

## **SEXUAL HARASSMENT**

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In an effort to keep you apprised of recent developments, we have prepared this introduction to recent cases and concepts that impact those who participate in the drama called sexual harassment litigation. It is not intended to be a comprehensive list of the important cases decided in the last three years; but rather a supplement to the rest of the article, with highlights and significant trends of this evolving body of sexual harassment law.

## 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 (Declined to follow by *Schmitz v. Bob Evans Farms* (1997) 120 Ohio App.3d 264; Abrogation recognized by *Burrell v. Star Nursery, Inc.* (1999) 170 F.3d 951, and *Hudson v. Tahoe Crystal Bay, Inc.* (1999) 191 F.3d 460) 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.

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\* 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. The California Supreme Court has ruled that managers and supervisors cannot be held individually liable for discrimination under the state Fair Employment and Housing Act ("FEHA") or the common law theory of wrongful termination in violation of public policy. *Reno v. Baird*, 18 Cal.4th 640, 957 P.2d 1333, 76 Cal.Rptr.2d 499

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 (declined to follow by *Gordan v Cummings* 2000 WL 419716; called into doubt by *Mosley v. Beaumont Ind. Sc. Dist.* (1999) 997 S.W.2d 934) (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* (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. 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.Gov. 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.

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\*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

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

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 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 has been our experience that employees affected by an unfavorable employment decision (*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 (10<sup>th</sup> 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.

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\*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 defendants' 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.4<sup>th</sup> 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.4<sup>th</sup> 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.

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.

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.

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.

## ADDITIONAL CASELAW AND CODES

### Amendment to Civil Code 51.9 and 52

Civil Code 51.9 establishes a cause of action for sexual harassment in a business, service or professional relationship. As amended, the code section expands the definition of sexual harassment to include “other verbal visual, or physical conduct of a sexual nature or a hostile nature based on gender.” Additionally, the conduct must be ‘pervasive’ as opposed to persistent.’

Another modification to this section deletes the requirement that the plaintiff ask the defendant to stop the allegedly harassing conduct, as is the requirement that tangible hardship would result to the plaintiff in terminating the relationship. Emotional distress or the violation of a statutory or constitutional right may now be included as an injury.

The requirement that the complaint and answer be verified is also deleted. Further, the definition of sexual harassment, and the standards for determining liability set forth in the section, apply to a determination of liability only with regard to a cause of action brought under this section.

Section 52, which governs damages for the denial of a right provided by specified code sections, is amended to also apply to the denial of a right provided by section 51.9.

### **Burlington Industries, Inc. v. Ellerth** (1998) 524 U.S. 742, 118 S.Ct 2257

(Vicarious liability of employer for supervisor’s harassing actions notwithstanding any tangible adverse employment action.)

Plaintiff quit her job after her supervisor subjected her to offensive remarks and gestures, some of which could have been construed as threats to deny her job benefits if she did not submit to her supervisor’s sexual demands. Plaintiff rebuffed her supervisor’s advances, suffering no real adverse employment action. In fact, plaintiff was promoted. Plaintiff eventually quit her job without complaining of the harassment to her employer, even though she was aware of the employer’s policy of sexual harassment.

The Court held that not only is an employer strictly liable for a supervisor’s harassment of a lower-level employee when a tangible adverse employment action is taken, but employer may also be strictly liable to an employee for a hostile work

environment created by a supervisor with immediate authority over the employee, even if the employee suffered no tangible adverse employment action.

The Court went on to hold that an employer has an affirmative defense to liability if it can demonstrate that first, it exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and second, that the plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.

**Faragher v. City of Boca Raton** ( 1998) 524 U.S. 775, 118 S.Ct 2275

(Employer may be liable for sexual harassment by a supervisor even if the employer lacked actual notice of the supervisor's conduct.

Plaintiff was a lifeguard for the City of Boca Raton, Florida. Plaintiff complained that she was subjected to sexually explicit remarks and unwanted touching for several years, however, she never complained about the harassment to her employer. Plaintiff eventually resigned her position without ever filing a complaint.

Plaintiff sued the city for failing to protect her from years of harassment by her supervisors under Title VII. The Court of Appeals for the Eleventh Circuit held that the employer was not liable. The Supreme Court reversed.

The Court held that Title VII created a cause of action against an employer where a sexually hostile environment is created by a supervisor with authority over an employee, regardless of actual notice of that harassment. The Court emphasized that the employer may defend this cause of action by establishing the existence of a harassment policy and the employee's unreasonable failure to use it. Further, the Court stated that although "proof that an employer had promulgated an anti-harassment policy with complaint procedures is not necessary in every instance," such proof would constitute a significant factor in meeting the first element of the affirmative defense. Although not dispositive, the fact that the employee failed to take any available action under the employer's policies and procedures will "normally suffice to satisfy the employer's burden under the second element of the defense."

**Brooks v. City of San Mateo** (2000) 2000 Daily Journal D.A.R. 5894

(Under Title VII, a single episode of sexual harassment, followed by removal of harasser, does not support a hostile work environment claim.)

Plaintiff was a telephone dispatcher for the City of San Mateo. Her coworker, a senior dispatcher, approached her one evening while she was taking 911 calls and placed his hand on her stomach, commenting on its softness and sexiness. Plaintiff told him to stop and pushed him away. Later that evening, he trapped her against the console as she was taking another 911 call and forced his hand under her sweater and bra to fondle her bare breasts. After releasing the call, plaintiff removed his hand and told her that “he had crossed the line.” Plaintiff immediately reported the incident and the coworker was placed on administrative leave the following day. Plaintiff complained that because of the incident, she had to begin to see a psychologist and had to take a leave of absence for six months. Upon her return, she alleged that she was ostracized by male employees and mistreated by supervisors. Further, she claimed that the city delayed approval of sick leave benefits, reprimanded her for conduct overlooked in other employees, and gave her an unwarranted negative performance evaluation. Plaintiff appealed the evaluation and while the city was considering her appeal, plaintiff left work and never returned.

Plaintiff sued the city, the Police Department and its chief for sexual harassment and retaliatory discrimination in violation of Title VII and FEHA. The district court held that the assault of plaintiff was not severe enough to give rise to a hostile work environment claim and that she failed to show any adverse employment consequences. Plaintiff appealed.

The Court held that the single episode of harassment does not establish a hostile work environment. The Court went on to state that “no reasonable woman in [the position of the plaintiff] would consider that [the co-worker’s] conduct had altered the terms and conditions of her employment,” thus, plaintiff’s hostile work environment claim could not stand. The Court rejected plaintiff’s retaliation claim. The court found that ostracism is not an adverse action, nor did she show any evidence as to how she was treated differently from her co-workers. Further, although a negative performance review can constitute an actionable retaliation claim, the review was under appeal and subject to modification by the city. Plaintiff’s abandoning her job while the review was on appeal, it is not sufficient to constitute an adverse job action by the city.

