Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2016 Issue

Dalia Khalili

Changes in California's sexual-harassment laws

From the basic elements of FEHA to the most recent developments

California has been on the forefront of protecting workers' rights. As early as 1959, California enacted the Fair Employment and Housing Act ("FEHA"), in order to protect Californians from employment discrimination, among other issues. The FEHA has expanded over the years, protecting individuals in a number of "protected classes" against harassment or discrimination. Importantly, the FEHA provides employees a remedy against sexual harassment. Government Code section 12940, subdivision (j), covers sexual harassment, stating that it is prohibited for "an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of… sex…to harass an employee, an applicant, an unpaid intern, or volunteer, or a person providing services pursuant to a contract."

Sexual harassment can come in a variety of forms. When sexual harassment comes to mind, many people envision a situation where an individual is personally subjected to harassing conduct (including, but not limited to, inappropriate sexual comments or unwanted touching), which creates a hostile work environment. Hostile work environment sexual harassment can also be established in situations where the individual may not be personally subjected to unwanted harassing behavior but witnesses harassing conduct taking place in his or her immediate work environment. (*Beyda v. City of Los Angeles* ("*Beyda*") (1998) 65 Cal.App.4th 511, 519-520.)

Sexual harassment can also take the form of sexual favoritism, where a plaintiff establishes "widespread sexual favoritism" that is "severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* ("*Miller*") (2005) 36 Cal.4th 446, 466.) *Miller* discussed the doctrine of paramour sexual harassment, where the plaintiff complained that the warden treated women as "sexual playthings" and gave unfair employment benefits to his paramours. Additionally, an employee can be subject to sexual harassment on a "quid pro quo" basis, when an individual's employment is "expressly or impliedly conditioned upon acceptance of a supervisor's unwelcome sexual advances." (*Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1414.)

Here, we focus on what is likely the most common form of sexual-harassment claims that arise in the workplace – hostile work environment sexual harassment, directed at the plaintiff personally. The essential elements necessary to establish this type of claim include: (1) that the plaintiff was an employee of, or a person providing services under a contract with, the defendant; (2) the plaintiff was subjected to unwanted harassing conduct because she was a woman; (3) that the harassing conduct was severe or pervasive; (4) that a reasonable woman in the plaintiff's circumstances would have considered the work environment to be hostile or abusive; (5) that the plaintiff considered the work environment to be hostile or abusive; (6) that a supervisor engaged in the harassing conduct *or* the defendant or its supervisors/agents knew or should have known of the conduct and failed to take immediate and appropriate corrective action; (7) that the plaintiff was harmed; and (8) that the conduct was a substantial factor in causing the plaintiff's harm. (Gov. Code, § 12940, subd. (j); Judicial Council of California Civil Jury Instruction ("CACI") 2521A [note that the elements above can be changed from "she" to "he" and "woman" to "man" in instances where a male is alleging sexual harassment. For purposes of efficiency, the elements as described below will be with reference to the plaintiff as a woman].)

(1.) Plaintiff was an employee of, or providing services under a contract with, the defendant

Under Government Code section 12940, subdivision (j)(4)(A), an "employer" is generally considered any person regularly employing one or more individuals, or regularly receiving the services of one or more individuals providing contract services.

(2.) Plaintiff was subjected to unwarranted harassing behavior because she was a woman

Despite the title of "sexual harassment," and as will be further explored below, sexual-harassing conduct need not be motivated by sexual desire. "[H]arassment consists of a type of conduct not necessary for performance of a supervisory job. Instead, harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. Harassment is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job." (*Reno v. Baird* (1998) 18 Cal.4th 640, 645-646, internal citations omitted.)

Harassing conduct can consist of anything from unwanted sexual advances, unwanted touching, assault, physical interference with normal work

See Khalili, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2016 Issue

or movement, to verbal harassment (obscene language, demeaning comments, sexual comments, sexual slurs or threats), or even visual harassment (such as offensive posters, objects, cartoons, or drawings). (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 869; *Roby v. McKesson* Corp. ("*Roby*") (2009) 47 Cal.4th 686, 707-709; CACI 2523.) In *Roby*, the plaintiff had complained that her supervisor took harassing actions toward her, including subjecting her to demeaning comments about her body odor and arm sores, demanding facial expressions and gestures made toward her. (*Roby*, *supra*, at p. 907.) These actions were deemed to constitute unwarranted harassing behavior.

