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Sexual harassment litigation in the post-#MeToo era

UNDERSTANDING THE RECENT CHANGES IN SEXUAL-HARASSMENT LAW AND SEIZING THE OPPORTUNITIES CREATED BY THEM

There has been no better time than the present to represent those who have been subjected to sexual harassment. Beginning in 2017, the #MeToo and #TimesUp movements caught the attention of both the general public and legislators, creating the will for sweeping legislation providing protections for those who have experienced sexual harassment.

As attorneys who represent plaintiffs, we must understand the recent changes in sexual-harassment law and seize the opportunities created by them. This article discusses some key ways that the practice has changed, and it offers tips to practitioners to enable them to obtain the best results possible for their clients.

New legal standards make it easier for sexual harassment plaintiffs to prevail

In 2018, the California Legislature passed SB 1300, a comprehensive bill that sought to combat workplace harassment by amending the California Fair Employment and Housing Act ("FEHA") in a number of ways:

- Prohibiting releases of claims presented in exchange for a raise, bonus, or as a condition of continued employment (Gov. Code, § 12964.5, subd. (a)(1));
- Prohibiting non-disparagement agreements that prevent employees from disclosing information about sexual harassment and other unlawful acts (often presented to employees at the outset of their employment as a condition of employment) (Gov. Code, § 12964.5, subd. (a)(2)(A));
- Holding employers liable for failing to prevent all forms of unlawful harassment by third parties, not just third-party sexual harassment, that it knew or should have known about but failed to take immediate and appropriate corrective action (Gov. Code, § 12940, subd. (j)(1));
- Confirming that prevailing defendants are entitled to fees and costs only when the action is frivolous, notwithstanding CCP section 998. (Gov. Code, § 12965, subd. (b).) This means that an employee need not fear that if she loses her case, that she may be forced to pay the company's legal costs;
- Allowing, but not requiring, "bystander intervention training," which has been recommended as a way to train bystanders to identify potential harassment and to act when they see it (Gov. Code, § 12950.2); and
- Declaring legislative intent regarding sex harassment, with language that is very favorable to plaintiff employees (Gov. Code, § 12923).

SB 1300's declarations of legislative intent, codified in Government Code section 12923, should be quoted extensively as applicable. First, the Legislature discussed the importance of anti-harassment laws, explaining that:

> [H]arassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives victims of their statutory right to work in a place free of discrimination when the harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being.

(Gov. Code, § 12923, subd. (a).)

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With this declaration, the Legislature affirmed its approval language from Justice Ruth Bader Ginsburg's concurrence in *Harris v. Forklift Systems* (1993) 510 U.S. 17, that a harassment plaintiff need not demonstrate that their work performance suffered, only that the harassment altered the working conditions so that it made it more difficult to perform the job. (*Ibid.*)

Second, the Legislature confirmed that a single incident can create a hostile work environment, even absent extreme circumstances. (Gov. Code, § 12923, subd. (b).) In doing so, the Legislature explicitly rejected the holding in *Brooks v. City of San Mateo* (9th Cir. 2000) 229 F.3d 917, an opinion by Judge Alex Kozinski, that a supervisor fondling his subordinate's bare breast was not actionable harassment because it was a single incident that was not sufficiently extreme.

Third, the Legislature affirmed the rejection of the "stray remarks doctrine" in *Reid v. Google*, explaining that a hostile work environment is determined based on the totality of the circumstances and that a single discriminatory comment may be relevant circumstantial evidence of discrimination even if made by someone who is not a decisionmaker. (Gov. Code, § 12923, subd. (c).)

Fourth, the Legislature declared that the same legal standards for harassment are used regardless of the type of workplace; the nature of the workplace may only be considered if "engaging in or witnessing prurient conduct and commentary is integral to the performance of the job duties." (Gov. Code, § 12923, subd. (d).) Thus, for example, it would not be appropriate to judge harassment at a construction job by a different standard than one at an elementary school.

Fifth, the Legislature affirmed that "harassment cases are rarely appropriate for disposition on summary judgment" and "involve issues 'not determinable on paper.'" (Gov. Code, § 12923, subd. (e) [quoting *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243].)

