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A California appellate court has expanded the scope of admissible evidence in a discrimination and harassment trial by allowing "me too" evidence of conduct that occurred outside of the plaintiff's presence and at times when she was not employed.

California Appeals Court Expands Admissibility of "Me Too" Evidence

By Helene Wasserman

In a case that significantly expands the scope of evidence that can be presented in a California employment discrimination and harassment trial, a California Court of Appeal ruled in *Pantoja v. Anton*, No. F058414 (Aug. 9, 2011), that "me too" evidence of harassing activity against other female employees, which occurred outside of the plaintiff's presence and at times when the plaintiff was not even employed, is admissible as evidence tending to show a discriminatory or biased motive under California Evidence Code section 1101(b).

Lorraine Pantoja was employed by the defendant, attorney Thomas Anton, from January through October 2002. Pantoja claims that during her employment, she was subjected to hostile environment sexual and racial harassment, including inappropriate touching, sexually- and racially-charged slurs, and other sexually-inappropriate conduct. The alleged conduct included, but was not limited to: touching of her buttocks and leg; being called a "stupid b—ch" and a "f—king c—t;" use of other profane language; being asked to place the defendant's food on the floor of his office while he watched her bend down; and derogatory use of the term "Mexicans." Ultimately, the plaintiff was terminated from her employment, and she filed a lawsuit. The claims that proceeded to trial were sexual and racial harassment and gender and race discrimination in violation of the California Fair Employment and Housing Act (FEHA).

Prior to trial, the defendant sought to exclude evidence of all acts of discrimination and harassment unless the plaintiff personally witnessed the acts such that they adversely affected her working environment. The defendant separately sought to exclude evidence of racial bias, given that the plaintiff had claimed during her deposition only one occasion in which she heard the term "Mexicans" used in a manner she considered to be derogatory. The trial court granted both motions.

At trial, while denying the alleged conduct, the defendant presented evidence that he may have used profanity at work, but it was never directed at individuals. The defendant's testimony regarding profanity was not limited to that time period during which the plaintiff was employed. The plaintiff sought during trial to admit evidence of the defendant's harassing or discriminatory conduct witnessed by other employees, but

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not experienced by the plaintiff – so called "me too" evidence – but the court limited testimony to conduct occurring during the plaintiff's employment, of which the plaintiff was aware.

After a jury verdict in favor of the defendant, the plaintiff sought a new trial on the grounds that the court erred in excluding the "me too" evidence and that there were errors regarding the jury instructions provided. The plaintiff presented a juror declaration indicating that it would have assisted the jury in finding for the plaintiff if the jury heard evidence that the defendant sexually harassed others. The court denied the plaintiff's new trial motion.

The appellate court reversed, holding that "me too" evidence, while inadmissible to show evidence of character under California Evidence Code section 1101(a), is admissible to establish intent under subsection (b) and to impeach a witness and attack his credibility under subsection (c). While acknowledging that the court's prior ruling in *Beyda v. City of Los Angeles* (1998) 65 Cal. App. 4th 511 bars evidence of sexual harassment of other employees for the purpose of establishing the defendant's propensity to harass, the court in *Pantoja* noted that the plaintiff's claim that the defendant's behavior towards her arguably revealed a gender bias that motivated her termination. Moreover, despite the fact that *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590 requires that an individual attempting to assert a claim for environmental sexual harassment must establish either that the conduct was directed at her or that she witnessed it and it was in her immediate environment in order to support the claim, the appellate court held that "me too" evidence was admissible to establish that motivation. Similarly, because an element of the plaintiff's case required her to establish harassing conduct *because of her sex*, and because the plaintiff needed to establish discriminatory intent and bias based on gender, the "me too" evidence was probative of the defendant's intent. In reaching its conclusions, the court cited *Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal. App. 4th 740, which had relied heavily upon federal court decisions on this issue.

The court also addressed whether the jury was given an erroneous instruction. On the defendant's request, the trial court gave an instruction based upon the California Supreme Court's decision in *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal. 4th 264. The instruction stated: "A hostile work environment/sexual harassment claim is not established where a supervisor or coworker simply uses crude or inappropriate language in front of employees without directing sexual innuendo or gender-related language toward a plaintiff or toward women in general." The plaintiff had requested follow-up instructions that provided information regarding circumstances that could establish the existence of a hostile work environment, but those were not given. The court ruled that while the *Lyle*-based instruction was an accurate statement of the law, without the instructions requested by the plaintiff, it was misleading under the circumstances of the instant case.

This case is troubling to employers and their trial counsel litigating these kinds of matters. It is anticipated that this decision will greatly expand the scope of discovery in such cases, as well as expand the types of evidence found to be admissible at trial. Employers with questions about the impact of this case should contact experienced employment counsel.

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