(3.) The harassing conduct is severe or pervasive

Under *Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 462, the Court found that in order to show hostile work environment harassment, the plaintiff "must demonstrate that the conduct complained of was 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." The conduct need not be both severe and pervasive – just meeting one of these standards will be deemed sufficient. In order for conduct to be sufficiently pervasive, one can look to a number of circumstances, including "(1) the nature of the unwelcome sexual acts or works (generally, physical touching is more offensive than unwelcome verbal abuse); (2) the frequency of the offensive encounters; (3) the total number of days over which all of the offensive conduct occurs; and (4) the context in which the sexually harassing conduct occurred." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609-610.) In order to be pervasive, the acts cannot be "occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature." (*Ibid*.) However, if a plaintiff can show that even one single act of harassment was "severe" in nature, a finding of pervasive harassment need not be met. For example, in a situation where a plaintiff is physically assaulted, or is threatened with being physically assaulted, that conduct, in and of itself, could constitute "severe" harassing conduct. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1049.)

(4.) A reasonable woman in the plaintiff's circumstances would have considered the work environment to be hostile or abusive; *AND,* (5.) The plaintiff considered the work environment to be hostile or abusive

Both of the above prongs establish that, in order to have an actionable claim for hostile environment sexual harassment, the conduct "must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." (*Beyda*, *supra*, 65 Cal.App.4th 511 at pp. 518-519.) "This determination required judges and juries to exercise '[c]ommon sense, and an appropriate sensitivity to social context' in order to evaluate whether a reasonable person in the plaintiff's position would find the conduct severely hostile or abusive." (*Ibid.*; see also *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264.) 284

(6.) A supervisor or agent engaged in the harassing conduct or the defendant *or* its supervisors/agents knew or should have known of the conduct and failed to take immediate and appropriate corrective action

An employer is vicariously liable and *strictly liable* for any harassing conduct committed by any of its supervisors. (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1046.) Government Code section 12926, subdivision (t) defines a supervisor as "any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, *or* discipline other employees, *or* the responsibility to direct them, *or* to adjust their grievances, *or* effectively to recommend that action, if in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment." (Emphasis added.) Any of the above elements can establish a supervisory relationship to the plaintiff. Even merely "directing" another employee can make an individual a supervisor, and make the company the plaintiff and supervisor worked for vicariously liable for his/her harassing conduct. If a supervisor is found to have engaged in the harassing conduct, both the individual supervisor him/herself and the employer can be found liable for sexual harassment.

If the individual perpetrator of the harassing conduct is not a supervisor, he or she can still be found personally liable for sexual harassment. However, in order for the employer to be found liable for the sexually harassing acts of a non-supervisor, a further inquiry needs to be made. Specifically, a trier of fact must find that the defendant employer, or any of its supervisors or agents, knew or should have known about the harassing conduct and failed to take immediate and appropriate corrective action. (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136.) While the word "agent" is not defined by the FEHA, "it is appropriate to consider general principles of agency law. An agent is one who represents a principal in dealings with third persons. An agent is a person authorized by the principal to conduct one or more transactions with one or more third persons and to exercise a degree of discretion in effecting the purpose of the principal. A supervising employee is an agent of the employer." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1328.)

(7.) The plaintiff was harmed

While there isn't necessarily a legal definition of the word "harm," according to the Merriam-Webster dictionary, "harm" is defined as "physical or mental damage; injury." ("Harm." Merriam-Webster.com. Merriam-Webster, n.d. Web. 29 Mar. 2016.) It follows that a trier of fact would employ a common sense definition of harm when determining whether a plaintiff was harmed or not. In a sexual-harassment matter, emotional or mental distress/damage is typically at the forefront of any non-economic damage claims. Harm can also take the form

See Khalili, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2016 Issue

of economic damages, such as past and future loss of earnings, loss of benefits, or medical expenses.

(8.)The conduct was a substantial factor in causing the plaintiff's harm

Finding that the plaintiff was harmed is not the end of the inquiry – the trier of fact must also determine that the conduct plaintiff was subjected to was a "substantial factor" in causing harm to the plaintiff. CACI 430 defines a substantial factor as "a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm." "The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical. Thus, 'a force which plays only an "infinitesimal" or "theoretical" part in bringing about injury, damage, or loss is not a substantial factor,' but a very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault." (*Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 79 internal citations omitted.)

