

RECENT CALIFORNIA OPINION REJECTS SEXUAL HARASSMENT CASE WHERE SEXUAL COMMENTS NOT “PERSUASIVE” AND CLARIFIES WHAT CONSTITUTES SEXUAL HARASSMENT

California employers should take note of a recent decision. In *Alicia M. Haberman v. Cengage Learning, Inc.* (2009) 180 Cal.App.4th 365, the California Appellate Court followed a California Supreme Court decision, and dismissed a hostile work environment sexual harassment case by granting summary judgment in favor of the employer. The Fourth District Court of Appeals further clarified the necessary degree of comments or incidents necessary to be deemed actionable sexual harassment.

In *Alicia M. Haberman v. Cengage Learning, Inc.*, the plaintiff worked as a sales representative at a textbook publishing company. The nature of her employment required her to work closely with her male supervisors as they traveled to sales meetings and attended various conferences.

Plaintiff failed to meet her sales goals for the third consecutive year and over the course of five months, her two male supervisors consulted with her several times telling her she would be placed on a Performance Improvement Plan if her sales did not improve. Two days after being placed on the Performance Improvement Plan, she began to raise issues of harassment and reported a claim to the company's human resources department. She then went out on stress leave and never returned.

Plaintiff's eventual lawsuit for sexual harassment, retaliation, breach of contract, and intentional infliction of emotional distress was brought against her former employer, Cengage Learning, Inc. (“Cengage”), her former supervisor, Rick Reed and Cengage's national sales manager, Eric Bredenberg. Plaintiff alleged six incidents of sexual harassment against Reed and thirteen incidents of sexual harassment against Bredenberg.

As to Reed, the Court held that most of the six incidents alleged against him were not sexual in nature. The Court found that the other comments made by Reed, as a matter of law, did not constitute “harassing conduct” “severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex.”

As to Bredenberg, the Court found that two of the alleged incidents were not sexual in nature (he told a customer that plaintiff was amazing with five children and no father in the picture; and later when both Reed and Bredenberg conducted a role playing sales training session at Bredenberg's house).

As to the remaining eleven incidents alleged against Bredenberg, the Court found that the comments were brief and isolated and insufficient to constitute a hostile environment, though possibly vulgar. The comments to plaintiff were made over the course of a two- or three- year period. Plaintiff did not allege that Bredenberg ever propositioned her or even asked her out on a date. There was no evidence that Bredenberg ever threatened her or used explicit language in her presence. Once Bredenberg made a joke to a group while giving a presentation at a meeting that his father was called “Big Dick.” But, the Court of Appeal noted that the sexual harassment laws (FEHA) are “not a ‘civility code’ and not designed to rid the workplace of vulgarity.”

The Court noted that Bredenberg twice briefly complimented plaintiff's appearance (*i.e.*, describing plaintiff as “drop dead gorgeous”; and on another occasion questioning “How could you look so pretty so early in the morning?”).

Also the Court noted that twice Bredenberg informed plaintiff that someone else had expressed interest in her (*i.e.*, telling plaintiff at the end of a conference that an author of one of the textbooks they were selling had the “hots” for her and asked whether she or another employee would ever go out with the author; and on a later occasion informing her that a customer's contractor had the “hots” for her and wanted to date her).

The Court also found other comments to be isolated, sporadic or trivial and not a concerted pattern of harassment of a repeated, routine or generalized nature. (*i.e.*, commenting that a school administrator

was “hot for being an older woman”; a later mild innuendo while talking on his cell phone to plaintiff that he was coming up right behind her and that it felt pretty good; and again later on a different occasion asking plaintiff if she was married).

The Court did note that some comments were too personal and inappropriate for the workplace, but without more, the comments did not constitute actionable conduct under California law (*i.e.*, supervisor spoke of his wife’s recurrent battle with cancer and said he thought the next time around he would ‘go for the younger ones because women in their 40’s get sick’ and asking several times later if she had any friends who only wanted a sexual relationship with him as he was not yet ready for a relationship).

Relying on the earlier California Supreme Court decision of *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1048-1049, the Supreme Court explained, “defendant’s sexually harassing conduct, as plaintiff has described it, was not ‘pervasive’ within the meaning of *Civil Code* § 51.9 - that is, it was not so egregious as to alter the conditions of the underlying professional relationship. To be pervasive, the sexually harassing conduct must consist of ‘more than a few isolated incidents.’” (Citations) ... “Employment law acknowledges that an isolated incident of harassing conduct may qualify as severe when it is ‘a physical assault or a threat thereof.’” (Citations)

The Court found that the acts of harassment alleged against Reed and the acts of harassment alleged against Bredenberg fell far short of “establishing ‘a pattern of continuous, pervasive harassment’ (Citation), necessary to show a hostile working environment under FEHA.” Plaintiff’s claim for sexual harassment against Cengage was entirely based on the allegations asserted against Reed and Bredenberg and thus failed for the same reasons.

Considering the “totality of the circumstances” the Court found plaintiff’s allegations of harassing conduct insufficiently severe and pervasive to alter her conditions of employment and create a work environment that qualifies as hostile or abusive. The Court also found that there was no evidence of retaliation or that plaintiff was subjected to extreme or outrageous conduct.

