may be sued as long as they are identified in either the caption or the body of the DFEH charge. If an individual is not named in at least one or the other, however, he/she may not be sued under FEHA because the plaintiff will not have exhausted his/her administrative remedies. *Cole v. Antelope Valley Union High School Dist.* (1996) 47 Cal.App.4th 1505, 55 Cal.Rptr.2d 443 (and see discussion below on "Filing an Administrative Charge of Discrimination or Harassment"). Under the EEOC, however, individuals may be subject to suit even if they are not named in a charge, as long as the individual's identity could otherwise be easily obtained or the individual had reason to know that he/she was subject of the complainant's claims. *Sosa v. Hiraoka* (9th Cir. 1990) 920 F.2d 1451, 1458-1459.

Harassment in the workplace is not always limited to behavior on the job site. Liability has been imposed even when the offensive activity has occurred outside the normal place of employment and even when the plaintiff is viewed only as an applicant for a job. In *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 58 Cal.Rptr.2d 122, an aspiring actor, who allegedly was drugged and gang-raped by an associate casting director and four other men at the director's home, sued the individuals involved for various causes of action, including actions against the employer for sexual harassment under the FEHA. On review, the court of appeal reversed the lower court's decision to disallow the sexual harassment causes of action. In so doing, the reviewing court held that the plaintiff's allegations were adequate to state a statutory claim for work-related sexual harassment and that, if proven, the act imposed strict liability on the employer (ABC Entertainment) regardless of whether the employer knew or should have known about the director's propensities. Cal. Gov. Code, § 12940, subd. (h). *Doe, supra*, 50 Cal.App.4th at 1052-1053.

What is significant in the *Doe* case is that the alleged sexual assault occurred away from the workplace and not during working hours. Further, the plaintiff was not an actual employee of the defendant, but rather someone seeking work with the defendant. The fact that an assistant casting director could bind a large corporation as the agent of that corporation, even when the alleged behavior was removed from the job site, is a significant extension of the reach of FEHA liability.

Such liability can extend to holiday parties as well. Indeed, federal courts across the United States have allowed sexual harassment claims to go forward, even when the parties are off the work premises and especially if the employer had reason to know that the alleged harasser had a history of inappropriate behavior. In *Ambrose v. U.S. Steel Corp.* (N.D. Calif. 1985) 39 Fair Empl. Prac. Cas. (BNA) 30, the court found an employer liable for a supervisor's sexual harassment of the plaintiff based, in part, on the supervisor's unwelcome advances and inappropriate comments at a corporate Christmas party. At one party off site from their workplace, the plaintiff's supervisor asked plaintiff if she ever had affairs. At another party, he asked her about the bra size of a co-worker and put his arms around plaintiff after walking her to her car. On other occasions, he asked plaintiff about her dating proclivities and told her he thought she would be good in bed. He also asked her views on oral sex. Plaintiff successfully argued at trial that she had been terminated because she rejected her supervisor's sexual advances.

Similarly, in *King v. Board of Regents of University of Wisconsin System* (7th Cir. 1990) 898 F.2d 533, the court, on appeal, evaluated a claim which was based, in part, on allegations of unwelcome advances at a departmental Christmas party. There, an assistant dean followed the plaintiff into the bathroom at the party, stated he "had to have her" and that "he would have her" and forcibly kissed and fondled her. In affirming a finding of liability for sexual harassment against the dean, the court rejected his defense that his actions merely resulted from his desire for plaintiff as an individual and, therefore, was not sex-based harassment. In *Contardo v. Merrill Lynch, Pierce, Fenner & Smith Inc.* (D.Mass. 1990) 753 F.Supp. 406, the court found that the plaintiff had established a prima facie case of sexual harassment based, in part, on repeated sexual innuendoes and improper touching at office gatherings such as Christmas parties. The plaintiff was eventually awarded \$250,000 in punitive damages.

If the alleged harassment is sufficiently severe, even one incident will support a claim of employer liability. Such is the case where the employee has been physically assaulted or raped. *Tompka v. Seiler Corp.* (2d Cir. 1995) 66 F.3d 1295 (even a single incident of sexual assault so alters the conditions of the victim's employment as to create an abusive work environment for purposes of Title VII liability.) Additionally, risqué entertainment can support a claim of impermissible harassment. For example, the hiring of female strippers at employer-hosted functions can be relevant to a claim of hostile work environment sexual harassment. *EEOC v.*

Acorn Niles Corp. (N.D. Ill. Aug. 29, 1995) 93 Civ. 5981, 1995 WL 519976, 1995 U.S. Dist. Lexis 12649. Similarly, a court has found that evidence of office parties at which women were degraded, strippers performed and a videotape of a male employee with bare-breasted female sales representatives was shown established sexual harassment for which the employer was liable. *See Stacks v. Southwestern Bell Yellow Pages, Inc.* (8th Cir. 1994) 27 F.3d 1316, 1326-1327.

This contrasts with the use of bare-breasted mermaids as table decorations at an office Christmas party which the court found insufficient to establish a claim of harassment against the employer. *See Jones v. Flagship Int'l* 721 (5th Cir. 1986) 793 F.2d 714. In this instance, the court found that the offending act was not so pervasive as to constitute a hostile work environment. Similarly, the isolated incident of giving an employee a gift of red lace underwear at an office Christmas party was not found to be actionable. *Babcock v. Frank* (S.D.N.Y. 1992) 783 F.Supp. 800.

As a whole, when claims of harassment involve isolated remarks or incidents at corporate parties which are not severe in nature, and where there is not an accompanying claim of a pattern of similar behavior in the workplace, the courts have not favored a finding of employer liability. Nevertheless, to avoid the possibility of a lawsuit, employers should discourage the giving of suggestive or inappropriate gifts and should disallow potentially offensive entertainment at work- sponsored parties.

VI. DOES THE SIZE OF THE COMPANY MAKE A DIFFERENCE?

To be held liable for sexual harassment under Title VII, an employer must have fifteen or more employees. 42 U.S.C., § 2000(e)(b). However, under the FEHA, an employer with one or more employees can be held liable for sexual harassment. Cal. Gov. Code, § 12940. *See, also, Page v. Superior Court (3NET Systems, Inc.), supra*, 37 Cal.Rptr.2d 529, 536.

VII. EXPANDED RIGHTS OF EMPLOYEES TO INSPECT PERSONNEL RECORDS

Labor Code section 1198.5, which provides employees with the right to inspect their own personnel records upon reasonable notice, was amended and rewritten to extend the existing right to public sector employees.

Additionally, the amendment expanded the employers' duties with respect to how and when the employer must make the personnel records available. The employer is still required to make the records available at reasonable intervals and at reasonable times. The employer is also required to do *one* of the following:

1. Keep a copy of each employee's personnel records at the place the employee reports to work.
2. Make the employee's personnel records available at the place where the employee reports to work within a reasonable period of time following an employee's request.
3. Permit the employee to inspect the personnel records at the location where the employer stores the personnel records, with no loss of compensation to the employee.

An employee's right to inspect personnel documents does not extend to the following:

1. Records relating to the investigation of possible criminal offenses.
2. Letters of reference.
3. Ratings, reports, or records that were:
 - (a) Obtained prior to the employee's employment.
 - (b) Prepared by identifiable examination committee members.
 - (c) Obtained in connection with a promotional examination.

VIII. CONCLUSION.

The determination of whether actionable sexual harassment has occurred is fact intensive, and courts will look at the totality of the circumstances in an employment situation before deciding whether an employer should be held liable for sexual harassment. There are no bright line rule as to what types of conduct are actionable. Therefore, prevention is still the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring in the first place. These steps include affirmatively raising the subject of sexual harassment, expressing strong disapproval of harassing conduct, developing appropriate sanctions for such conduct, informing employees of their right to raise and how to raise the issue of harassment, and developing methods to sensitize the work force to this issue.

FACTS ABOUT SEXUAL HARASSMENT

Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964 and the Employment and Housing Act. Cal.Govt. Code, § 12940, et seq.

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with

an individual's work performance or creates an intimidating, hostile or offensive work environment. (At least under California law.)

Sexual harassment can occur in a variety of circumstances, including but not limited to the following:

- The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.
- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
- The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
- The harasser's conduct must be unwelcome.

It is helpful for the victim to directly inform the harasser that the conduct is unwelcome and must stop. The victim should use any employer complaint mechanism or grievance system available.

When investigating allegations of sexual harassment, the EEOC or DFEH looks at the whole record. This includes the nature of the sexual advances and the context in which the alleged incidents occurred. A determination on the allegations is made from the facts on a case-by-case basis.

Prevention is the best tool to eliminate sexual harassment in the workplace. Employers are encouraged to take steps necessary to prevent sexual harassment from occurring. They should clearly communicate to employees that sexual harassment will not be tolerated. They can do so by establishing an effective complaint or grievance process and taking immediate and appropriate action when an employee complains.

FILING AN ADMINISTRATIVE CHARGE OF DISCRIMINATION OR HARASSMENT

Before filing a civil lawsuit alleging discrimination or harassment in violation of Title VII or the California Fair Employment and Housing Act ("FEHA": Gov. Code, § 12940, *et seq.*), an individual must "exhaust his or her administrative remedies;" this means filing a charge of discrimination or harassment with either the federal Equal Employment Opportunity Commission ("EEOC") or the state Department of Fair Employment and Housing ("DFEH") and obtaining a "Right to Sue" letter. *See, Hon v. Marshall* (1997) 53 Cal.App.4th 470,475, 62 Cal.Rptr.2d 11; *Martin v. Lockheed Missiles & Space Co., Inc.* (1994) 29 Cal.App.4th 1718, 1724, 35 Cal.Rptr.2d 181. Both agencies have concurrent jurisdiction of charges brought under state and/or federal law. Charges of discrimination or harassment can be filed at any of the local offices of either agency. If an individual elects to file with the DFEH, the charge must be filed within one year of the alleged act of discrimination or harassment. In the case of the EEOC, the charge must be filed within three hundred days. If an individual is alleging an ongoing pattern of discriminatory or harassing acts, the time for filing the charge begins to run from the time of the most recent act. Alleged acts of discrimination or harassment that occur outside of the limitations period may or may not be admissible in a subsequent civil action depending upon their nexus to the act(s) that fall within the limitations period.

After the charge is filed and the claimant is interviewed, the agency will investigate the individual's complaint. Typically, a notice of the charge and request for information is sent to the claimant's employer. The employer has an obligation to respond to the agency and to cooperate during the investigation, including allowing representatives of the agency to interview employee witnesses. It is important for the employer to take this obligation seriously and to respond to all of the claimant's allegations. If, after its investigation, the agency issues a finding that the individual's claims have merit, this finding may be admissible in a subsequent civil suit and be very damaging to the employer's position. *Heyne v. Caruso* (9th Cir. 1995) 69 F.3d 1475.

At the conclusion of the investigation, the agency may decide to file a lawsuit on the individual's behalf (this is rare and most often seen in cases of particularly egregious conduct, of claims by a large number of employees against the same employer, or in cases in which the agency believes that broad public policy issues are involved). Alternatively, the agency will issue a "Right to Sue" letter which allows the claimant to go forward in either state or federal court to pursue his or her allegations of discrimination or harassment in violation of Title VII or FEHA.

If an individual wishes to go forward with a civil lawsuit immediately, a "Right to Sue" letter can be requested from the agencies at any time. If the "Right to Sue" letter is issued by the DFEH, the claimant has one year from the date of issuance to initiate a civil lawsuit. If the letter is from the EEOC, the claimant has only ninety days in which to bring his or her action.

Exhaustion of administrative remedies is *not* a prerequisite for filing a lawsuit containing common law causes of action (e.g., breach of contract, breach of the covenant of good faith and fair dealing, defamation, etc.). The claimant should bear in mind that although the one year statute of limitations for filing a lawsuit alleging statutory violations is tolled during the pendency of an administrative agency's investigation, the statutes of limitation for other causes of action continue to run and may expire prior to the issuance of a "Right to Sue" letter from the agency.