Recent developments in sexual harassment law

(1.) An employee need not establish that sexual harassment was motivated by sexual desire or interest

While sexual harassment is traditionally thought of in the context of a male sexually harassing a female, or in more recent years as a female sexually harassing a male, it is also true that "sexual harassment can occur between members of the same gender as long as the plaintiff can establish the harassment amounted to discrimination *because of sex*." (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1525.) The harassing conduct would need to be shown to take place due to "a discriminatory intent or motivation based on gender." (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 114.)

A 2014 case, *Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, clarified that the term "because of ... sex … [or perceived] sexual orientation" is not synonymous with a motive that is sexual in nature. In *Taylor*, Defendant Nabors Drilling employed the plaintiff, Max Taylor, as a floorhand on an oil rig. Taylor's supervisors called Taylor homophobic slurs several times a day, even though it was clear that Taylor was heterosexual. His supervisors also subjected Taylor to harassing conduct such as urinating on him, patting him on the buttocks, simulating masturbation, and posting a picture of Taylor with a target on his mouth. Following the supervisors' lead, Taylor's coworkers also subjected him to taunts and derisive comments suggesting that he was a homosexual, thus leaving Taylor "extremely disturbed and humiliated."

After Taylor sued Defendant for hostile work environment sexual harassment under the FEHA, the jury returned a $160,000 special verdict in favor of Taylor and denied the defendant's motion for judgment notwithstanding the verdict (JNOV). In its appeal, Nabors Drilling argued that the evidence was insufficient to establish that Taylor "was harassed *because of* his sex and/or perceived sexual orientation." Nabors Drilling relied on *Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, which held that a supervisor's conduct did not constitute sexual harassment where there was no evidence that the supervisor's acts "were an expression of actual sexual desire or intent by [the supervisor], or that they resulted from [plaintiff's] actual or perceived sexual orientation."

The Court of Appeal disagreed. In affirming the trial court's denial of defendant's JNOV, it held that sexual harassment occurred here because "sex was used as a weapon to create a hostile work environment" for Taylor. The Court criticized *Kelly* and instead relied on the holding in *Singleton v. United States Gypsum Co.* (2006) 140 Cal.App.4th 1547: "a heterosexual male is subjected to harassment because of sex under the FEHA when attacks on his heterosexual identity are used as a tool of harassment in the workplace, irrespective of whether the attacks are motivated by sexual desire or interest." The Court also noted that the California Legislature recently amended section 12940, subdivision (j)(4)(C) of the Government Code to provide: "[s]exually harassing conduct need not be motivated by sexual desire." This amendment had the effect of overturning the decision in *Kelley*.

(2.) An employee of an independent contractor has standing to bring a sexual-harassment claim under the FEHA

Hirst v. City of Oceanside ("*Hirst*") (2015) 236 Cal.App.4th 774 clarified who may bring a claim for sexual harassment as a "person providing services pursuant to a contract."

In *Hirst*, American Forensic Nurses, Inc. (AFN) contracted with San Diego County to provide phlebotomy services for the county's law enforcement agencies, including the City of Oceanside. Kimberli Hirst, an employee of AFN, was sexually harassed by an Oceanside police officer, Gilbert Garcia, while she was providing phlebotomist services for the Oceanside Police Department. Hirst sued the City of Oceanside for sexual harassment under the FEHA, alleging that the City was liable because Garcia was her supervisor, or the City knew or should have known about the sexual harassment and failed to take immediate and corrective action.

The trial court granted a new trial after a jury verdict awarded Hirst $1.5 million but denied judgment notwithstanding the verdict. The City appealed on the grounds that Hirst lacked standing to recover against the City for Garcia's sexually harassing conduct because she was not a City employee or a "person providing services pursuant to a contract" in accordance with California Government Code, section 12940, subdivision (j)(1).