The Judicial Council of California Civil Jury Instructions ("CACI") for harassment claims were modified in July 2019 to make them consistent with Government Code section 12923. (See CACI 2521A, 2521B, 2521C, 2522A, 2522B, 2522C, 2524, revised July 2019.) Further changes are in the works as the Judicial Council's Advisory Committee on Civil Jury Instructions has released proposed revisions to the relevant CACI instructions and verdict forms (CACI 2521C, 2522C, VF-2506A, VF-2506B, VF-2506C, VF2507A, VF-2507B, and VF-2507C). (See Judicial Council of California Invitation to Comment, CACI 20-01, https://www.courts.ca.gov/documents/CACI-20-01-ITC.pdf.) Practitioners should update the language they use in pleadings, motions, jury instructions, and other places as applicable.

Takeaway: *Be sure to understand the changes brought about by SB 1300 and use the language contained in Government Code section 12923 to your client's benefit.*

Employees now have more time to pursue their discrimination and harassment claims

In the wake of the #MeToo movement, many people came forward hoping to assert harassment and discrimination claims only to find that the time in which they could do so had passed. The time to exhaust administrative remedies on a sexual harassment claim was one year. Contrast this to two years for personal injury claims (Code Civ. Proc., § 335.1), three years for fraud claims (Code Civ. Proc., § 338, subd. (d)), four years for breach of written contract claims (Code Civ. Proc., § 337), and ten years for latent defect claims (Code Civ. Proc., § 337.15). Discrimination and harassment victims were getting the short end of the stick.

Following the passage of AB 9 in 2019, effective January 1, 2020, employees now have three years to exhaust their administrative remedies by filing a complaint with the Department of Fair Employment and Housing ("DFEH"). (Gov. Code, § 12960, subd. (e).) They continue to have one year to file their lawsuit following the issuance of a right-to-sue notice. (Gov. Code, § 12965, subd. (b).) In addition, with the enactment of AB 1619 in 2018, the statute of limitations for sexual assault cases against adults has been extended from two to ten years or three years after the date injuries or illnesses are discovered (which may exceed ten years). (Code Civ. Proc., § 340.16.)

Allowing additional time to come forward will be incredibly helpful to harassment victims who may not know their rights or are hesitant to take action – particularly those still working at a company who are afraid of retaliation. Indeed, their concerns are valid: One study found that an estimated 75% of employees who complain about workplace mistreatment face some form of retaliation. (See Feldblum & Lipnic, *Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace, Equal Emp. Opportunity Commission* (2016), at p. 16, https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.)

Often, employees are afraid to be the first to report. Depending on circumstances, employees may choose to take a "wait and see" approach before determining whether to pursue their own claims. Additional time to move forward with civil harassment claims will also be helpful in situations where there are pending criminal charges, so that harassment victims need not file civilly to preserve the statute, only to have the civil case stayed (or have the defendant attempt to use the civil case as an opportunity to portray the victim in a certain light or to get broader discovery than would be allowed in the criminal context).

There are, however, downsides to the additional two years now provided to exhaust administrative remedies that practitioners must keep in mind: memories decline, evidence may be deleted or lost, and bad behavior may

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continue unaddressed if unreported. Indeed, these were the reasons that Governor Jerry Brown vetoed a prior version of AB 9 in 2018. (Assem. Bill. No. 1870 (2017-2018 Reg Sess.), Governor's Veto Message, Sept. 30, 2018, https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201720180AB1870.)

Takeaway: *If you hold off on filing a claim based on the additional time provided, be sure to take steps to preserve evidence and obtain witness declarations.*

More people now have discrimination, harassment, and retaliation protections

AB 5, passed in 2019, was a huge victory for the millions of workers previously misclassified as independent contractors. Indeed, an estimated one in ten workers have been designated independent contractors. (See Noguchi, *1 in 10 Workers is an Independent Contractor, Labor Department Says* (June 7, 2018) NPR.org, https://www.npr.org/2018/06/07/617863204/one-in-10-workers-are-independent-contractors-labor-department-says.) Now, many of those workers have been reclassified as employees. With formal recognition as employees, they gain access to unemployment and disability insurance, workers' compensation, anti-discrimination and leave law rights, and the protections of the Labor Code (minimum wage, overtime, meal and rest breaks, sick pay, etc.). (For a discussion of AB 5, its applicability, and its exemptions, see Jennifer Kramer, *Easy as ABC!*, Advocate Magazine, February 2020 at p. 64.)

The FEHA already provided protections against workplace harassment to certain individuals not deemed "employees," including unpaid interns, volunteers, and those "providing services pursuant to a contract." (Gov. Code, § 12940, subd. (j)(1).) However, those individuals now reclassified as employees also gain the FEHA's protections against discrimination and retaliation – including retaliation for protesting workplace harassment. (Gov. Code, § 12940, subd. (a) [discrimination]; Gov. Code, § 12940, subd. (h) [retaliation].)