SEXUAL HARASSMENT -- AN EMPLOYER'S DUTIES

Employers cannot assume that their employees will appreciate or know their rights concerning sexual harassment in the workplace. California Government Code section 12950 imposes certain duties on employers to educate their employees in this regard. At a minimum, employers must notify employees as to the following:

- (1) The illegality of sexual harassment.
- (2) The definition of sexual harassment under applicable state and federal law.
- (3) A description of sexual harassment, using examples.
- (4) The internal complaint process of the employer available to the employee.
- (5) The legal remedies and the complaint process available through the California Department of Fair Employment and Housing ("Department") and the Fair Employment and Housing Commission ("Commission").
- (6) Directions on how to contact the Department and the Commission.
- (7) Protections against retaliation for opposing sexual harassment or for filing a complaint with, or otherwise participating in an investigation, proceeding, or hearing conducted by, the Department or the Commission.

An employer must deliver this information to employees in a manner which ensures distribution to each employee, such as including an information sheet with the employee's pay. Cal. Gov. Code, § 12950(c). However, the fact that a particular employee does not receive the information sheet or information to be distributed does not, in and of itself, confer liability on an employer to any present or former employee or applicant in any action alleging sexual harassment. Conversely, an employer's compliance with the Government Code will not insulate the employer from liability for sexual harassment of any current or former employee or applicant.

Nevertheless, California law clearly provides that employers have a responsibility to inform employees about their right to be free from sexual harassment in the workplace and to inform workers of what they should do and where they can go if they think harassment has occurred. While employers sometimes question governmental attempts to regulate relations between employer and employee, what the law prescribes in this case makes good practical sense for everyone. In today's litigious society, employers can best protect themselves by setting a tone in the workplace which says that sexual harassment will not be tolerated.

To do that, employers not only need to define what is meant by sexual harassment and to provide a grievance procedure where allegations of harassment can be aired, but to have in place an on-going program which sensitizes employees, supervisors and non-supervisors alike, to the

need for mutual respect in the work place. For supervisors, in particular, such sensitivity is very important, as is a course of serious investigation and follow-up once a charge of sexual harassment has been made or observed. Indeed, under California law, the employer may be held liable for harassment by a supervising employee, irrespective of the employer's lack of knowledge or the employer's attempt to remedy the situation. (Cal. Gov. Code, § 12940, subd. (h)(1); *Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 415, 27 Cal.Rptr.2d 457, 466.)*

"Sexual harassment" within the meaning of the California Fair Employment and Housing Act ("FEHA") is defined as verbal, physical, or sexual behavior directed at an individual because of her, or his, gender, and includes, but is not limited to, conduct which is verbal (such as epithets, derogatory comments or slurs) as well as physical and visual insults. *Michaelian v. State Comp. Ins. Fund* (1996) 50 Cal.App.4th 1093, 1107, 58 Cal.Rptr.2d 133, 142, citing to *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476-477, 4 Cal.Rptr.2d 522, 528. The supervisor of an employee who is being harassed by a co-worker has a statutory duty under the FEHA to act immediately to end the harassment and to take appropriate corrective action once a harassment complaint is brought to the supervisor's attention. (Cal. Gov. Code, §12940, subd. (h).) This is true even if the alleged harassment was not so severe as to alter the harassed employee's work environment. (*Flait, supra*, 3 Cal.App.4th at 477, 4 Cal.Rptr.2d at 529.) The supervisor should not wait until such harassment has become pervasive, continual and systematic. (*Ibid.*) Misconduct which is left unattended not only invites further harassment, but may well lead to litigation which might otherwise have been avoided. A prompt response to allegations of harassment is not only the law, it is in the best interests of employers and employees alike.

*By contrast, California Government Code section 12940, subdivision (h)(1) provides in relevant part that harassment of an employee "by an employee *other than* an agent or supervisor" shall be unlawful if the employer knows or should have known of the conduct and fails to take corrective action. (Emphasis added.) *Kelly-Zurian, supra*, 22 Cal.App. 4th at 419, 27 Cal.Rptr.2d at 468. When a supervisor is involved, the employer can be held strictly liable for the supervisor's actions, but this does not necessarily include liability for punitive damages. California Civil Code section 3294 provides that an employer is only liable for punitive damages if the employer had "advance knowledge of the unfitness of the [offending] employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud or malice." When a corporate employer is involved, "the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud or malice must be on the part of an officer, director or managing agent of the corporation."

LEGAL DEFENSES AND STRATEGY FOR RESPONDING TO ALLEGATIONS OF SEXUAL HARASSMENT AND ETHNIC DISCRIMINATION IN THE WORKPLACE

Allegations of sexual harassment and/or ethnic or sex discrimination in the workplace are very serious. When confronted with such a situation, an employer must take immediate action, including a thorough investigation of the allegations and obtaining legal advice. Since no two situations will be identical, it is advisable to seek legal counsel promptly upon learning of the allegations in order to properly plan the employer's response. Following is a brief summary of some of the legal defenses and strategies that apply to "typical" cases of sexual harassment and discrimination.

LEGAL DEFENSES

THE "GOOD CAUSE" DEFENSE: THE ACTION COMPLAINED OF WAS BASED ON NONDISCRIMINATORY REASONS.

A challenged business decision can be justified, even if it has an adverse effect (*e.g.*, employment termination) on an employee in a protected class (*e.g.*, gender, ethnicity), if it was carried out for legitimate, nondiscriminatory reasons. If the employer is able to show that it had a legitimate reason for the employment actions and if the plaintiff fails to refute the employer's asserted reasons as pretextual or to show a nexus between the alleged discriminator and the adverse employment action, a motion for summary judgment or summary adjudication is proper. See, for example, *Nidds v. Schindler Elevator Corp.* (9th Cir.1997) 113 F.3d 912, *petn. for cert.* filed July 29, 1997; *Wallis v. Simpson* (9th Cir.1994) 26 F.3d 885, 892.

BONA FIDE OCCUPATIONAL QUALIFICATION

Federal and state statutes, including Title VII, the Age Discrimination in Employment Act (ADEA) and the California Fair Employment and Housing Act all provide statutory exceptions for a bona fide occupational qualification ("BFOQ") in hiring an individual on the basis of his or her religion, sex, or national origin in instances where religion, sex or national origin is a bona fide occupational qualification. The term "occupational" means that these requirements must concern job-related skills and aptitudes. A particular qualification must relate to the essence or central mission of the employer's business. *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of America, UAW v. Johnson Controls, Inc.* (1991) 499

U.S. 187, 111 S.Ct. 1196. Under the ADEA, the BFOQ is also a defense if such BFOQ is reasonably necessary to the normal operation of the particular business.

BUSINESS NECESSITY

This defense, created by case law, is applicable to allegations that certain employment decisions and/or practices have a disparate impact on a protected class of employees. *Pettway v. America Cast Iron Pipe Co.* (5th Cir.1974) 494 F.2d 211, *Johnson Controls, Inc. v. FEHC* (1990) 218 Cal.App.3d 517, 541-542, 267 Cal.Rptr.158. Title VII, Americans with Disabilities Act (ADA), ADEA and FEHA have all held that business necessity is a defense in disparate impact cases. Thus, after a plaintiff establishes the elements of a *prima facie* case of unlawful discrimination under the disparate impact theory of liability, the burden shifts to the employer to refute the plaintiff's evidence and demonstrate that the employment practice does not have a disparate impact, or to demonstrate that the challenged practice is "job related for the position in question and consistent with business necessity." 42 U.S.C. §§ 2000e-2(k)(1)(A)(I).

HOSTILE WORK ENVIRONMENT

State and federal courts impose strict liability on an employer for sexual harassment by a supervisor which is *quid pro quo*. But what if the acts of harassment constitute a hostile work environment? What if the accused is a co-worker and not a supervisor? Under federal Title VII actions, an employer is only liable for the acts of an employee, supervisor or non-supervisor, if the acts complained of were known or should have been known. By contrast, under the FEHA, employers are strictly liable for the acts of their supervisors regardless of whether they had or should have had knowledge of the offensive conduct. This is not true of harassment by co-workers who are not supervisors. Under that circumstance, the employer must have had actual or constructive knowledge for liability to be imposed. This includes cases of alleged race discrimination. For example, under FEHA, the California court stated that once the racially adverse impact of an employment practice is established, the burden of proof shifts to the defendant to prove the practice is job-related. To meet that burden, the defendant must demonstrate a business necessity for its use. *City and County of San Francisco v. FEHC* (1987) 191 Cal.App.3d 976, 236 Cal.Rptr. 716 (disparate impact in race case).

DEFENSE STRATEGIES

Each case involving allegations of sexual harassment or discrimination based on sex or race will have different factual settings. There are, however, a number of common themes that

arise in these types of cases. Following are a few common issues and effective strategies that we have identified based on our experience.

PRETRIAL MOTIONS CAN ELIMINATE OR LIMIT SOME CASES INVOLVING SEXUAL HARASSMENT OR DISCRIMINATION

The most effective way of disposing of all or parts of a case involving allegations of sexual harassment or discrimination is by a motion for summary judgment, or alternatively, by motion for summary adjudication.* In order to prevail on a motion for summary judgment, however, the defendant employer must show that it is entitled to a judgment as a matter of law; that is, there are no disputed issues of fact that must be determined by a judge or jury. Code Civ. Proc., § 437c, subd. (c); *Union Bank v. Superior Court* ("*Union Bank*") (1995) 31 Cal.App.4th 573, 37 Cal.Rptr.2d 653. An employer's burden is met by showing that a cause of action has no merit "if that party has shown that one or more elements of the cause of action ... cannot be established, or that there is a complete defense to that action." Code Civ. Proc., § 437c, subd. (o)(2). The burden then shifts to the plaintiff to show that a triable issue exists. (*Ibid*; *Union Bank, supra*.) The plaintiff cannot rely on mere allegations or denials in his pleadings to create such a triable issue. (*Ibid*.) Rather, the plaintiff must state specific facts which show that a triable issue of material fact exists as to his causes of action. (*Ibid*.)

Unfortunately, in most cases involving sexual harassment or discrimination, the plaintiff will be successful in raising triable issues of fact to defeat such a motion. Most often there are "factual" disputes concerning alleged incidents of harassment or discrimination that are raised by the plaintiff. For example, if it is a case of the plaintiff's word against the word of the supervisor about what actually happened in a particular incident, this may be sufficient for the court to deny the motion for summary judgment and conclude that this is a factual question that must be resolved by the jury.

Nevertheless, motions for summary judgment, or in the alternative, for summary adjudication of issues may be beneficial. Many lawsuits based on allegations of sexual harassment and discrimination also contain causes of action for breach of an implied-in-fact employment contract, breach of the implied covenant of good faith and fair dealing, intentional or negligent infliction of emotional distress, tortious interference with business relationships, negligent hiring or retention (of a supervisor) and/or defamation. Depending upon the facts of the case, many of these alleged causes of action may not be viable. For example, with regard to allegations of infliction of emotional distress arising out of incidents in the workplace, the

*Generally speaking, motions for summary judgment should always be plead in the alternative as a motion for summary adjudication.

California Supreme Court has ruled that when alleged employer misconduct stems from actions which "are a normal part of the employment relationship," an employee suffering disability due to emotional distress "may not avoid the exclusive remedy provisions of the Labor Code by characterizing the employer's decision as manifestly unfair, outrageous, harassment, or intended to cause emotional disturbance resulting in disability." (*Cole v. Fair Oaks Fire Protection Dist.* ("Cole") (1987) 43 Cal.3d 148, 160, 233 Cal.Rptr. 308, 729 P.2d 743; and *see*, Lab. Code, § 3600.) This applies to actions that are part of normal employment relations, such as demotions, criticism of work practices and negotiations as to grievances. (*Ibid.*) As the court in *Cole* stated, if describing normal workplace conduct as "unfair or outrageous" were enough to avoid exclusive statutory remedies, an employee could "allege a cause of action in every case where he suffered mental disability merely by alleging an ulterior purpose of causing injury. Such an exception would be contrary to the compensation bargain and unfair to the employer." (*Cole, supra*, 43 Cal.3d at 160, *Livatsanos v. Superior Court* (1992) 2 Cal.4th 744, 754; 7 Cal.Rptr.2d 808, 815, 828 P.2d 1195).

