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Unfriendly Business

By Michele M. Goldsmith

Sexual harassment in the workplace is considered unlawful sexual discrimination in violation of Title VII of the Civil Rights Act and California's Fair Employment and Housing Act. Sexual harassment could consist of a demand for sexual favors in return for a job benefit. Such conduct has been termed "quid pro quo" harassment, which literally means "this for that." Quid pro quo sexual harassment occurs when someone (usually someone in a position of authority) makes unwelcome sexual advances or requests for sexual favors, and submission to such conduct is either a term or condition of employment or is used as a basis for an employment decision. "Hostile work environment," another form of sexual harassment in the workplace, occurs when unwelcome sexual conduct has the purpose or effect of unreasonably interfering with an individual's work performance or when sexual conduct creates an intimating, hostile or offensive work environment. A hostile work environment need not cause a "tangible detriment" and the acceptance or rejection need not be expressed or implied. The sexual conduct may be physical (e.g., touching or bumping), verbal (e.g., jokes, suggestive comments, slurs or crude remarks) or visual (e.g., posters, cartoons or sexually explicit materials).

The most common question regarding hostile work environment is whether the conduct is "sufficient" to constitute actionable harassment. It is not uncommon for an employment lawyer to be asked: "If my boss yells at me once, have I been subjected to a 'hostile work environment'?" Although federal and state statutes are silent on the definitions, case law has been instructive and phrases have taken on their own legal significance. One such phrase, premised on case law, is that conduct must be sufficiently "severe or pervasive" as to change the conditions of employment to constitute actionable harassment. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). The "severity" of the conduct has been interpreted to mean the magnitude of the nature of the conduct, and the "pervasiveness" to mean the number of occurrences. The "severe or pervasive" standard has been interpreted to be inversely proportionate to one another. Meaning, the more severe the conduct, the fewer number of incidents are required. Therefore, simple teasing, offhanded comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the employment conditions. Although the sexual discrimination theory of "hostile work environment" receives the most attention in the workplace, there is a little known statute that also prohibits sexual harassment in certain business relationships outside the workplace. This statute, Civil Code Section 51.9, was enacted in 1994, and is often lumped together with the Unruh Civil Rights Act, although it is technically not part of the act. In enacting Section 51.9, the Legislature declared that the section was to address the "sexual harassment" that occurs in relationships between providers of professional services and their clients.

Under Civil Code Section 51.9, a plaintiff must not only establish the existence of a qualifying "relationship," but also that the relationship is one that the plaintiff cannot easily terminate. Qualifying relationships include physicians, lawyers and any relationship that is substantially similar to those named in the statute. The plaintiff must also show that the defendant has made sexual advances, etc., or that the defendant has "engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender, that were unwelcome and pervasive or severe." But, like the Fair Employment and Housing Act, the term "severe or pervasive," is not defined in Section 51.9. In a recent Supreme Court decision, the questions of how to define "severe or pervasive" outside the workplace was put to the test, and to rest. The Supreme Court concluded that the workplace definition of "severe or pervasive" will apply even in those situations which occur outside the workplace.

Hughes v. Pair

In 1998, Suzan and Mark Hughes ended their marriage. Their marriage dissolution agreement provided that Alex, their sole son, was to inherit Mark's estate. When Mark died in 2000, he left approximately $350 million in trust with Suzan as Alex's guardian. The trustees included defendant Christopher Pair. In 2001, Hughes initiated several lawsuits against the trust. In June 2005, the trustees rejected a request for a two-month beach rental house. Also in June, Pair called Hughes, and invited Alex to an event. During the conversation, Pair called Hughes "sweetie" and "honey" and said he thought of her "in a special way." When Hughes asked why the trustees had voted a certain way, he replied that he could be persuaded to cast his vote the other way, if Hughes would be "nice" to him, and added, "you know everyone always had a thing for you. You are one of the most beautiful, unattainable women in the world. Here's my home telephone number and call me when you're ready to give me what I want." When Hughes took her son to the

event, and saw Pair, he said, "I'll get you on your knees eventually. I'm going to f---k you one way or another."

Although Pair initially denied the claims brought by Hughes under Section 51.9, he brought summary judgment and argued that the complaint's allegations stated no claim for relief. The trial court granted the summary judgment. A divided Court of Appeal affirmed. The majority concluded that because the defendant's statements were neither "pervasive" nor "severe" within the meaning of either federal or California employment discrimination law, the statements were likewise insufficient to meet Section 51.9's requirements. In the view of the dissenting judge, however, the words "severe or pervasive" did not in and of themselves indicate an intent to import into the statute the employment discrimination laws. That judge would have allowed the case to proceed to jury under Section 51.9.

The Supreme Court

As a matter of first impression, the issue before the Supreme Court was whether to apply the existing definitions of "severe" and "pervasive" to harassing situations that occur in other business relationships. The Supreme Court determined that the Court of Appeal had correctly affirmed the trial court's granting of summary judgment. In making this determination, the Supreme Court began with a brief overview of the federal and California laws prohibiting sexual harassment in the workplace. It found that while there were some differences in the wording, Title VII and the Fair Employment and Housing Act "share the same anti-discriminatory goals and serve the same public policies."

Using the federal and state precedent, the Supreme Court acknowledged that when an employee seeks to prove sexual harassment based on no more than a few isolated incidents, he or she must show that the conduct was "severe in the extreme." The Supreme Court agreed, even in considering all of the conduct alleged, that the statements (occurring in one day), were neither "pervasive" nor "severe" within the meaning of Section 51.9. Thereby rejecting the argument, made by the appellate dissent, that whether the alleged sexually harassing conduct was "pervasive or severe" presents a factual question for the jury.

Persuasively, the Supreme Court relied on the 1999 amendments to Section 51.9, which included replacing the word "persistent" with "pervasive," and adding the phrase "or engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender" after the words "sexual compliance by the plaintiff." The Legislature, in the 1999 amendments, also deleted the requirement in former subdivision (d) that the plaintiff's complaint be verified, as well as the phrase, "without tangible hardship" formerly contained in subdivision (a)(3). In so determining, the Supreme Court relied on the legal presumption that a statute's use of terms, which have well-settled judicial construction, indicates the Legislature's intent to retain the same meaning.

Supreme Court Continuity

The Supreme Court clearly found that the employment definition of "severe or pervasive" would apply to the establishment of liability in the business relationships designated in Section 51.9. This decision, however, does not diminish the ability of a plaintiff who has objectively and subjectively been harassed in a business relationship from bringing suit. Employers must be mindful and educate their employees that there is a risk of suit within the manner in which they treat each other, and also within the business relationships in which they engage on a daily basis as defined in Section 51.9.

Michele M. Goldsmith is a shareholder of Bergman & Dacey, where she represents and advises employers and management in employment litigation and on compliance with employment laws. She can be reached at mgoldsmith@bergmandacey.com.

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