In addition, SB 224, passed in 2018, strengthened the Unruh Civil Rights Act, which already prohibited sexual harassment in certain business relationships. SB 224 created protections against sexual harassment by an investor, elected official, lobbyist, director, or producer. It eliminated the element that the plaintiff prove there is an inability by the plaintiff to easily terminate the relationship. It further made it an unlawful practice to deny or aid, incite, or conspire in the denial of the rights created by Section 51, 51.5, 51.7, 51.9, 54, 54.1, or 54.2 of the Civil Code (including related to sexual harassment claims under the Unruh Civil Rights Act).

Takeaway: *Protections against sexual harassment and retaliation apply to more working and business relationships than ever; explore whether the person subjected to sexual harassment and retaliation has recourse even if not officially an employee.*

Plaintiffs can choose confidentiality, but cannot be forced to agree to it

SB 820, the Stand Together Against Non-Disclosures (STAND) STAND Act, passed in 2018, was motivated by an awareness that the Harvey Weinsteins of the world sexually harassed woman after woman with impunity and shielded that information behind confidentiality provisions in settlement agreements.

Those who have been sexually harassed or abused are often afraid to be the first to come forward because of the historical disbelief of harassment accusers. There is tremendous power in numbers, and people are more likely to be believed when others corroborate their claims. Indeed, the December 31, 2019, New York Daily News cover about Bill Cosby comes to mind:

> After 55+ accusations, Cosby finally busted. HE SAID-SHE SAID she said, she said.

Thus, confidentiality or nondisclosure agreements not only protect an accused harasser from public censure in one instance but can undermine the likelihood that future cases of harassment will succeed, as corroborating evidence is hidden.

Such confidentiality provisions create life-long obligations. A plaintiff may be agreeable to confidentiality at the time of settlement but may feel remorse months or years later that she agreed to be forever silenced. Indeed, at the height of the #MeToo movement, this author had a former client reach out ten years after her discrimination case settled to ask whether she could now speak about what happened to her. The answer: She could not without facing a potential lawsuit for breach of her confidentiality obligations. We have seen the powerful impact of women coming forward and risking grave consequences for breaking their confidentiality agreements. They exhibit tremendous bravery in doing so. But we as attorneys must warn our own clients that they may not fare so well if they do the same.

SB 820, however, has changed the legal landscape when it comes to confidentiality in harassment cases. It enacted Section 1001 of the Code of Civil Procedure ("section 1001"), which prohibits confidentiality provisions in the settlement agreement of any civil or administrative action that states a cause of action for: sexual assault; workplace harassment or discrimination based on sex, or related retaliation, in

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violation of the FEHA; failure to prevent workplace harassment or discrimination based on sex, or related retaliation; sexual harassment in a business, service, or professional relationship; and sex discrimination, harassment, or retaliation by the owner of a housing accommodation. (Code Civ. Proc., § 1001, subd. (a).) The law does permit restrictions on the disclosure of the settlement amount. (Code Civ. Proc., § 1001, subd. (e).) In addition, settling employees are entitled to request that their identities be kept confidential. (Code Civ. Proc., § 1001, subd. (c).) The STAND Act therefore makes it more difficult for employers to support and protect serial harassers.

Some plaintiff-side lawyers continue to believe that it remains in the best interests of certain individual clients to agree to confidentiality to maximize their settlement recoveries. Others may be concerned that defendants may be less likely to settle cases early if confidentiality is not a negotiable term. These are real concerns in situations where clients may not have the appetite for litigation.

Critically, these prohibitions on confidentiality created by section 1001 apply only *after* the filing of civil action or administrative complaint. This means that those asserting claims covered by section 1001 can make an election: file a complaint with the DFEH and/or file suit *before* reaching a settlement with the defense so that they cannot require confidentiality or wait if willing to offer a confidentiality provision.

This is a conversation that attorneys should be having with their clients at the outset of representation, so that the client can make an informed decision regarding how to proceed. The client must understand the magnitude of the decision. This author's practice is to file DFEH complaints and obtain right-to-sue letters early, as most sexual-harassment and sex-discrimination cases to continue to settle as they did before section 1001 went into effect; defendants accept the law as a fact, other pressures to settle cases remain, and settlement agreement language is adjusted accordingly (almost always still asking for confidentiality of the settlement amount).