Additionally, allegations of breach of employment contract and breach of the covenant of good faith and fair dealing may not be well founded if it can be shown conclusively that the employee was an "at-will" employee pursuant to California Labor Code section 2922. In the case of defamation, depending upon the alleged defamatory statements, the conduct of the employer, and its agents, may be "privileged." California Civil Code section 47(c) provides that a qualified privilege attaches to communications "made without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information."

Thus, although a motion for summary judgment may not eliminate the entire lawsuit, it may often be successful in limiting the issues at trial. This limitation may be beneficial in that certain types of evidence that would be prejudicial to the employer may be excluded at trial on the grounds that it is not relevant to any of the surviving causes of action.

**THOROUGH PRETRIAL INVESTIGATION IS NEEDED TO DISCLOSE THE
"TOTALITY OF THE CIRCUMSTANCES" SURROUNDING PLAINTIFF'S
ALLEGATIONS OF HARASSMENT OR DISCRIMINATION.**

In order for a plaintiff to prevail on a theory of sexual harassment, particularly one involving allegations of a hostile work environment or discrimination, she/he must prove that the alleged acts were "harassing" or "discriminatory" given the totality of the circumstances that existed in the workplace environment. It is has been our experience that employees affected by an unfavorable employment decisions (*e.g.*, termination due to reduction in force or poor

performance) may tend to reflect back on past employment experiences with a different point of view. That is, acts which at the time were unnoticed or not construed as discriminatory, may take on "new meaning" for the employee who is considering a lawsuit against his or her employer. A complaint, therefore, may contain allegations of numerous instances of harassment or discrimination that had previously gone unreported.

In order to put these allegations in the proper context, it is necessary to interview the plaintiff's co-workers for possible information on the alleged incidents. For example, in one case involving allegations of discrimination based on race, the plaintiff, an individual of Filipino origin, complained that his immediate supervisor referred to him, on occasion, as "Marcos." Plaintiff claimed that he found this to be humiliating and discriminatory, although he did not complain until the lawsuit was filed. Further investigation uncovered the fact that although the supervisor admitted to calling the plaintiff "Marcos," this was done in the context of a party atmosphere wherein the plaintiff referred to his supervisor as "Willie," based on his resemblance to the country singer, Willie Nelson. It was also discovered that one of plaintiff's co-workers referred to him as "Marcos," and he in turn referred to her as "Princess Di." At trial, plaintiff admitted that he was not offended to be called "Marcos" by a co-worker.

EFFECTIVE USE OF EXPERT WITNESSES IS ESSENTIAL TO DEFEND A CASE OF SEXUAL HARASSMENT OR DISCRIMINATION

In addition to the testimony of the "percipient witnesses" (*e.g.*, the plaintiff, the defendants, and co-workers), a case involving sexual harassment or discrimination will undoubtedly involve testimony from a variety of expert witnesses. Effective defense of these cases involves both the acquisition of appropriate expert witnesses for the defense and the ability to neutralize the testimony of experts testifying on behalf of the plaintiff. Such experts are likely to include psychiatrists, psychologists, economists, vocational rehabilitation counselors, statisticians, and even experts on the sociology/psychology of sexual harassment and discrimination.

Virtually all harassment and discrimination cases will involve claims for emotional distress damages. Plaintiff will present such evidence via testimony of his or her treating mental health professional. Rebuttal of such evidence will require testimony from a mental health professional retained by the defendant. This mental health professional, however, will be at a distinct disadvantage; it is likely that he or she will have only one opportunity to examine the plaintiff and this examination may occur long after the initial trauma has subsided. Nevertheless, an examination of the plaintiff by the defendant's expert witness provides an opportunity to obtain admissions from the plaintiff that may be used to discredit plaintiff's testimony at deposition or at trial. Additionally, the defense must consider whether to require the plaintiff to

submit to psychological testing. If the psychological tests reveal that the plaintiff is not suffering from any mental health problem, this will obviously bolster the defense on the issue of damages. However, if the plaintiff submits to psychological testing and the results of the examination by the defendant's expert support a claim of mental health problems, this adverse finding will be borne by the defendant throughout the trial.

In cases involving allegations of disparate impact, or discrimination that affects a protected class of employees generally, there will almost certainly be a presentation of statistical evidence. Plaintiffs will attempt to demonstrate statistically, or mathematically, that the defendant's conduct systematically discriminates against employees of a particular race or sex. It is important that the defendant present a competent statistician to rebut the plaintiff's allegations. In selecting this expert witness, defense counsel should identify an individual who is capable of explaining complex statistical analysis in lay terms. When statistical evidence is presented to a jury, care must be taken to give a clear and organized explanation of the data because this topic will be unfamiliar to many jurors.

For example, in a case involving racial discrimination, the plaintiff presented what appeared to be stark, statistical evidence of racial discrimination. Plaintiff suggested that there was a virtual absence of minorities in a particular job position that he sought and that this disparity was statistically significant. The defense involved an analysis not just of the specific job title that was the focus of plaintiff's attention, but of the employer's entire, nationwide work force in positions both above and below that identified by the plaintiff. In this context, the defense expert was able to explain to the jury that there was no statistically significant difference in the distribution of minority employees in the overall ranks of the employer. The jury found in favor of the defendant employer.

**CAREFUL PREPARATION OF DEMONSTRATIVE TRIAL EXHIBITS
CAN BE VERY PERSUASIVE TO A TRIER OF FACT**

Trials of sexual harassment or discrimination cases may be quite lengthy and involve numerous witnesses. It is essential to keep the jury's attention focused, throughout the presentation of the evidence, on the defense theory of the case. Preparation of a core group of key exhibits that summarize the defense theory can be very advantageous in this regard. Use of such exhibits in the opening statement and in conjunction with the testimony of several witnesses will keep fresh in the jurors' minds the defense theory and allow them to become comfortable with this position. For example, in a case involving allegations of failure to promote due to racial bias, an exhibit was created that graphically depicted the differences between the qualifications the plaintiff possessed and those that were required for the position that he sought. The defense theory was that despite plaintiff's admitted qualifications for the position that he held, there was an absence of the specific qualifications for the position that he sought. This exhibit was utilized repeatedly and may have contributed significantly to the jury's finding in favor of the employer.

The use of videotape can also produce powerful trial exhibits. The California Code of Civil Procedure permits videotaping of deposition testimony. Furthermore, the videotaped deposition testimony of a party may be presented at trial, even if that individual is available to testify at trial. It is possible, therefore, for the defendant to present testimony of the plaintiff, via edited excerpts of his or her videotaped deposition, to the jury. This has many advantages. First, the testimony to be presented is under the control of the defendant and is not subject to any "waffling" by the plaintiff on the witness stand. Second, although the testimony of a plaintiff may "evolve" by the time she/he reaches the witness stand, a videotape of her/his deposition, taken many months or years earlier, may provide the jury with a different picture of the plaintiff as a witness than the image that plaintiff is attempting to portray at trial.

CONCLUSION

Just as allegations of sexual harassment or discrimination must be treated very seriously, so must the preparation of the defense. This preparation must begin early with a complete investigation of the facts and continue through the time of trial, if necessary. The importance of a prompt and active response cannot be overly emphasized. An early understanding of the issues and facts is critical to prepare for dispositive motions and will allow the employer to deal with the plaintiff's counsel from a position of strength and understanding. A careful evaluation of the case is essential to prompt resolution, either by litigation or appropriate settlement.

SUMMARIES OF KEY SEXUAL HARASSMENT CASES

A. Sex Discrimination/Sexual Harassment.

1. ***Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 49 Cal.Rptr.2d 322.**

(Preferential Treatment of Other Employees Is Not Discrimination)

Plaintiff was working as defendant's secretary and office manager when she began noticing that defendant had become romantically involved with the woman employed as his full-time word processor. The word processor received a larger year-end bonus than any other employee, more valuable Christmas gifts, and was invited to a private birthday lunch. After seeing the word processor blowing kisses at her employer, the shocked plaintiff called the employer's wife to report what she had seen. Two days later, plaintiff's employment was terminated.

Plaintiff's suit alleged sexual discrimination and sexual harassment. The court granted a motion for summary judgment, stating that mere preferential treatment of a paramour could not sustain plaintiff's theories of sexual discrimination or sexual harassment. In so ruling, the court held that plaintiff had failed to put forth any facts (1) that plaintiff believed that preferential treatment could be had if an employee became romantically involved with the employer; (2) that the office affair was conducted so indiscreetly as to create a hostile work environment; and (3) that there was any evidence of other pervasive conduct which could create a hostile work environment. In affirming the lower court's summary judgment, the court on appeal found that, although unfair, the alleged favoritism was not based upon gender and that it would be impracticable and unwarranted for the courts to police intimate consensual relationships.

The court in Proksel is not alone in denying a claim for discrimination or harassment based on the more advantageous treatment of one co-worker over another due to an office romance. For example, in Taken v. Oklahoma Corporation Commission, 125 F.3d 1366 (10th Cir. 1997), the court held that promotion of a supervisor's paramour rather than an allegedly more qualified co-worker did not constitute gender or race discrimination. Although the supervisor and his girlfriend were African-American, and the plaintiffs were Caucasian, plaintiffs could not show they would have been promoted but for their race. The court went on to say that they were not denied promotion due to their gender, but because they had not had a voluntarily romantic relationship with the supervisor. Like the court in Proksel, the court here refused to find gender discrimination based on such selective favoritism. In essence, by proving that a romance was the sole factor influencing the promotion decision, plaintiffs pleaded themselves out of court.

Similarly, mere cronyism will not support a claim of discrimination. In Foster v. Dalton, 71, F.3d 52, 69 FEP 1402 (1 st Cir. 1995), a U.S. Navy decision-maker selected a white acquaintance over a better qualified black civilian. This selection was a departure from the policy of giving preference to in-house employees. Additionally, the job description was rewritten so that the acquaintance would be the only qualified candidate. The court held that favoritism, and not racial animus, was the reason and that Title VII does not outlaw cronyism if the practice is race neutral, although a policy of cronyism could be attacked under the disparate impact theory. The court stated that although the record was painfully clear that this was far from the Navy's finest hour, it did not constitute actionable discrimination.

2. ***Addy v. Bliss & Glennon (1996) 44 Cal.App.4th 205, 51 Cal.Rptr.2d 642.***

(Summary Judgment Appropriate in Failure to Promote Case)

Plaintiff worked as an underwriter assistant for defendant who advertised a position for management trainee that required a four-year degree. The trainee position paid less than plaintiff's position and offered the same promotional opportunities as the position which plaintiff held. Plaintiff applied for the position although she lacked the required college degree. Defendant hired a male for the position before it received plaintiff's application. Defendant explained to plaintiff that the trainee position would not have been a promotion for her. Nevertheless, she filed charges with the EEOC alleging race and sex discrimination based on a claim of failure to promote. Plaintiff later quit after being demoted for poor performance. On motion for summary judgment, the court found that plaintiff was not qualified for the position she sought and that the position was not available to her in any event by the time the defendant received her application. Moreover, the trainee position was not a promotion so that plaintiff could not establish a cause of action for failure to promote.

3. ***Bradley v. Harcourt, Brace and Co. (9th Cir. 1996) 104 F.3d 267.***

(When the Same Person Hires and Fires the Plaintiff, There Is an Inference of Non-Discrimination)

After being employed for only one year, defendant dismissed plaintiff for poor performance and for asking a subordinate to lie. In upholding the lower court's granting of the employer's motion for summary judgment, the Ninth Circuit held that plaintiff had not carried her burden of showing that her termination was a pretext for discrimination. The court held that where, as here, the same actor is responsible for both the hiring and the firing of a plaintiff within a short period of time, there is a strong inference that there was no discriminatory animus which motivated the termination.