The recent decision is important for employer defendants in that the California Court found that up to 20 incidents of alleged sexually harassing comments is not enough as a matter of law to support a sexual harassment claim. However, there are lessons to be learned from the opinion. The plaintiff was able to bring a lawsuit simply because comments had been made over a period of time. Managers, supervisors and staff should avoid any sexual comments, even if trivial in nature or made on isolated occasions. Periodic training provided by California employers with 50 or more employees is essential and mandated by law.

Employers could avoid the likelihood of being sued as sexual harassment lawsuits can be expensive to defend with no assurance that a Court or jury will find the plaintiff’s allegations insufficient. Employers should promote professional conduct in the workplace at all times.

Wesierski & Zurek commonly handles and wins hostile work environment and sexual harassment claims and has specific expertise in the issues outlined in this article. As in this case, Wesierski and Zurek can guide the case to a pretrial win where the facts show that a motion for summary judgment is appropriate.

- Mary Bevins

SEXUAL HARASSMENT STANDARD APPLIES EQUALLY TO HARASSMENT OUTSIDE OF THE WORKPLACE

We all know that an employer can be sued under the Fair Employment and Housing Act (FEHA) and similar statutes for permitting pervasive or severe sexual harassment that occurs in the workplace. But what if the former wife of the “Herbalife” founder is using her son’s trust to rent a luxury condominium for

both of them to live in, and one of the son's trustees allegedly implied that he would permit the money to be spent if she would sleep with him by saying, "I'm going to get you on your knees and **** you one way or another." This allegedly took place outside of the workplace (while at a museum with the trustee and right in front of her son) and therefore is not governed by FEHA, Title VII, or other workplace statutes. In California, she can still sue under California's Civil Rights Statute § 51.9 for sexual harassment during a "professional relationship," not just in the "workplace." But what standard applies? How appalling or chronic does the harassment have to be to be actionable?

On July 2, 2009, the Supreme Court of California announced in *Hughes v. Pair* that acts have to be "pervasive or severe" in exactly the same way those words are used in traditional workplace claims. Under these circumstances, the court held the comments were too short-term and isolated to be "pervasive," and did not constitute a true physical threat to commit a sexual assault to be "severe." The court felt the comments did not threaten or alter the relationship with the other trustees and the comments were nothing but remarks pertaining to financial retaliation.

Hughes is not the typical employer/employee sexual harassment case because the plaintiff was not an employee of the defendant. Rather, the plaintiff's son was the beneficiary of a rather large trust that contained the estate of his deceased father. Therefore, the plaintiff had to utilize *Civil Code* § 51.9 which permits a plaintiff to bring an action for sexual harassment against a professional if the plaintiff is unable to easily terminate the relationship and the defendant has made sexual advances or engaged in conduct of a sexual nature that was unwelcome and "pervasive or severe."

The holding in Hughes turned on the definition of the words "pervasive" and "severe" under *Civil Code* § 51.9. Both the trial and appellate court ruled that, as in Title VII and FEHA which pertain to sexual harassment that occurs inside the workplace, the words mean "altering the conditions of the employment and creating an abusive working environment." Therefore, under the totality of circumstances, neither court found the defendant's statements to violate *Civil Code* § 51.9.

Plaintiff vehemently argued that the words "pervasive" and "severe" under *Civil Code* § 51.9 must have a different and less stringent definition than in Title VII and FEHA because actions brought under that code section pertain to sexual harassment which occurs outside the workplace. The California Supreme Court acknowledged that the words "pervasive" and "severe" under *Civil Code* § 51.9 lack a defined meaning. Therefore, the Supreme Court took upon the task to determine the legislature's intent when it wrote the Code.

Had plaintiff's argument prevailed, it is quite possible that two different standards would coexist in California; a stricter standard for sexual harassment in the workplace and a lesser standard for conduct outside the workplace. In Hughes, however, the Supreme Court firmly established that a plaintiff must meet the same standard whether the alleged conduct occurred inside or outside of the workplace.

The proper presentation of a sexual harassment defense requires more trial skill and experience than most other tort cases. Wesierski & Zurek, LLP has years of front line experience trying sexual harassment cases which arise both in and out of the workplace, in Federal and state court, and would be delighted to provide consultation for any potential case or matter.

NEW AT WESIERSKI & ZUREK

Minh Hoang: Ms. Minh Hoang's current practice includes general civil litigation, automobile liability, personal injury, and premise liability. Ms. Hoang has accomplished much in her professional endeavors in diverse areas of the law, including experience in risk management at an international law firm, government offices, and was a key player in several litigation boutique firms handling cases involving landlord-tenant issues, immigration, bankruptcy, family law and business disputes.

Ms. Hoang serves as a professor and ethics board member at a law school in San Jose teaching the California Bar Examination and Immigration.

Prior to entering the practice of law, Ms. Hoang had over 10 years of experience in residential and commercial property management. Ms. Hoang specialized in managing capital improvements, marketing and leasing, tenant relations, financial reporting and budgeting, and lease negotiation. She serves and stays active in the legal community, and is involved in the Vietnamese American Bar Association, Asian American Bar Association, and the Bar Association of San Francisco.

Ms. Hoang graduated from the University of Washington with a Bachelor of Arts degree in Business and Finance. She earned her Juris Doctorate from Golden Gate School of Law, in San Francisco, California and is a member of the State Bar of California. Wesierski & Zurek is proud to welcome Minh aboard!