Note, too, that AB 3109, passed in 2018, makes a provision in a contract or settlement agreement void and unenforceable if it waives a person's right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or sexual harassment if the person is subpoenaed, ordered by the court, or upon receiving a written request from the legislature or an administrative agency. Such a prohibition would have already been void as against public policy, but AB 3109 codified it.

Takeaway: *Carefully discuss with your clients the issue of confidentiality and whether to exhaust their administrative remedies with the DFEH before entering into any pre-litigation settlement with the defense.*

Non-disparagement provisions cannot be used to silence employees in sex-discrimination and harassment cases

The restrictions created by SB 1300 (2018) and SB 820 (2018) must also be considered when crafting another common settlement term: non-disparagement. Many employers seek to prevent settling employers from making comments that defame, disparage, or otherwise criticize the company or its employees. Such provisions are generally enforceable – except where an employee is prohibited from speaking freely about the underlying facts related to sex harassment or discrimination. The best practice in such cases is to either avoid a non-disparagement provision or to make explicit that nothing contained within the paragraph containing the non-disparagement provision is intended to limit the employee's rights under Code of Civil Procedure section 1001 and Government Code section 12964.5, subdivision (a)(2)(A), and that the restrictions of the paragraph do not apply to any disclosures of factual information relating to the employee's claims (for sexual harassment, etc.).

Takeaway: *Do not let non-disparagement language in a settlement agreement be used as a means to silence clients.*

Witnesses are now more willing to come forward

As discussed above, there is power in numbers. Juries are more willing to believe plaintiffs when others are willing to corroborate their accounts. In addition, juries are more likely to award punitive damages when presented with evidence of a pattern or practice of discrimination or harassment, or with evidence that an employer knew and did nothing – or worse yet, enabled discrimination, harassment, or retaliation by sweeping prior bad acts under the rug.

One major effect of the #MeToo movement that this author has seen is that people are now more willing to come forward as witnesses. They want to do their part to speak out against wrongful behavior. Lawyers owe it to their clients to make every effort to track down these corroborating witnesses to see if they are willing to offer their support in the form of a declaration or witness testimony. There are few uses of an attorney's or paralegal's time that are more valuable to a case.

DocuSign has been an invaluable tool to help in securing witness declarations. Lawyers no longer have to meet the witnesses in person or wait for them to scan or mail back declarations. Instead, witnesses can sign declarations in moments on their cell phones or other devices.

Takeaway: *Always put in the effort to secure declarations from corroborating witnesses.*

No-rehire provisions are no longer enforceable

It used to be customary for companies settling harassment and discrimination cases to require the employees to agree never to work for that company again. Indeed, the language was often so broad as to cover "affiliates" and "associates" – terms so broad that one could argue that the employee would be prohibited from working for entities that provide services to the former employer or its related

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entities. It was perverse for workplace harassers to keep their jobs while their victims were forced out of their positions, and sometimes even out of their occupations or industries. Consider, for example, how many of Harvey Weinstein's victims were blacklisted and unable to find work in the industry after their separation from his company. (See, generally, Kantor & Twohey, She Said: Breaking the Sexual Harassment Story That Helped Ignite a Movement (2019).)

AB 749, passed in 2019, added Code of Civil Procedure section 1002.5, which provides that "[a]n agreement to settle an employment dispute shall not contain a provision prohibiting, preventing, or otherwise restricting a settling party that is an aggrieved person from obtaining future employment with the employer against which the aggrieved person has filed a claim, or any parent company, subsidiary, division, affiliate, or contractor of the employer." (Code Civ. Proc., § 1002.5, subd. (a).) Any such provision entered into on or after January 1, 2020 is deemed void as a matter of law and against public policy. (*Ibid.*) (This prohibition does not apply if the employer has made a good-faith determination that the employee engaged in sexual harassment or sexual assault. (Code Civ. Proc., § 1002.5, subd. (b)(1)(B).)

Takeaway: *While the parties are free to negotiate an employee's separation from the company, the employee cannot be asked to agree never to work again for the company.*

Greater sexual-harassment training requirements may lead to a more informed workplace

SB 1343, passed in 2018, amended Government Code section 12950 to require employers with five or more employees to provide sexual harassment training to both supervisory employees (two hours) and non-supervisory employees (one hour), every two years, with the DFEH to create training courses to be available online. The law was set to go into effect on January 1, 2020, but an emergency bill (SB 778) postponed the effective date to January 1, 2021.