4. ***Gilligan v. Dept. of Labor* (9th Cir. 1996) 81 F.3d 835.**

(Meeting Affirmative Action Goals Defeats Claim of Gender Discrimination)

A male employee of the Department of Labor filed suit under Title VII when he was passed over for promotion in favor of a female. The Ninth Circuit held that in an institutional setting, as long as the choice of the female was consistent with affirmative action goals, it was not discrimination. This was despite the fact that there was no showing that the Department of Labor had actually relied on its affirmative action plan in choosing the female over plaintiff. Defendants testified at trial that they chose the best person for the job, regardless of gender, not that affirmative action was a motivating factor.

5. ***Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522.**

(Inadequate Investigation of Sexual Harassment Claims)*

Plaintiff was a female Oakland police officer who broke off a romantic relationship with a fellow officer named Antonio Romero in September 1986. Romero began calling plaintiff at home on a regular basis, culminating in a March 1987 threat to kill himself. Alarmed, plaintiff changed her home telephone number, but Romero trapped her in the parking lot and extorted her new number. Plaintiff again changed her home number, but Romero accessed personnel files and called her at home. In July 1987, Romero encountered plaintiff and her boyfriend driving home from work and ran them off the road in an unmarked police car.

In October 1987, Romero became one of plaintiff's supervisors. Plaintiff objected and an internal affairs investigation was conducted. Meanwhile, plaintiff rarely came into contact with Romero in his new position. She claims to have been harassed by Romero's investigation of plaintiff's handling of a case and complained that Romero had unnecessarily called her to the podium during a line-up. The investigation ultimately determined plaintiff's charges were "unfounded." Plaintiff filed a suit for sexual harassment under Title VII against Romero, the Police Chief and the City of Oakland. The U.S. District Court concluded that there was no hostile environment and ruled in favor of defendants. Plaintiff appealed the judgment in favor of the City.

*See, also, *Steiner v. Showboat Operating Co.* (9th Cir. 1994) 25 F.3d 1459, below.

The Ninth Circuit found that a hostile work environment had been created before October 1987 (when Romero was promoted to plaintiff's supervisor, and the investigation into his actions was initiated), but agreed with the District Court that the post-October 1987 incidents were not sufficiently severe as to alter plaintiff's work environment. The Court disagreed with the City's contention that their response to plaintiff's complaint relieved them from liability because the harassment stopped.

The Court ruled that the effectiveness of an employer's remedial measures "will be measured by the twin purposes of ending the current harassment and deterring future harassment by the same offender or others We refuse to make liability for ratification of past harassment turn on the fortuity of whether the harasser, as he did here, voluntarily elects to cease his activities." The Court found the City's responsive investigation completely inadequate to deter future misconduct.

6. ***Farmers Ins. Group v. County of Santa Clara.* (1995) 11 Cal.4th 992, 47 Cal.Rptr.2d 478, 906 P.2d 440.**

(Harassment Found Within the "Course and Scope of Employment")

Plaintiffs, three deputy sheriffs employed by the County, filed sexual harassment claims against another deputy sheriff and against the County. The harasser admitted all of his harassing conduct. The harasser requested that the County defend and indemnify him pursuant to Government Code sections 995-996.6, which require that a public entity defend its employees in civil actions brought on account of an employee's acts or omissions within the scope of his employment. The County refused to defend him, stating that the harasser acted outside the scope of his employment when sexually harassing the three female deputies. The harasser obtained counsel paid for by his homeowner's insurance. After the case went to verdict against the harasser, he and his insurance company sought indemnity for the judgment.

The trial court granted the County's motion for summary judgment, finding that the harasser's actions were outside the scope of his employment. The appellate court reversed. The California Supreme Court reversed the appellate court, concluding that the harasser's conduct was outside the scope of his employment as a matter of law. The Court noted that his conduct was motivated by reasons completely unrelated to his job duties. His conduct was not necessary to his comfort, convenience or health on the job and was not precipitated by a work-related dispute. His conduct also directly violated the County's sexual harassment policy and constituted abuse of his job authority for personal gratification. Accordingly, the California Supreme Court affirmed the trial court's grant of summary judgment in favor of the County.

7. ***Romero v. American Pres. Lines, Ltd.* (1995) 38 Cal.App.4th 1199, 45 Cal.Rptr.2d 421.**

(Standard of Review is De Novo for Motion for Summary Judgment Involving Insufficient Evidence to Support Discrimination Claims)

Plaintiff was employed as a secretary at the time she filed her complaint based on race, sex and age discrimination. She later added a claim that she had been retaliated against for filing discrimination charges with the DFEH. The appellate court affirmed summary judgment in favor of the defendant, stating that plaintiff had produced insufficient evidence to support her claims that she was denied certain positions by her employer based upon improper discriminatory motivation, rather than due to the superior qualifications of the other people selected. The evidence was also insufficient to maintain claims for harassment or retaliation.

The appellate court stated that the proper standard of review to be given to the trial court's decision to grant summary judgment was "de novo" as opposed to "an abuse of discretion". This standard of independent review was appropriate in a discrimination case, despite the shifting burdens of evidence which govern such an action during trial.

8. ***Bator v. State of Hawaii* (9th Cir. 1994) 39 F.3d 1021.**

("Qualified Immunity" Not a Defense to Harassment Claims)

Clerk stenographer for the State of Hawaii alleged extensive sexual harassment by many individual defendants from 1982 through to 1988 when she left her job. Plaintiff also alleged race discrimination and brought a Section 1983 action against the individual harassers and a supervisor to whom she had complained but who failed to investigate. The individual harassers and the supervisor all moved for summary judgment on a qualified immunity defense.

The court rejected the "qualified immunity" defense. Qualified immunity protects state officials from Section 1983 liability only if their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." The court rejected defendants' argument that the constitutional right to be free of sexual harassment was not clearly established during the period of plaintiff's employment. In rejecting the qualified immunity defense, the Court noted that the right to be free of purposeful sex discrimination had been well-established by the mid -1970's and earlier. The Court also held that the supervisor who did nothing to respond to plaintiff's complaints should have known that her failure to investigate and stop the harassment was unlawful.

9. ***Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 27 Cal.Rptr.2d 457.**

(Employer Is Strictly Liable for Acts of Supervisor)

Plaintiff was hired by Wohl Shoe Co., Inc. in 1979 and was promoted to regional supervisor in 1985. At that time, her supervisor, Robert Lawicki, began making suggestive and sexual comments to plaintiff and touched her breasts, crotch and buttocks at various times; witnesses corroborated this harassment.

In July 1987, plaintiff complained to the vice president in charge of personnel, who did nothing. The following month, she complained to two visiting managers, but stressed that she did not want to confront Lawicki directly. Nevertheless, the managers had plaintiff and Lawicki meet and asked if there was something plaintiff wanted to bring up. She left in tears, and the managers told her they had spoken with Lawicki and he wasn't going to do it anymore. They also told her that Lawicki knew she had complained, but emphasized that she shouldn't feel badly about working with him. Thereafter, plaintiff complained to another vice president. He said that unless plaintiff confronted Lawicki, nothing could be done. Plaintiff resigned in September 1987 and began suffering from panic attacks, depression, insomnia and post-traumatic stress disorder.

Plaintiff sued the Company and Lawicki for sexual harassment, constructive discharge and emotional distress. A verdict was rendered against Lawicki for \$125,000 and his conduct was found to involve oppression and malice. However, the jury found in favor of the Company.

After trial, the court granted plaintiff's motion for judgment notwithstanding the verdict (JNOV) against the Company for \$125,000 and awarded plaintiff attorneys' fees against the Company and Lawicki in the amount of \$103,000. Plaintiff's motion for a new trial on the issue of punitive damages against the Company was denied. The Company appealed.

The appellate court affirmed, holding that under FEHA, employers are strictly liable for harassment of an employee by an agent or supervisor regardless of whether the employer knew or should have known of the harassment. The court held there is no strict liability for punitive damages for a supervisor's conduct. Knowledge, ratification or other culpable conduct by the employer is required before it will be liable for punitive damages under Civil Code section 3294(b).

10. ***King v. Hillen* (Fed.Cir. 1994) 21 F.3d 1572.**

("Psychological Damage" Not Necessary for Claim of Hostile Work Environment)

Hillen was a civilian Army employee who was removed from service for incidents allegedly involving five female military and civilian personnel. He had allegedly touched some

of the women's buttocks, thighs and breasts, leered at them, and subjected them to sexual innuendo and jokes. Three of the women complained to their supervisors and other agency officials. Hillen denied the charges and said his actions were misunderstood and were not intended to be sexual harassment. The Army investigated and concluded Hillen had committed sexual harassment. Hillen appealed to the Merit Systems Protection Board ("Board").

Three administrative proceedings were held and the ALJ granted summary judgment each time, finding the incidents were not of a sexual nature, that some of the women had misperceived Hillen's conduct, and that there was no proof that the women were psychologically damaged. After each decision, the full Board vacated the ALJ's decision, remanded the case, but the judge continued to make similar findings.

On the final (third) appeal, the Board stated that the proper standard for proving "sexual intent" on the part of the harasser requires: (1) a showing that the conduct was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and, (2) a showing that the conduct was sufficiently severe and persistent so as to seriously affect the employee's psychological well-being. The Board found that the women had not met these requirements.

Citing *Harris v. Forklift Systems*, the federal circuit panel, however, held that psychological injury is not a necessary criterion of hostile environment sexual harassment. Rather, it was a factor to be taken into account like any other factor, but that no single factor was required. The Court questioned the Board's treatment of each separate incident in isolation, as well as the Board's conclusion that each incident failed to create a hostile environment. The Court held that the trier of fact must look at the totality of the conduct, rather than individual instances of sexual harassment, which, by themselves, might not constitute sexual harassment. The Court held that "[c]onduct that is based on the sex of the victim, whether or not the conduct is of a sexual nature, is appropriately considered in determining whether an abusive or hostile environment has been created." The Court did not expressly indicate it would apply the "reasonable woman" standard (as in the Ninth Circuit). Rather, it found that "the reasonableness of sex-based conduct is determined from the perspective of eliminating 'the entire spectrum of disparate treatment of men and women' in employment."

11. ***Nichols v. Frank* (9th Cir. 1994) 42 F.3d 503.**

(Title VII Standard of Liability of Employer Is "Knew or Should Have Known")

A deaf female employee of the Postal Service in Salem, Oregon communicated solely through sign language, and read at only a fifth-grade level. Her supervisor, Ron Francisco, was the only supervisor at the facility who knew sign language. (Defendant Frank is the Postmaster

General). Soon after plaintiff began work, Francisco approached her in the copy room, started kissing her and indicated that he wanted her to perform oral sex on him. Initially she refused, but later complied for fear of losing her job. As a result, plaintiff became depressed, suicidal and withdrew from her husband. Six months after the forced sex began, plaintiff's husband filed for divorce. When she asked Francisco for a leave of absence to deal with her family problems, Francisco asked for oral sex before approving the leave. Ultimately, plaintiff reported the harassment and filed a complaint with the Postal Service, the EEOC, and her union.

After a bench trial, the district court concluded that the Postal Service was liable for sexual harassment under Title VII, finding that Francisco's acts created a "hostile work environment" and that Francisco had acted within "the scope of his employment." The Postal Service did not appeal the finding of a hostile work environment, but did appeal the finding that it was liable for Francisco's actions.

The court held the proper analysis for employer liability in hostile environment cases is whether management-level employees knew or should have known of the harassment and remedied it, not whether the employee acted within the scope of his employment. Although the court found that the Postal Service could not have been held liable on a hostile environment theory, it found that the acts, as described, constituted "*quid pro quo*" harassment. Therefore, the Postal Service was liable under the doctrine of respondeat superior for *quid pro quo* harassment. In so doing, the court provided a comprehensive discussion of the definition and parameters of *quid pro quo* sexual harassment.

NOTE: This contrasts with the California case of *Kelly-Zurian*, above, decided under California law, which held an employer strictly liable for the sexually harassing conduct of the supervisor, regardless of knowledge.