The Court of Appeal held that Hirst had standing to recover against the City for Garcia's sexually harassing conduct. It was undisputed that Hirst's employer, AFN, was a "person providing services pursuant to a contract" under section 12940, subdivision (j)(5). Hirst had provided services to the City to fulfill AFN's obligations under a contract between AFN and the City, and Garcia sexually harassed Hirst while she was performing

See Khalili, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2016 Issue

these contractual services. The Court reasoned that because these services could only be rendered by individuals acting on AFN's behalf, AFN's status as a "person providing services pursuant to a contract" must be attributed to Hirst.

The City argued that the expansion of the scope of FEHA to include nonemployee contract workers was not meant to include someone like Hirst because she already had a "traditional employer," (i.e., AFN). The Court of Appeal, however, was unpersuaded. It noted that AFN had "little or no bargaining power" over the City and "little or no process for influencing or addressing the behavior of the offending police officer;" furthermore, as the harasser's employer, the City had "more effective and immediate means to prevent and/or correct the harassment."

Moreover, the court emphasized that the FEHA placed an affirmative duty on an employer to take all reasonable steps to prevent harassing conduct "towards employees *and* other contract workers": "[p]rotecting those who work alongside employees from harassment implements the statutory goals of affording equal opportunity and eliminating discrimination and harassment in the workplace."

(3.) As of April 1, 2016, an employer is required to take more comprehensive steps to prevent and promptly correct discriminatory and harassing conduct

Pursuant to Government Code section 12940, subdivision (k), an employer has to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct in the workplace. This requirement has been expanded upon pursuant to a new regulation, 2 California Code of Regulations section 11023, which went into effect on April 1, 2016. This new regulation requires that employers distribute the Department of Fair Employment and Housing's DFEH-1895 brochure on sexual harassment, or an alternate writing that complies with Government Code section 12950. Additionally, an employer must also develop a harassment, discrimination, and retaliation prevention policy, in writing, that sets forth a list of required language. This includes a complaint policy and complaint mechanism available to its employees. Moreover, this new regulation requires an employer to disseminate the policy using a number of available methods outlined by the new law. In addition to providing this information in English, it must also be translated into every language that is spoken by at least ten percent of the workforce, if applicable.

An individual can bring a failure to prevent sexual-harassment cause of action under Government Code section 12940, subdivision (k), in addition to a stand-alone sexual-harassment claim under Government Code section 12940, subdivision (j). These "failure to prevent" claims may become even more commonplace with the more robust requirements under the new regulation. However, in order to prevail on a claim for failure to prevent sexual harassment, there must be a successful underlying sexual-harassment claim. In *Dickson v. Burke Williams, Inc.* (2015) 234 Cal.App.4th 1307, Domaniqueca Dickson, a massage therapist at a spa, brought an action against her employer under the FEHA for discriminatory and harassing conduct she was subjected to by two of her customers. Dickson alleged sex discrimination, sexual harassment, racial harassment, retaliation, failure to take reasonable steps necessary to prevent harassment and discrimination based on sex, and failure to take reasonable steps necessary to prevent harassment based on race.

At the conclusion of trial, the jury found the defendant, Burke Williams, not liable for sexual harassment or sex discrimination. However, the trial court entered a judgment on a special jury verdict for Dickson on her claim for failure to take reasonable steps necessary to prevent sexual harassment or sex discrimination.

The Court of Appeal reversed and held that "there cannot be a valid claim for failure to take reasonable steps necessary to prevent sexual harassment if…the jury finds that the sexual harassment that occurred was not sufficiently severe or pervasive as to result in liability." In doing so, the Court of Appeal rejected the plaintiff's argument that a finding of *any* harassing conduct – even conduct that is not "severe or pervasive" enough to amount to actionable harassment under the FEHA – was sufficient for a jury to find a defendant liable for failure to prevent sexual harassment. The court found that the necessary element of the underlying sexual-harassment claim had not been established; therefore, the jury could not proceed with making a determination on whether the defendant failed to prevent sexual harassment.

Dalia Khalili is a Senior Associate Attorney at Matern Law Group *in Manhattan Beach, CA. Since 2008, she has focused her practice on representing employees in all aspects of employment litigation, handling both individual plaintiff and class action matters. She has successfully litigated cases involving sexual harassment, racial discrimination, disability discrimination, retaliation, and wrongful termination. Ms. Khalili received her J.D. from the University of California, Hastings College of the Law in 2007 and is admitted to the California Bar.*