Takeaway: *Once the law goes into effect, one can expect a more informed workforce – and a corresponding uptick in reporting and litigation.*

Releasing employees from arbitration obligations in sexual-harassment and discrimination cases

Much has been written about how the deck is stacked against employees in the arbitration forum. (See, e.g., Research, AAJ, The Truth About Forced Arbitration (September 10, 2019), SSRN: https://ssrn.com/abstract=3451316 ["[F]orced arbitration is not an alternative judicial process, but instead eliminates claims, immunizes corporations, and allows abuse, discrimination, fraud, and essentially all other corporate wrongdoing to go unchecked. Americans are more likely to be struck by lightning than they are to win a monetary award in forced arbitration."].)

While AB 51 (2019) was intended to preclude employers from requiring employees to agree to arbitration as a condition of employment, continued employment, or the receipt of any employment benefit, it remains enjoined. (See *Chamber of Commerce of U.S., et al. v. Xavier Becerra, et al.*, Case No. 2:19-cv-02456-KJM-DB, Dkt. No. 44 (E.D. Cal. Jan. 31, 2020) [minute order granting preliminary injunction] & Dkt. No. 47 (E. D. Cal. Feb. 7, 2020) [written order granting preliminary injunction].)

However, advocacy by workers and pressure from the general public have led to commitments by some companies not to enforce arbitration agreements in sexual harassment and discrimination cases. (See, e.g., Martinez, *Facebook, Airbnb and eBay Join Google in Ending Forced Arbitration for Sexual Harassment Claims*, NBC News (Nov. 12, 2018), https://www.nbcnews.com/tech/tech-news/ facebook-airbnb-ebay-join-google-ending-forced-arbitration-sexual-harassment-n935451; Wakabayashi, *Google Ends Forced Arbitration for All Employee Disputes*, N.Y. Times (Feb. 21, 2019), https://www.nytimes.com/2019/02/21/technology/google-forced-arbitration.html; Bloomberg News, *Wells Fargo Ends Forced Arbitration for Sexual Harassment* (Feb. 12, 2020), https://advisorhub.com/wells-fargo-ends-forced-arbitration-for-sexual-harassment/.) Thus, depending on the circumstances, even if there is an arbitration agreement in effect, employees may yet be able to have their day in court.

Takeaway: *Don't assume that, just because the employee signed an arbitration agreement, the company will seek to enforce it. Furthermore, if the company is large or in the media, public pressure may lead them to agree not to enforce their arbitration provisions for sexual harassment or discrimination cases.*

The media may be useful in certain harassment cases

Employment lawyers often explain to their clients that money is the primary remedy that they can obtain in civil cases. Civil litigation often fails to bring about the real substantive changes that clients crave. This is especially true in sexual-harassment cases, where harassers often continue in their positions long after harassment cases are resolved.

Just as external pressure has led some companies to alter their arbitration policies when it comes to harassment or discrimination cases, public pressure can be used to motivate companies to take public actions against harassers and other wrongdoing. Consider, for example, the fact that Fox News continued to support Bill O'Reilly despite having made over $45 million in known sexual-harassment settlements related to his conduct. (See Steel & Schmidt, *Bill O'Reilly Settled New Harassment Claim, Then Fox Renewed His Contract*, N.Y. Times (Oct. 21, 2017), https://www.nytimes.com/2017/10/21/business/media/bill-oreilly-sexual-harassment.html.) Those payouts paled in comparison to the revenues that O'Reilly's show generated; estimated to be over $446 million in a three-year span. (*Ibid.*) It was only after public pressure led advertisers to drop O'Reilly's show that Fox News severed its relationship with him. (See Karl Russell, *Bill O'Reilly's*

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Show Lost More Than Half Its Advertisers in a Week, N.Y. Times (Apr. 11, 2017), https://www.nytimes.com/interactive/2017/04/11/business/oreilly-advertisers.html (reporting that two-thirds of the show's advertisers left after news of O'Reilly's settlements broke).

If there are multiple victims or witnesses who are willing to come forward, or if the client is not media shy and willing to step forward on her own, media coverage may lead to greater changes than litigation could accomplish on its own.

Takeaway: *Consider the use of the media in high-profile or egregious cases.*

Conclusion

The #MeToo and #TimesUp movements created momentum to fight sexual harassment. The California Legislature, inspired by the momentum, enacted laws that protect workers and that have changed the legal landscape when it comes to litigating sexual harassment cases. Corroborating evidence can no longer be hidden and witnesses – who can no longer be silenced – are motivated to come forward and to offer support. In addition, plaintiffs are more likely to be allowed their day in court, before juries who are more educated, and more likely to believe them. Taken together, these changes mean that there is no better time to represent clients in sexual harassment cases.

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