12. ***Steiner v. Showboat Operating Co.*, (9th Cir. 1994) 25 F.3d 1459.**

("Equal Opportunity" Discrimination Against Both Men and Women
Is Not a Defense)

Plaintiff Steiner was a "floor person" in the Showboat Hotel and Casino in Las Vegas. A few months after she started, her supervisor, Showboat Vice-President Jack Trenkle, called her offensive, sexually derogatory names, such as "dumb f_____ broad" and "c__t." Plaintiff complained to management, and was transferred to a different shift. Trenkle was not reprimanded.

Over a year later, Trenkle verbally assaulted Steiner in front of customers for "comping" a free breakfast to two Blackjack players. Trenkle used expletives and, by his own admission, yelled:

"Why don't you go in the restaurant and suck their d___s while you are at it if you want to comp them so bad."

Plaintiff complained to management, and Trenkle was told to apologize, which he did in a rude and sarcastic manner. Unsatisfied, plaintiff filed a charge with the Nevada Equal Rights Commission. Showboat management then investigated further and determined that Steiner was abusive to both men and women, and gave him a written reprimand. Management also changed his shift. Plaintiff alleged that Trenkle continued to harass her by showing up early for work and making "stares, glares, snickers and comments." Trenkle was ultimately terminated for making rude comments to another female employee.

Plaintiff filed a suit for Title VII sexual harassment, constructive discharge, retaliation and emotional distress. The district court granted summary judgment in defendant's favor, finding that Trenkle's conduct was not sexual harassment because he consistently abused men and women alike. The Ninth Circuit rejected this finding. First, although Trenkle debased men, his abuse of women was qualitatively different. He relied more on sexual epithets, offensive and explicit references to women's bodies and sexual conduct. Trenkle's abuse of men was in no way related to their gender. Further, the Court cited *Ellison v. Brady*, noting that even if Trenkle used sexual epithets equally intensive and degrading to men and women, conduct which is unobjectionable to men may offend many women. The Court also noted that words from a man to a man are received differently than words from a man to a woman.

The Court noted that Showboat was consistently slow in reacting to plaintiff's complaints, and never seriously investigated them until she filed her complaint with the State. Moreover, defendant changed plaintiff's shift twice, rather than changing Trenkle's shift or work area (or firing him outright). Relying on *Intlekofer v. Turnage*, the court ruled that a victim of sexual harassment should not have to work in a less desirable location as a result of the employer's remedial plan. Finally, although defendant eventually fired Trenkle, it was for his comments to a different woman, and only after the Nevada Equal Rights Commission had convinced Showboat that it could face serious liability. Thus, Showboat failed to persuade the court that it should escape liability because it took adequate disciplinary and remedial action.

13. ***Johnson v. County of Los Angeles Fire Dept.* (C.D. Cal. 1994) 865 F.Supp. 1430.**

(First Amendment Protects Workplace Reading of Sexual Material)

In 1992, the Los Angeles County Fire Department implemented a written sexual harassment policy prohibiting employees from having sexual material such as *Playboy* and

Penthouse in any work locations, including restrooms and lockers. The plaintiff filed an action alleging that the Fire Department's policy violated his right to free speech.

In balancing the plaintiff's First Amendment rights against the defendant's interest in an efficient workplace, the district court ruled in plaintiff's favor. The Court held that *Playboy* constituted speech relating to matters of public concern (accepting plaintiff's contention that, in essence, he buys the magazine to "read the articles"). The Court also found the restriction burdensome since it applied to the firefighter's off duty and private areas where firefighters remained when they were on-call at the station. Finally, the court held that the Fire Department failed to show that the "quiet reading and possession" of *Playboy* threatened to disrupt the fire station. The Court rejected the Department's argument that *Playboy* may influence its male firefighters to treat their female coworkers poorly.

14. ***Folkerson v. Circus Circus Enterprises, Inc.* (9th Cir. 1997) 107 F.3d 754.**

(Employer's Ratification of Sexual Harassment by Third Party May Support a Title VII Sexual Harassment Claim)

Plaintiff was a mime at a gambling casino. She was so realistic that patrons would often touch her to see if she were real. Plaintiff complained about this to her employer and various measures were taken to protect her. Nevertheless, a patron touched her on the shoulder and she responded by punching him. Plaintiff, an independent contractor with the casino, was fired. She then brought suit, claiming that she was retaliated against for complaining about sexual harassment. After two summary judgments were granted by the lower court, the court on appeal found that plaintiff could not make out a *prima facie* case of retaliation. The court also held that by punching a patron, she was not engaged in a protected activity. Nevertheless, the court also held that an employer may be held liable for sexual harassment on the part of a private party for not taking immediate and/or corrective actions when it knew or should have known of the conduct.

15. ***Yamaguchi v. U.S. Dept. of the Air Force* (9th Cir. 1997) 109 F.3d 1475.**

(Military Discipline May Not Discharge Employer Liability for Sexual Harassment)

Plaintiff, a civilian worker for the military, alleged that she had been sexually harassed by a uniformed employee, who reportedly tried to rape her. Plaintiff filed suit against the Air Force under Title VII for sexual harassment and discrimination. The Air Force claimed that it had acquitted itself of any liability by transferring the alleged harasser to another building and by ordering him to stay away from the plaintiff. The Ninth Circuit rejected this argument and noted

that the defendant had failed to officially discipline or reprimand the uniformed offender, irrespective of the military's claims that its actions were the equivalent of discipline. The court then held there was a triable issue of material fact as to whether the military's actions were adequate and upheld the lower court's denial of summary judgment on the question of employer liability.

16. ***Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 58 Cal.Rptr.2d 122.**

(Employer Liability May Be Had for Same Sex Harassment off the Job Site and Not During Working Hours)

Plaintiff was an aspiring actor, who allegedly was drugged and gang-raped by an associate casting director and four other men at the director's home. Plaintiff thereafter both brought criminal charges against the individuals involved and filed a civil suit against them and the director's employer, ABC Entertainment. On review, the court of appeal reversed the lower court's decision to disallow plaintiff's sexual harassment causes of action against the employer. In so doing, the reviewing court held that the plaintiff's allegations were adequate to state a statutory claim for work-related sexual harassment and that, if proven, the act imposed strict liability on the employer regardless of whether the employer knew or should have known about the director's propensities. Gov. Code, § 12940, subd. (h).

In *Doe*, the alleged sexual assault occurred at the director's home on a Sunday morning. Further, the plaintiff was not an actual employee of the defendant, but rather someone seeking work with the defendant. In this regard, the court ruled that the protections of FEHA extend to applicants for employment and that the plaintiff had a reasonable expectation that the employer intended to hire him, given the acts and representations of the director on prior occasions. This included the fact that the director had been grooming plaintiff for a job at ABC Entertainment and that the director had told plaintiff that he was the employer's manager. The court therefore viewed the director as an agent of the employer and held that he could bind the employer as to acts of sexual harassment.

17. ***Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 58 Cal.Rptr.2d 308.**

(A Supervisor Who Does Not Act to Prevent Known Sexual Harassment Is Not Personally Liable for Aiding and Abetting the Harasser or as an Agent for the Employer)

Plaintiff was sexually harassed by his direct supervisor and complained to another supervisor on various occasions. Nothing was done to investigate the complaints or to stop the

offending behavior. Plaintiff then filed suit against the supervisor who had failed to investigate, restrain or otherwise discipline the harasser. The court held that FEHA may impose liability on the employer for a supervisor's acts, but that it does not confer personal liability on a non-harassing supervisor who fails to act.

18. ***Gutowsky v. County of Placer* (9th Cir. 1997) 108 F.3d 256.**

(Continuing Violation Theory Applies to Sexual Discrimination Claim
Under 28 U.S.C. § 1983)

Continuing violation theory applied to Title VII cases is applicable to claims based on 28 U.S.C. section 1983 if plaintiff claims that there was a policy or practice of discrimination by one's employer which continues through the date of his/her termination. Under these conditions, the one year statute of limitations does not begin to run until the date of termination.

19. ***Simens v. Reno* (D.D.C. 1997) 960 F.Supp. 6.**

(Plaintiff Cannot Establish a *Prima Facie* Case of Gender Discrimination
If the Person Who Replaces Her Is of the Same Gender)

Plaintiff was a female FBI agent who was turned down for a position which went to another woman. In finding that plaintiff could not make out a *prima facie* case of discrimination, the court reasoned that an essential element of a *prima facie* case of employment discrimination is the allegation that a job sought by a member of a protected class went to someone who was not also in the protected class. Since the job plaintiff wanted went to someone in the same protected class, there was no legally cognizable discrimination. In so ruling, the court declined to extend the holding in *O'Connor v. Consolidated Coin Caterers Corp.* (1996) -- U.S. --, 116 S.Ct. 1307, which held that a case of age discrimination could be made out even if someone in the protected class of over 40 years of age was replaced by another worker in that same protected class.

20. ***Oncale v. Sundowner Offshore Services Inc.* (1998) 118 S.Ct. 998.**

(Same-Sex Harassment is Actionable Under Title VII)

The United States Supreme Court unanimously held that a claim for a same-sex sexual harassment may be stated under Title VII, regardless of whether the harasser is homosexual. The defining issue is not whether the wrongful behavior is motivated by sexual desire, but rather whether it constitutes discrimination due to one's sex. The Court did not define what it meant by

impermissible discrimination, but said that it will be up to other tribunals to differentiate between “simple teasing and roughhousing among members of the same sex,” which is not actionable and conduct which is “severely hostile or abusive,” which is actionable.

21. ***Wellpoint Health Networks Inc. v. McCombs (1998) 59 Ca.App.4th 110.***

(Discovery of Attorney’s Prelitigation Investigation of an Employee’s Discrimination Claims)

This case addressed two issues: (1) whether a law firm’s prelitigation investigation into the circumstances surrounding the claims of an employee who may have suffered discriminatory treatment is protected by the attorney-client privilege and/or the attorney work product doctrine, and (2) if so, whether the employer waives these protection when it raises the investigation as a defense to the employee’s ensuing discrimination lawsuit. On appeal, the court found that whether the investigation was privileged depended on such factors as whether confidential communications occurred between the attorney and the client as part of the investigation and whether the defendant claimed an adequate investigation as a defense to the claim of discrimination (which would make the investigation subject to discovery).

22. ***Cotran v. Rollins Hudig Hall Internat., Inc. (1998) 17 Cal.4th 93, 69 Cal.Rptr.2d 900***

(Termination of Employee Following Good Faith Determination of Misconduct Shields Employer from Liability)

Two female workers complained to the director of human resources that each had been sexually harassed. Each provided statements that plaintiff had exposed himself and masturbated in their presence on more than one occasion. A thorough investigation followed and it was determined that it was more likely than not that the harassment had occurred. As a result, plaintiff was fired.

At trial, it was disclosed that plaintiff had had an affair with each of his accusers who, in turn, were angered to find out that plaintiff had been “two timing” them. The jury found that plaintiff had not engaged in any of the behavior which led to his termination. It set the present cash value of plaintiff’s lost compensation at \$1.78 million. The Court of Appeal reversed and that reversal was affirmed by the Supreme Court with an order that the case be retired. In so doing, the Supreme Court found that it was error to instruct the jury that the employer could prevail only if the jury was satisfied that the alleged sexual harassment had actually occurred. Rather, the critical question was whether plaintiff’s termination stemmed from a good faith belief

and an appropriate investigation, such that the employer had reasonable grounds to believe that plaintiff had committed the alleged harassment.

23. ***Baker v. McKenzie, 98 Daily Journal D.A.R. 4634 (filed May 4, 1998)***

(Employer Needn't Fire Harassers, But Take Reasonable Steps to Prevent Harassment; Employers May Be Assessed Punitive Damages Exceeding Those Assessed the Harasser)

In this case, managers of a law firm were advised over a number of years that one of their partners was a serial harasser. The law firm did little to intervene, despite complaints from different women. In finding against the law firm for punitive and compensatory damages, the court held that although Civil Code section 3294 (which deals with the assessment of punitive damages) does not require termination of a harassing employee, the employer must take reasonable steps to prevent a known harasser from committing future acts of harassment. Here, the court found that the employer exhibited a conscious disregard for the rights and safety of others by failing to take such steps. This failure not only entitled plaintiff to punitive damages against the harasser, but against the employer which essentially ratified the errant behavior.

