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TOP **Labor & Employment** Lawyers 2024 *Addendum*

‘Severe or Pervasive’ in sexual harassment cases: Is one incident enough?

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SHUTTERSTOCK

When parties bring employment discrimination cases to mediation, they often have entrenched ideas about the strengths and values of those cases. In fact, counsel on one or both sides usually enter settlement negotiations with predetermined walkaway positions for their respective clients. But these positions are not always based on thorough evaluations under current California law.

The longstanding “severe or pervasive” standard in sexual harassment cases is one of these nuanced, complex issues. In almost every sexual harassment case I mediate these days, the issue of whether the conduct alleged was sufficiently “severe or pervasive” to rise to the level of unlawful harassment invariably comes up, especially if only one incident of harassment has been alleged.

The plaintiff, of course, argues that one incident is sufficient under the amended law (discussed below), especially if the alleged incident involved touching or the use of vulgar or offensive words. The defense, on the other hand, argues that a single incident is not enough, even under the amended standard – the alleged conduct not only had to be severe, but it also had to be pervasive, occurring on a persistent basis.

Plaintiff employees may feel strongly that their claims are compelling and that they are entitled to significant compensation for their alleged suffering. Defendant employers may believe that any alleged harassment was minor, trivial, and inconsequential, thus not entitling the plaintiff to a significant monetary settlement.

That some alleged misconduct occurred might not even be in contention during mediation. The parties may agree about the alleged event, incident or conduct underlying the plaintiff’s claim. What they don’t agree upon is how bad the alleged event, incident, or conduct was. The employer may assert that the conduct wasn’t bad enough to constitute harassment; the employee may argue that it drastically changed their work environment and subjected them to substantial emotional distress, along with economic damages. How can the two sides bridge the divide?

“SEVERE OR PERVASIVE”

A sexual harassment claim under the FEHA or Title VII cannot be minor or casual. To be actionable under the FEHA, “it must be sufficiently severe or pervasive ‘to alter the conditions of [the alleged victim’s] employment and create an abusive working environment.” (*Aguilar v. Avis Rent a Car System, Inc.* (1999) 21 Cal.4th 121, 129-130.) According to California Civil Jury Instructions, CACI 2524, such conduct must alter “the conditions of employment” and create “a work environment that is hostile, intimidating, offensive, oppressive, or abusive.”

Under Title VII, “harassment becomes unlawful where: 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.”

An employee claiming sexual harassment based upon a hostile work environment must therefore be able to demonstrate that the conduct complained about was severe enough or sufficiently pervasive to alter the conditions of employment and that it created a work environment that, when evaluated considering the totality of the circumstances, was hostile or abusive to the employee because of the employee’s sex.

What does such conduct look like? Until recently, unless offensive conduct was persistent, repetitive, or ongoing it would not be considered actionable harassment under the law. In the landmark case of *Lyle v. Warner Bros. Television Prods.* ((2006) 38 Cal. 4th 264), the California Supreme Court ruled that a single

incident of harassment or discrimination, unless very egregious, was not enough to establish a hostile work environment.

On the heels of that decision, state courts regularly have granted summary judgment even when plaintiffs argued that the alleged conduct was reprehensible. Such conduct, courts have held, was neither "severe" nor "pervasive;" it was either too sporadic or not offensive enough. In the 2013 case of *McCoy v. Pac. Mar. Assn.* (2013) 216 Cal. App. 4th 283, 294, 156 Cal. Rptr. 3d 851), the court held that a workplace that allowed multiple "crude and offensive" comments about women's bodies, as well as blatant ogling and gestures, was not sufficiently hostile to overcome a motion for summary judgment.

These cases were decided before the California law was amended. Single-incident claims may now qualify for "severe or pervasive" consideration under the new law.

SINGLE INCIDENTS

Five years ago the legislature enacted Government Code Section 12923. Effective Jan. 1, 2019, the law clarified that "[a] single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment."

Suddenly the floodgates opened for harassment claims. Workers allegedly subjected to one-time incidents of alleged hostile or offensive conduct could now assert claims under the FEHA.

In the recent case of *Beltran v. Hard Rock Hotel Licensing, Inc.* (97 Cal. App. 5th 865, 879–81, 315 Cal. Rptr. 3d 842, 854–55 (2023), review filed Jan. 16, 2024), an appellate court ruled that "evidence of multiple incidents of conduct over a period of months, including leering gestures, hand massages, and inappropriate questions, which culminated with the slapping or groping incident" was more than enough to raise a triable issue of fact. The amended law, the court said, "did not change the substantive law of sexual harassment, but addressed how the trial courts were to apply that law…"

For parties litigating FEHA cases that include a claim of alleged harassment or hostile work environment, the fundamental question continues to be whether the alleged conduct was "severe or pervasive" as required both by the FEHA and Title VII. Although the definition of what constitutes a triggering incident has been clarified to include single incidents, this does not mean that "severe or pervasive" is no longer the threshold standard.

THE CASES

Even after the enactment of Section 12923, courts have found still that certain single-incident claims did not rise to the level of "severe or pervasive." The law may have recognized a wider swath of claims, including many that earlier would have been dismissed, but it did not sweep every incident of alleged bad conduct into the "severe or pervasive" net.

A single comment, even if distasteful or improper, may not by itself create an intimidating, hostile, or offensive work environment. The Lyle court observed that "[c]ommon sense, and an appropriate sensibility to social context, will enable courts and juries to distinguish between simple teasing or roughhousing ... and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." (*Lyle, supra*, 38 Cal.4th at p. 283.)

Dismissal of single-incident harassment cases is, however, now less likely. A plaintiff who charged her employer with sex and gender-based harassment and discrimination was allowed to proceed with her case even though the alleged conduct consisted of just verbal harassment and one incident of physical harassment by a coworker. The appellate court ruled, consistent with the more recent Beltran holding, that she may have stated a claim that "a reasonable jury… could conclude…was more than 'annoying or merely offensive.'" (*Vargas v. Vons Companies, Inc.*, No. B315167, 2022 WL 17685801, at 10–11 (Cal. Ct. App. Dec. 15, 2022)).

MEDIATING HARASSMENT CLAIMS

The amended law may have lowered the bar for bringing hostile work environment claims to trial, but both plaintiffs and defendants must be apprised of the nuances of the "severe or pervasive" standard and what it takes to prove or disprove their case.

The mediator's role in such cases is to keep all parties focused on the relevant standard and helping the parties to dissect the facts on both sides that relate to the standard.

Plaintiffs will need to present facts and information showing that a single incident was sufficiently egregious to alter the work environment. If they cannot do so, they may need to modify their settlement expectations. Similarly, defendants must present facts supporting their position that one alleged incident, especially if the incident is viewed as egregious, is insufficient to establish a claim for sexual harassment. If they cannot do so, they may also need to modify their settlement expectations.

Parties mediating sexual harassment claims now must evaluate their cases based on the amended statute and may need to adjust their respective settlement postures based on the facts before them. What constitutes "severe or pervasive" conduct under the amended statute will continue to be decided by courts on a case-by-case basis and will require critical review and assessment in mediation.

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