

9th Circ. Lowers Bar For Sexual Harassment Claims

Law360, New York (March 12, 2014, 5:52 PM ET) -- A California court of appeal recently ruled that motive is not a requisite element in proving a claim of hostile work environment based on same-sex harassment under the Fair Employment and Housing Act ("FEHA"). As a result of the legislature's recent amendment to the FEHA and the recent appellate opinion analyzing the issue, it is now easier for a plaintiff to establish a claim for sexual harassment.

Competing Judicial Holdings on "Motive" in Sexual Harassment Claims

A layperson's understanding of employment sexual harassment often envisions a scenario of a male or female making unwanted sexual advances or comments laden with sexual innuendo to another coworker of the opposite sex. The evolution of California's statutory framework and case law clearly establishes that anti-discrimination laws do not just protect against heterosexual harassment. Indeed, the laws continue to evolve and expand as illustrated by same-sex harassment claims involving heterosexual individuals. These claims have directed recent judicial focus on the question of whether actual sexual desire or intent is necessary to establish a claim of sexual harassment.

A key element a plaintiff must prove to establish liability for sexual harassment under the FEHA is that he or she was subjected to unwanted harassing conduct "because of" their sex.

The U.S. Supreme Court recently held that the phrase "because of" refers to a showing that discrimination occurred based upon a plaintiff's status within a protected class and that his or her status was a substantial motivating factor for the alleged discriminatory conduct. *Harris v. City of Santa Monica* (2012). In the context of a sexual discrimination claim, whether a plaintiff had to prove a harasser's sexual intent or desire in order to show the harassment occurred "because of" the plaintiff's sex had been at odds through two competing rationales — that is, until now.

The issue was recently analyzed in *Taylor v. Nabors Drilling USA LP*, filed Jan. 13, 2014, which highlights the two competing rationales concerning an alleged harasser's motive in sexual discrimination claims.

In *Taylor*, a court of appeal held an employer may be subjected to liability for hostile work environment sexual harassment irrespective of whether the conduct was motivated by actual sexual desire or intent. The facts of the case were similar to prior appellate opinions involving same-sex harassment. The plaintiff (i.e., Taylor) sued his employer based on the comments and conduct of his supervisors targeting his sexual orientation. According to Taylor, a heterosexual male, two male supervisors constantly subjected him to homophobic slurs and challenged his sexual orientation. Taylor alleged one of the supervisors posted a photograph of him on a wall in the employee restroom with a target around his mouth and comment that, he argued, indicated an act of oral sex. The other supervisor was alleged to

have aroused himself in front of Taylor and urinated on him. After filing a complaint with the human resources department, one of the offending supervisors was terminated. Three months after his complaint to human resources, Taylor was terminated for performance issues.

Taylor subsequently filed a complaint for: (1) hostile work environment sexual harassment, (2) failure to prevent sexual harassment, (3) unlawful retaliation and (4) wrongful retaliation and termination in violation of public policy. Finding that his termination was justified, the jury returned a verdict in favor of Taylor on his cause of action for hostile work environment sexual harassment and awarded \$160,000 in damages and \$680,520 in attorneys' fees. On appeal, the employer argued there was insufficient evidence to show the plaintiff "was harassed because of his sex and/or perceived sexual orientation." The Taylor court disagreed.

In reaching its decision, the Taylor court analyzed competing holdings from Division Eight of the Second Appellate District in *Singleton v. United States Gypsum Company* (2006), and Division Five of the First District in *Kelley v. The Conco Companies* (2011). Both cases involved the alleged harassment of a heterosexual male by male supervisors through use of homophobic slurs and other actions targeting the plaintiffs' sexual orientation.

Sex as a Weapon

The Singleton court opined that sexual harassment occurs when sex is used as a weapon to create a hostile work environment. Accordingly, the court found that the alleged acts fell within the FEHA's definition of sex discrimination: "[Plaintiff] recognized, as would any reasonable heterosexual male, that [his coworkers] targeted [his] heterosexual identity, and attacked it by and through their comments. ... [G]iven that [the coworkers] had targeted [plaintiff's] identity as a heterosexual male, it is axiomatic that they would treat women 'differently,' (i.e., not attack them for the same reason). It follows that the harassment was 'because of sex,' (i.e., it employed attacks on Singleton's identity as a heterosexual male as a tool of harassment)."

In so holding, the Singleton court opined that there is "no requirement that the motive behind the sexual harassment must be sexual in nature."

Lack of Sexual Intent

Five years later, in *Kelley*, the court expressly rejected Singleton's holding and opined that the Kelley plaintiff's failure to establish an expression of actual sexual desire or intent defeated his claim for sexual harassment.

The Kelley court elaborated on its disagreement with Singleton as follows: "Singleton finds that the gender-specific nature of the harassment establishes disparate treatment based on sex. Singleton's reasoning inevitably leads to the conclusion that any hostile, offensive and harassing comment or conduct, with or without sexual content or innuendo, made to one gender and which would not be made to the other, would constitute discrimination because of sex within the scope of the FEHA." Thus, the Kelley court believed the expansive definition would almost always necessarily support a finding of sexual discrimination.

Intent is Irrelevant

The Taylor court opined that Singleton's holding was narrowly tailored and correctly decided — "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.”

Citing the fact that California courts often seek guidance from Title VII opinions when interpreting the FEHA, the Taylor court noted several Title VII decisions which hold that a plaintiff is not required to prove sexual desire as a motivating factor to establish a claim for sexual harassment.

Ninth Circuit Rejects Motivation as a Factor in Title VII Claims

Although not cited by the Taylor court, the holding in the decision follows a 2002 Ninth Circuit opinion analyzing a Title VII claim for sexual harassment which holds that the motive behind the harassing conduct is irrelevant to an employer’s liability for sexual harassment. See *Rene v. MGM Grand Hotel Inc.*

The relevant inquiry is simply whether the environment is hostile to the plaintiff because of his or her sex — “So long as the environment itself is hostile to the plaintiff because of [his] sex, why the harassment was perpetrated [(e.g., sexual interest, misogyny, personal vendetta, misguided humor or boredom)] is besides the point.”

Amendment of Government Code Section 12940(j)(4)(C)

California’s legislature recently amended the FEHA statute to clarify that “[s]exually harassing conduct need not be motivated by sexual desire.” The amendment became effective Jan. 1, 2014. The 2013 bill submitted in support of the amendment expressly states its purpose was to overturn the Kelley opinion.

Practical Applications for Employers

As California’s statutory amendment and recent case law expand the scope of potential liability, employers should exercise caution when investigating a claim of sexual harassment, especially in the context of same-sex harassment claims. Under current law, a jury is not required to find that sexual harassment was motivated by sexual desire or interest. Accordingly, employers should not look at the motivations behind the comments or conduct at issue. The relevant inquiry, instead, is simply whether the individual’s sex was used to create a hostile working environment.

Employers should also confirm that anti-discrimination policies contained within their employment handbooks and manuals conform with Government Code Section 12940(j)(4)(C) and the Taylor ruling. Moreover, these recent developments emphasize the importance for an employer to be vigilant in establishing and enforcing anti-discrimination policies in the workplace, and completing anti-discrimination/harassment training of all employees on a regular basis.

Finally, employers should foster an environment which encourages employees to promptly report alleged discriminatory and harassing conduct to effectively minimize or reduce potential liability under the FEHA and Title VII discrimination claims.

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