The court also made it clear that when an employer indulges harassment, an award of punitive damages against the employer may far exceed that awarded against the actual harasser. This is in keeping with the goal of making an award of such damages truly punishing, so as to deter future wrong-doing. Here, the award of punitive damages (even after being significantly reduced) was 70 times greater than the award of compensatory damages against the employer.

B. Race Discrimination.

1. ***Heard v. Lockheed Missiles & Space Co., Inc. (1996) 44 Cal.App.4th 1735, 52 Cal.Rptr.2d 620.***

(*Prima Facie* Case of Discrimination Does Not Require Proof Relating to Similarly Situated Individuals)

Plaintiff was an African-American male who worked in defendant's missiles system division compiling video training packages. He alleged that his Caucasian manager discriminated against him due to race. The jurors were instructed that plaintiff had to prove, as part of his *prima facie* case, that similarly situated non-African-Americans received the employment terms and conditions he had sought. The jurors answered "no" and judgment was entered for defendant. Plaintiff appealed based on the jury instruction.

The appellate court reversed, concluding that controlling judicial authority did not include a "similarly situated" requirement within the *prima facie* model and did not require proof

as to the employer's treatment of employees outside the protected class. The court acknowledged that proof regarding similarly situated employees was relevant and could represent one way of raising an inference of intentional discrimination, but that it was not the only way. The court stated that the burden-shifting framework for determining whether plaintiff has established a *prima facie* case was intended to be flexible, and not restricted to only a few circumstances.

2. ***Kirmse v. Hotel Nikko of San Francisco, Inc.* (1996) 51 Cal.App.4th 311, 59 Cal.Rptr.2d 96.**

(Foreign Treaty May Affect Application of FEHA)

Defendant Hotel Nikko ("Hotel") was a California corporation whose parent was a Japanese company. Plaintiff sued both Hotel and its parent for wrongful termination and race and national origin discrimination under "FEHA". The court ruled that a treaty with Japan preempted FEHA, but that Hotel could not assert the treaty rights of its parent corporation under the circumstances here. However, in an unpublished portion of the opinion, the court granted summary judgment in favor of the Hotel and its parent company.

3. ***Paige v. State of California* (9th Cir. 1996) 102 F.3d 1035.**

(Administrative Exhaustion on an Individual Level Satisfies Administrative Exhaustion for Class Action Where Individual is Member of the Class)

Plaintiff alleged racial bias in the California Highway Patrol's promotional examination and sued, pursuant to Title VII, under both disparate impact and disparate treatment theories. The district court certified a class action, but granted partial summary judgment on the disparate impact claim. On appeal, the Ninth Circuit held that the class certification and the partial summary judgment order were inextricably intertwined with an injunctive order that had been made by the lower court and granted immediate review. The court found that as long as plaintiff had exhausted his administrative remedies with the Equal Employment Opportunity Commission ("EEOC"), there was no need to have exhausted his administrative remedies with respect to the class allegations because the EEOC's investigation would have disclosed such potential class claims.

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4. ***Strother v. Southern Cal. Permanente Medical Group* (9th Cir. 1996) 79 F.3d 859.**

(Partner May Be an "Employee" for FEHA Purposes)

An African-American woman alleged that the medical group of which she was a partner discriminated against her on the basis of race and retaliated after she complained. The lower court granted defendant's motion for summary judgment on the grounds that plaintiff was a partner, and not an employee, of the medical group and therefore not entitled to the protections of the FEHA.

The Ninth Circuit reversed the summary judgment, stating that plaintiff's putative "partner" status did not preclude her from employee status under FEHA per se. The court found that to determine whether a plaintiff is truly a partner or should otherwise be deemed an employee depends on the relationship among the partners, the method of compensation, the partner's responsibilities for partnership liabilities, the management structure and the plaintiff's role in the structure. Here, the court found that it was the Board of Directors which primarily conducted the affairs of the partnership and that plaintiff had little control and limited access to the Board. Plaintiff's compensation was largely determined by her performance and she could be disciplined for poor performance. Additionally, the fact that there were some 2,500 partners made it more likely that the plaintiff could show that her partnership rights were so limited that she could be deemed an employee.

5. ***Lane v. Hughes Aircraft Co.* (1997) 56 Cal.App.4th 1038, 65 Cal.Rptr.2d 889.**

(Circumstantial Evidence May Be Used to Prove Case of Race Discrimination)

An African American employee sued Hughes over race discrimination involving pay raises, promotions and other job-related matters. His former supervisor also sued Hughes for retaliation and constructive discharge, stemming from his support of the employee and for refusing to give the employee a false poor work evaluation. After consolidation of the cases, the plaintiffs were awarded multimillion dollar verdicts, parts of which were somewhat reduced on appeal.

In reviewing this case, the appellate court also ruled that to prove that the employer's actions were pretextual or lacking in any legitimate business reason, the plaintiff could rely on indirect or circumstantial evidence. In so doing, the court rejected the argument that pretext could only be shown through direct, comparative or statistical evidence. The court further held that plaintiff need only show that the employer's decision-making process was infected by bias and not that each of the employer's representatives intentionally discriminated against the plaintiff. The court also said that for purposes of an award of punitive damages, a determination of who is a managing agent for purposes of binding the corporation depends on the degree to

which an employee can affect corporate policy and not on the employee's formal place in the corporate hierarchy.

6. ***Cordova v. State Farm Ins. Companies, 124 F.3d 1145, 74 FEP 1377 (9th Cir. 1997)***

(Bigoted Comments Against Third Parties May Be Used as Proof of Discriminatory Animus Against Plaintiff)

In this discrimination-in-hiring case, the court ruled that plaintiff could rely on derogatory remarks made by a company decision-maker after the events in question and in another context as evidence of nationality bias. The decision-maker in question had referred to an Hispanic insurance agent as a “dumb Mexican” and said he had been required to hire the person because he was a minority. These comments were found to be so egregious and bigoted that they constituted strong evidence of discriminatory animus. As such, this was more than just a “stray remark” and created an issue of fact as to whether discrimination existed. Accordingly, the lower court’s summary judgment was reversed.

C. Retaliation.

1. ***Ortez v. Washington County (9th Cir. 1996) 88 F.3d 804.***

(Individuals Not Liable under Title VII)

Plaintiff was terminated by his employer and filed a complaint alleging national origin discrimination. The lower court dismissed his action for failure to establish a causal connection between his national origin and the adverse employment actions he alleged and for failure to otherwise state a cause of action for which relief could be given. The district court dismissed plaintiff’s Title VII claims against ten individual defendants because his EEOC charge named only Washington County.

On appeal, the Ninth Circuit held that the district court erred since the individual defendants should have anticipated being named in an action arising from the complaint. However, the Ninth Circuit affirmed the dismissal of those claims because employees cannot be held liable in their individual capacities under Title VII. The Ninth Circuit also concluded that plaintiff did state a Title VII claim against nine of the individual defendants in their official capacities and against Washington County under the theory of respondeat superior.

The Ninth Circuit also held that dismissal of plaintiff’s Title VII and retaliation claim was in error since plaintiff had set forth sufficient evidence to show impermissible discrimination.

However, the Ninth Circuit affirmed the dismissal of the claims against six of the defendants because plaintiff failed to allege that those defendants knew of or participated in activities connected to the alleged violations. The court deemed the dismissals of the claims against the remaining four defendants to be in error.

2. ***Woodson v. Scott Paper Co.* (3rd Cir. 1997) 109 F.3d 913.**

(Under the Civil Rights Act of 1991, Discrimination Must Have a “Determinative Effect” for Plaintiff to Prove Retaliation)

Plaintiff was a former manager who claimed he was terminated from his job in retaliation for complaints he made about racial bias in the workplace. In reversing a \$1.5 million verdict favoring plaintiff and remanding the case for a new trial, the court on appeal held that under the Civil Rights Act of 1991, retaliation is not proven unless the alleged discrimination is shown to have had a determinative effect on the employer's adverse actions towards the employee. That is, discrimination cannot simply be a motivating factor in the adverse decision.

(NOTE: Due to differences in statutory construction, the courts are split on whether retaliation is the type of employment practice which confers a higher burden of proof on plaintiff.)

3. ***Robinson v. Shell Oil Co.* (1997) ___ U.S. ___, 117 S.Ct. 843.**

(Title VII Suit May Be Had Over Retaliatory Negative Job References)

Plaintiff claimed that his former employer gave his prospective employer a negative reference about him after he filed an EEOC charge against the former employer. The case went up to the Supreme Court which found that both the district court and the appellate court erred in finding that plaintiff was not an "employee" of the former employer for purposes of a Title VII recovery. In so doing, the high court found that the term "employee" was broader than the term "current employee."

4. ***Tanca v. Nordberg* (1997) (1st Cir. 1996) 98 F.3d 680, cert. den., 117 S.Ct. 1253.**

(1991 Civil Rights Law Applying to Mixed Motive Discrimination Claims Does Not Extend to Retaliation Claims)

The Supreme Court let stand the First Circuit Court of Appeals' finding that mixed motive discrimination claims do not subsume retaliation claims under the 1991 civil rights law.

5. ***Payne v. Northwest Corp.* (9th Cir. 1997) 113 F.3d 1079.**

(Inconsistent Reasons for Employer Actions May Create Triable Issue of Material Fact)

Plaintiff was terminated for alleged insubordination. The articulated reasons for his termination, however, ranged from violation of a code of ethics to violation of the attorney-client privilege. Plaintiff argued that the true reason for his termination was that he was being retaliated against for having filed complaints of race, gender, age, and disability discrimination with the Montana Human Rights Commission (MHRC). Plaintiff also alleged that his employer terminated him due to his race, gender, age, and disability. The court found that differing justifications for the termination could create a genuine issue of fact as to whether the employer's reasons were a pretext for impermissible discrimination.

6. ***Hashimoto v. Dalton* (9th Cir. 1997) 118 F.3d 671.**

(Attorney's Fees Available on Retaliation Claim Even If Plaintiff Cannot Show Damages)

Plaintiff was an Asian-American woman who sued the United States Navy for race and gender discrimination under Title VII after being terminated in a reduction in force. Among other things, she claimed retaliation by her employer for having filed complaints with the Navy's EEO officer. Thereafter, she said that the Navy had given the Army a negative reference about her when she sought employment with the Army. The EEOC found that although the Army would not have employed her in any event, that the negative reference was motivated by a discriminatory animus and that the plaintiff was entitled to attorneys' fees. On appeal, the court agreed that plaintiff could collect attorneys' fees even if there were no damages because an illegal act of discrimination is a wrong in itself under Title VII, regardless of whether that wrong would warrant an award of damages.

D. Summary Judgment in Discrimination Cases.

1. ***Nidds. v. Schindler Elevator Corp.* (9th Cir. 1997) 113 F.3d 912, petn. for cert. filed July 29, 1997.**

(Plaintiff Fails to Prove "Pretext" for Termination)

In this amended opinion, the court ruled that an employer's showing of sufficient evidence to warrant the plaintiff's layoff permits summary judgment of plaintiff's wrongful termination claim. Plaintiff had worked as an elevator service mechanic and was laid off along

with a number of other workers in a company downsizing. Before the layoff, a company supervisor allegedly told another service mechanic that he intended to get all of the "old timers" because they would not "kiss my ass." A 25-year-old employee replaced the 54-year-old plaintiff. Plaintiff then filed an age discrimination claim with the Department of Fair Employment and Housing. Thereafter, plaintiff was rehired but maintained his age discrimination action and then filed a second charge of discrimination and retaliation based on his reassignment to a route in a reportedly high crime area. Customer complaints about his work on the route led to plaintiff's termination.

The court granted summary judgment in favor of the defendant stating that although plaintiff made out a prima facie case of discrimination and retaliation, he was unable to show that the reason for his termination was false or that the true reason was discrimination. The court on appeal affirmed, holding that a reasonable fact finder could not conclude that the reason for plaintiff's termination was "pretextual."

2. ***Addy v. Bliss & Glennon* (1996) 44 Cal.App.4th 205, 51 Cal.Rptr.2d 642.**

(Summary Judgment Appropriate for Claims of Discrimination, Retaliation and Constructive Discharge)

Plaintiff, an Asian woman, sued her former employer based upon alleged discriminatory failure to promote, retaliation and constructive discharge. The trial court granted the defendant's motion for summary judgment.

On appeal, plaintiff contended that the trial court applied the wrong standard in granting summary judgment. She contended that the employer was required to negate each of the theories of liability contained in the complaint. The appellate court, applying the 1993 modifications to Code of Civil Procedure section 437c, held that a defendant can prevail on summary judgment by making an affirmative showing that the plaintiff cannot prevail.

On plaintiff's claim for discriminatory failure to promote, the employer showed that plaintiff was not qualified for the position (it required a four-year college degree and plaintiff had only a two-year degree) and that it had already hired another candidate when it received the plaintiff's application. Absent any evidence that the employer's showing was untrue or pretextual, summary judgment was appropriately granted.

On plaintiff's claim for retaliatory reassignment of work, the plaintiff was able to show that she engaged in protected activity and that she was thereafter subjected to adverse employment action. She was unable, however, to establish a causal link between the filing of her charge and the adverse actions. In support of its motion, the employer submitted evidence that it

had legitimate, nondiscriminatory business reasons for reassigning plaintiff's work and that she was treated exactly the same as a co-worker.

Plaintiff based her constructive discharge claim on alleged denial of training and demotion. The employer submitted evidence that plaintiff had received substantially similar training as the other employee in her job category. It further held that a mere demotion, even with reductions in pay, are not by themselves sufficient to constitute constructive discharge. Accordingly, summary judgment was appropriate on that claim as well.

3. ***Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 48 Cal.Rptr.2d 448.**

(Failure to Make a Prima Facie Case Should Be Addressed by Demurrer, Summary Judgment or Nonsuit)

Plaintiff, a school superintendent, claimed that his termination was motivated by his age and race. His proof included direct evidence of age discrimination--a school board member who voted him out was quoted in the paper noting his age and that he was at the end of his career, not the beginning. The school district prevailed on both discrimination claims. The trial court then ordered a new trial on the discrimination claims, having concluded that it improperly instructed the jury on the *McDonnell Douglas* shifting burdens of proof as stated in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S.Ct. 1817.

The Court of Appeal, after a detailed discussion of *McDonnell Douglas*, held that it was inappropriate to instruct the jury on the shifting burdens of proof at the trial stage. The court held:

[T]he issues raised by the shifting burdens of proof are amenable to pretrial proceedings. . . . If the employer presents admissible evidence either that one or more of the plaintiff's prima facie elements is lacking, or that the adverse employment action was based on legitimate nondiscriminatory factors, the employer will be entitled to summary judgment unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant's showing.

The court also noted that Code of Civil Procedure section 437c was a "particularly suitable means to test the sufficiency of plaintiff's *prima facie* case and/or of the defendant's nondiscriminatory motives for the employment decision." The court then offered advice to those practicing employment law: To prevail on one party's failure to satisfy one of the elements of the

McDonnell Douglas analysis, you must seek to do so through demurrer, summary judgment or nonsuit.

E. Discovery Issues.

1. ***Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214, 54 Cal.Rptr.2d 575.**

(Witness Interviews May Be Privileged)

In an employment termination case, plaintiff propounded form interrogatories. While defendants, pursuant to Interrogatory No. 12.1, identified seven persons who witnessed the incident, they objected to and refused to answer Interrogatory No. 12.2 or 12.3, seeking the identity of persons interviewed or persons from whom statements were taken. The appellate court upheld defendant's objections to Interrogatory No. 12.2, citing California authority that listing witnesses interviewed by opposing counsel would necessarily reflect counsel's evaluation of the case and was protected by the work product doctrine. The court also held that defendants must provide a list of persons who turned over independently prepared statements, which the court distinguished from interview notes prepared by counsel.

2. ***Cloud v. Superior Court* (1996) 50 Cal.App.4th 1552, 58 Cal.Rptr.2d 365.**

(Courts Do Not Recognize the "Self-Critical Analysis Privilege")

This case involved a discovery dispute in an action for gender-based discrimination. Plaintiff demanded production of defendant's affirmative action plans. Defendant objected on the grounds that at least some of the documents were protected by the "self-critical analysis privilege." On appeal, the court held that defendant's documents were not shielded by any privilege recognized in this state.

3. ***Doyle v. Superior Ct.* (1996) 50 Cal. App. 4th 1878, 58 Cal.Rptr.2d 476.**

(No Psychological Exam Allowed If Plaintiff's Mental Health Is Not an Issue)

Plaintiff sued defendant for sexual harassment. Thereafter she refused to submit to an independent medical exam. Defendant brought a motion to compel and was awarded sanctions for having to bring the motion. On appeal, the court held that since the sexual harassment was not ongoing, the plaintiff had not put her mental condition in controversy. Accordingly, the lower court was ordered to deny defendant's motion to compel.

4. ***Pillsbury, Madison & Sutro v. Schectman* (1997) 55 Cal.App.4th 1279, 64 Cal.Rptr.2d 698.**

(Employee May Not Take Confidential Business Records from His Employer for Use as Evidence in Employment Action)

Plaintiff employer sued an attorney and law firm representing current and former employees of plaintiff in employment law claims, to recover documents removed from its offices without its consent. The lower court issued injunctive relief and ordered the return of the documents. The court on appeal affirmed the granting of injunctive relief and stated its agreement with other courts which have condemned self-help evidence gathering. This was especially so in that the documents at issue were otherwise subject to the Civil Discovery Act which was meant to allow for the orderly discovery of cases and to eliminate surprise at trial. In this regard, the court sent the strong message that "[a]ny litigant or potential litigant who converts, interdicts or otherwise purloins documents in the pursuit of litigation outside the legal process does so without the general protections afforded by the laws of discovery and risks being found to have violated protected rights."

5. ***Jorgensen v. Taco Bell Corp.* (1996) 50 Cal.App.4th 1398, 58 Cal.Rptr.2d 178.**

(Plaintiff's Counsel May Use a Private Investigator to Interview Plaintiff's Former Co-Workers Months Before Filing Suit)

In an employment suit, the trial court denied the corporate defendant's motion to disqualify plaintiff's counsel for having hired an investigator to interview witnesses concerning facts relevant to plaintiff's claims of sexual harassment before her lawsuit against the corporation and one of its employees had been filed. The court on appeal affirmed the denial of the motion finding that there was no violation of rule 2-100 of the California Rules of Professional Conduct which precludes an attorney from communicating directly or indirectly with a party represented by other counsel without that counsel's consent. Since no lawsuit had yet been filed, neither the corporation nor its employees were yet represented by counsel and plaintiff's counsel did not otherwise know that either the corporation or any of its employees were represented by counsel in the matter.

F. Evidentiary Issues.

1. ***Heyne v. Caruso* (9th Cir. 1995) 69 F.3d 1475.**

(Treatment of Others May Be Relevant Evidence)

Plaintiff was a waitress who was allegedly fired for being late to work 2 days in a row. She claimed that she was fired because she refused her boss' sexual advances during the previous two months. The trial court excluded testimony of six other women who claimed to have been harassed by the boss. The Ninth Circuit held that the exclusion of that evidence was an abuse of discretion, noting that "it is clear that an employer's conduct tending to demonstrate hostility towards a certain group is both relevant and admissible where the employer's general hostility toward that group is the true reason behind firing an employee who is a member of that group."

Notably, the court stated that since the case was a *quid pro quo* case, evidence of the employer's harassment could not be used to prove that he propositioned her. It could be used, however, to prove his motive or intent in terminating the plaintiff's employment.

2. ***EEOC v. Farmers Brothers Co. (9th Cir. 1994) 31 F.3d 891.***

(Evidence of Sexual Harassment May Be Relevant to Claim of Gender-Based Employment Discrimination)

In June of 1992, Farmer Brother's company president decided to reduce the percentage of women workers in production jobs, while circumventing the union collective bargaining agreement that allowed union members to retain seniority and recall rights for nine months after layoff. The president laid off 10 men and 11 women, and, during the ensuing nine months, no one was recalled and no new employee was hired. At the end of the nine months, Farmer Brothers filled most of the jobs with men.

One of the terminated workers, Diana Estrada, filed a DFEH charge in 1983, ultimately leading to a class action brought by the EEOC in 1988. The district court found for Estrada, and the company appealed.

Evidence of sexual harassment was admissible to prove that gender bias motivated the lay-offs. The trial court admitted testimony from former employees who testified that Estrada's immediate supervisor sexually harassed women from the 1950's into the 1980's. The Ninth Circuit concluded this was not reversible error "because hostility against women underlies decisions to discharge or to refuse to hire women because of their gender, so that evidence of sexual harassment often will be relevant to claims of gender-based employment discrimination."

G. Wrongful Termination in Violation of Public Policy/Statute of Limitations.

1. ***Barton v. New United Motor Mfg., Inc.* (1996) 43 Cal.App.4th 1200, 51 Cal.Rptr.2d 328.**

(Statute of Limitations for Public Policy Violation Is One Year)

Plaintiff's employment was terminated on October 12, 1992. He filed a complaint against his former employer on October 5, 1994, alleging breach of contract and wrongful termination in violation of public policy. The employer demurred to the complaint on the grounds that the public policy cause of action was barred by the one-year statute of limitations set forth in Code of Civil Procedure section 340(3). The trial court sustained the demurrer and the Court of Appeal affirmed. The court held that a claim for wrongful termination in violation of public policy was one for personal rights, rather than a property right.

Plaintiff also argued that the statute of limitations should have been tolled because he did not fully understand "the dimensions" of his wrongful termination until October of 1994. The court rejected that argument, noting that the infliction of actual and appreciable harm will commence the statutory period, even if there is uncertainty as to the amount of damages.

H. Infliction of Emotional Distress.

1. ***Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 53 Cal.Rptr.2d 741.**

(Management Activity Is Not "Outrageous Conduct" for Emotional Distress Claim)

The Court of Appeal upheld the trial court's entry of summary judgment on plaintiffs' intentional infliction of emotional distress claims based upon alleged termination on the basis of age. The court held:

Managing personnel is not outrageous conduct beyond the bounds of human decency, but rather conduct essential to the welfare and prosperity of society. A simple pleading of personnel management activity is insufficient to support a claim of intentional infliction of emotional distress, even if improper motivation is alleged. If personnel management decisions are improperly motivated, the remedy is a suit against the employer for discrimination.

2. ***King v. AC&R Advertising (9th Cir. 1995) 65 F.3d 764.***

(Comments about Age Were Not Outrageous)

When plaintiff was offered a reduction in pay and responsibilities, he resigned. He brought contract and age discrimination claims. Supporting his age claims were age-related comments that were not made to him or about him. The Court distinguished "racial slur" cases and held that "defendants actions, while perhaps demonstrating poor judgment and manners," were not sufficiently extreme or outrageous to support a claim.

I. Failure to Exhaust Administrative Remedies.

1. ***Cole v. Antelope Valley Union High School Dist. (1996) 47 Cal.App.4th 1505, 55 Cal.Rptr.2d 443.***

(Individual Defendants Must Be Identified in the DFEH Charge)

The Court of Appeal held that a plaintiff may not sue individuals under the FEHA who were **not** named in either the body or the caption of a DFEH charge. Individuals who were named in the body, but not the caption, could be sued since they were put on notice of the allegations of discrimination.

2. ***Leibert v. Transworld Systems, Inc. (1995) 32 Cal.App.4th 1693, 39 Cal.Rptr.2d 65.***

(Administrative Exhaustion Does Not Apply to Violation of Public Policy Claims)

Plaintiff, a collection specialist for Transworld Systems, was hired in April 1991. During the course of his employment, it became known that plaintiff was a homosexual. Co-workers and managerial employees began calling him "fag" and his supervisor portrayed him in an effeminate manner. In May 1991, a company vice president told another employee to keep a close watch on plaintiff and that any mistake would result in plaintiff's termination because, "I do not need a fag working for me in this office." Plaintiff contends he was terminated without good cause in August 1991 and that his sexual orientation was the reason for his termination.

Plaintiff alleged various causes of action, including violations of Labor Code sections 1101, 1102 and 1102.1, invasion of California's constitutional right to privacy, wrongful termination in violation of public policy and intentional infliction of emotional distress. On review, the Court of Appeal sustained the summary adjudication of the Labor Code section violation allegations in favor of the defendant and upheld a demurrer to the violation of privacy allegation.

The Court of Appeal, however, reversed the lower court's orders granting judgment on the pleadings on the wrongful discharge claim and the sustaining of the defendant's demurrer to the emotional distress claim. In so doing, the court looked to the decision of *Rojo v. Kliger* (1990) 52 Cal.3d 65, 276 Cal.Rptr. 130, 801 P.2d 373, to hold that violations of public policy (i.e. *Tameny* claims) do not require administrative exhaustion. A *Tameny* cause of action 'reflects a duty imposed by law upon all employers in order to implement the fundamental public policy [of this state]. . . .' (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 688, 254 Cal.Rptr. 211, 765 P.2d 373, quoting *Tameny v. Atlantic Richfield Co.*, (1980) 27 Cal.3d 167, 176, 164 Cal.Rptr. 839, 610 P.2d 1330). Further, the court on appeal found that allegations of intentional infliction of emotional distress which flow from a *Tameny* claim are exempt from the exclusivity provisions of the Workers' Compensation Act and were therefore actionable.

J. Individual Supervisor's Liability.

1. ***Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 53 Cal.Rptr.2d 741.**

(Individual Supervisors Are Not Liable for Discrimination)

The Court of Appeal for the Second Appellate District held that individual supervisory employees don't risk liability under the FEHA for personnel decisions. Plaintiffs, four former and current employees of Hughes, brought age discrimination claims under the FEHA against both the company and the individual defendants. Plaintiffs also brought claims for intentional infliction of emotional distress.

The trial court sustained demurrers on the grounds that: (1) the FEHA does not impose personal liability on individual supervisors for age discrimination in making personnel management decisions; and, (2) that the infliction of emotional distress count simply duplicated the FEHA claim. The Court of Appeal discussed distinctions between harassment and discrimination. It found that harassment was a type of conduct not necessary to a supervisor's job performance, whereas claims of discrimination flowed from business or personnel management decisions which were inherently necessary to performance of a supervisor's job. While supervisors can insulate themselves from claims of harassment by refraining from prohibited conduct, they cannot avoid making personnel decisions, which remain an inherent and unavoidable part of their supervisory function.

The *Janken* court also rejected plaintiff's theory that the supervisory employees had "aided and abetted" the defendant company in its alleged wrong-doing. In dispensing with this theory, the court analogized "aiding and abetting" to conspiracy cases. Similar to conspiracy, the corporation can only act through its employees, making it impossible to "conspire" or "aid and

abet" itself. Since the element of concert is missing, there can be no cause of action as "aiding and abetting."

NOTE: This case was granted a rehearing and recently argued before the California Supreme Court. The Court of Appeal decision is therefore no longer citable.

2. ***Reno v. Baird* (1997) 57 Cal.App.4th 1211, 67 Cal.Rptr.2d 671.**

(Individual Supervisor May Be Liable for Employment Discrimination)

Disagreeing with the court's holding in *Janken v. G.M. Hughes*, as discussed above, the court here found that the clear language of FEHA, as well as the intent of those who wrote Government Code section 12940, et seq. (the statute defining FEHA's purpose and intent), and for reasons of public policy, a plaintiff may bring an action for wrongful discharge against an individual supervisor. The court found the *Janken* court's distinction between harassment and discrimination unpersuasive. The court went on to find that the goal of FEHA to eliminate discriminatory practices in the workplace are advanced by allowing lawsuits to go forward both against the employer and against individual supervisory agents of the employer who engage in impermissible discrimination.

3. ***Page v. Superior Court (3NET Systems, Inc.)* (1995) 31 Cal.App.4th 1206, 37 Cal.Rptr.2d 529.**

(Individual Supervisors May Be Liable for Harassment)

Plaintiff was an assistant controller for 3NET Systems, Inc. Her supervisor, Dennis Montgomery, regularly asked plaintiff to perform oral sex on him. He twice masturbated in front of her, and asked if it "turned her on." Plaintiff repeatedly complained to the company president, and was told that the situation would be addressed. Instead, after taking a one month leave of absence for stress, plaintiff was terminated.

Plaintiff sued the company, the president and Montgomery for sexual harassment. Montgomery demurred on the grounds that a supervisor cannot be held personally liable for sexual harassment or retaliation under the FEHA. Montgomery's demurrer was sustained without leave to amend. Plaintiff sought a writ of mandate.

The Court held the FEHA made it an unlawful employment practice for any "person" to harass or retaliate against an employee or applicant. "As to supervisors," the Court ruled concluded "that the language of the FEHA is unambiguous in imposing personal liability for harassment or retaliation in violation of FEHA." This ruling comports with decisions of the Fair

Employment and Housing Commission (FEHC), which has consistently held supervisors personally liable for sexual harassment as "Persons" under the FEHA.

The Court rejected the defendant's analogy to federal Title VII law and reliance on the Ninth Circuit case of *Miller v. Maxwell's International, Inc* (9th Cir. 1993) 991 F.2d 583. The court found that because Title VII expressly limited liability to employers of 15 or more employees and their agents, while the FEHA extended liability to "any person", the *Miller* case provided no guidance. The Court expressly did not rule on the individual liability of non-supervisory co-workers.

4. ***Trent v. Valley Elec. Ass'n Inc. (9th Cir. 1994) 41 F.3d 524.***

(Employer May Be Liable for the Harassing Acts of a "Consultant")

Plaintiff was a female residential electric meter reader in Nevada. Shortly after her hire, she attended a mandatory safety meeting conducted by an outside consulting firm. The consultant used foul language and made sexually offensive comments, including descriptions of the sexual experiences of linemen at a Nevada brothel. Plaintiff was the only female in attendance. Plaintiff complained to her supervisor and submitted a written report to the Company General manager. One month later she was fired.

The U.S. District Court granted summary judgment in favor of the Company, holding that plaintiff had failed to establish that she was engaging in a protected activity, the first prong in a prima facie retaliation claim. Specifically, the court reasoned that because plaintiff complained about an outside consultant (a "private individual") rather than her employer, she was not protesting an "unlawful employment practice" under Title VII and was therefore not engaging in "protected activity."

The Ninth Circuit reversed. On appeal, the court questioned whether the consultant was a "private individual," since the consultant was hired by the company to train employees, a function often carried out by company supervisors. However, the Court's decision did not hinge on this distinction. To establish the first element of a prima facie retaliation case, plaintiff must only show that she had a "reasonable belief" that the employment practice she protested was prohibited under Title VII, rather than proving it was in fact unlawful. The Court explained that to require plaintiff to prove the conduct at issue is actually unlawful "would not only chill the legitimate assertion of employee rights under Title VII but would tend to force employees to file formal charges rather than seek conciliation or informal adjustment of grievances."

This ruling is similar to a decision in *Sias v. City Demonstration Agency* (9th Cir. 1978) 588 F.2d 692.

K. Arbitration

[ARBITRATION CLAUSE FOUND ENFORCEABLE]

1. ***Brookwood v. Bank of America* (1996) 45 Cal.App.4th 1667, 53 Cal.Rptr.2d 515.**

Plaintiff sued defendants for wrongful termination in violation of FEHA. Defendants filed a petition to compel arbitration on the ground a written agreement existed to arbitrate plaintiff's dispute. Although there was no specific arbitration provision in the employer's agreement for salaried employees, the court ruled that related documents to which plaintiff was a party contained such an arbitration clause and that such a clause was binding despite plaintiff's claim that she did not knowingly agree to submit her claim to arbitration.

2. ***Cole v. Burns Int'l Security Services* (D.C. Cir. 1997) 105 F.3d 1465.**

The court on appeal enforced a provision for arbitration in a "Pre-Dispute Resolution Agreement". To obtain employment, the plaintiff was required to sign the agreement, which compelled arbitration of his Title VII race discrimination claims against the employer.

[ARBITRATION CLAUSE FOUND UNENFORCEABLE]

1. ***Cheng-Canindin v. Renaissance Hotel Associates* (1996) 50 Cal.App.4th 676, 57 Cal.Rptr.2d 867.**

In this wrongful termination action against a hotel, the trial court denied defendant's motion to compel arbitration pursuant to the hotel's review committee procedure. The court of appeal affirmed, concluding that the employer's problem-solving procedure, as set out in the employee handbook, did not compel arbitration of disputes between the employer and the employee.

2. ***Renteria v. Prudential Ins. Co. of America* (9th Cir. 1997) 113 F.3d 1104.**

Plaintiff had signed a standard securities industry form, Form U-4, which provides that parties must arbitrate their disputes, claims or controversies with their employer. On appeal, the court refused to find that such a form compelled her to arbitrate her sex discrimination and harassment claims under Title VII or the FEHA. More specifically, the court found that the employer failed to adequately notify plaintiff that her required signing of the Form U-4 meant she was agreeing to arbitrate statutorily protected employment-related rights. This same finding of inadequate notice was earlier had by the Ninth Circuit in *Prudential Insurance Company of America v. Lai* (9th Cir. 1994) 42 F.3d 1299.

[NOTE: The National Association of Securities Dealers, Inc. ("NASD") recently voted to eliminate mandatory arbitration of statutory discrimination claims for registered persons. This came as a direct result of several courts challenges to the NASD's policy of requiring persons who have a signed Form U-4 to arbitrate their claims of employment discrimination against their member firms.]

3. ***Buckley v. Gallo Sales Co. (N.D. Cal. 1996) 949 F.Supp. 737.***

The district court in Northern California refused to compel the arbitration of plaintiff's FEHA and ADA disability claims, despite an arbitration agreement in a collective bargaining agreement.

[NOTE: In the employment area, courts generally distinguish between employees who are subject to collective bargaining agreements and those who are not. When federal statutory protections are involved, the validity of arbitration clauses in collective bargaining agreements have been broadly challenged unless the individual employee has expressly agreed to arbitrate claims covered by these protected areas.]

4. ***Stirlen v. Supercuts, Inc. (1997) 51 Cal.App.4th 1519, 60 Cal.Rptr.2d 138.***

On appeal, the First District upheld the lower court's refusal to compel arbitration of plaintiff's wrongful termination claims in violation of public policy. In so doing, the court held that under the circumstances of the case, the arbitration requirement was against public policy and unconscionable. Moreover, the court was unpersuaded by the employer's argument that the plaintiff was a successful and sophisticated corporate executive. The court was particularly concerned with the fact that the plaintiff had no realistic way to modify the terms of the employment contract which were cast in generic and gender-neutral language and which were presented to the plaintiff after he had accepted employment. It was undisputed in this regard that the employment contract was presented to him on a "take it or leave it basis".

5. ***EEOC Notice: Policy Statement on Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment.***

The EEOC's policy statement of July 10, 1997, reaffirms the EEOC's opposition to mandatory arbitration of employment discrimination claims as contrary to fundamental principles of employment discrimination laws. In this statement, EEOC investigators are

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specifically instructed to closely scrutinize any charge involving an agreement to arbitrate to make sure that the agreement was not had under coercive circumstances (*e.g.*, as a condition of employment). The EEOC voiced its concern that arbitration favors employers and harms the ability of the EEOC to enforce civil rights laws.

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