California Plaintiff Must Show Severe or Pervasive Harassment to Prevail, Appeals Court Rules

By Mark S. Askanas

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The California Court of Appeal has held that judgment for an employer is proper under California law where the plaintiff failed to present sufficient evidence that she was subjected to severe or pervasive workplace harassment based on her gender. *Brennan v. Townsend & O'Leary Enterprises, Inc.*, No. G042398 (Cal. Ct. App. Oct. 18, 2010). Accordingly, the Court affirmed judgment notwithstanding the verdict in favor of the employer.

The Facts

Stephanie Crowley Brennan began working for Townsend & O'Leary Enterprises, Inc., an advertising agency, in 1991 as an assistant media planner. By the time she resigned from the company in 2005, Brennan was an account supervisor and vice-president.

In August 2004, a co-worker forwarded an e-mail to Brennan that referred to an unnamed employee as the "big-titted, mindless one." Brennan believed the e-mail was referring to her. She complained to her supervisor that she found the e-mail offensive. She then went on a previously scheduled vacation. Upon her return, Brennan met with her supervisor and Steve O'Leary, the company's owner. O'Leary apologized to Brennan about the e-mail and showed her a letter of reprimand signed by the e-mail's sender, Scott Montgomery, which warned Montgomery against violating the company's sexual harassment policy. He also said Montgomery wanted to apologize to Brennan. Brennan said she did not want Montgomery's apology. She had had no interactions with Montgomery since she saw the e-mail.

Brennan resigned in January 2005 and sued the company for sexual harassment in violation of the California Fair Employment and Housing Act ("FEHA"), among other things.

Jury Trial

Brennan testified at trial that during her employment, she had heard of, but did not witness, alleged derogatory comments directed toward female clients. She also testified that she was not personally subjected to sexual harassment during her employment. The jury returned special verdicts in favor of Brennan, found she was subjected to sexual harassment, and awarded her $250,000 in damages. Townsend moved for judgment notwithstanding the verdict, which the trial court granted. Brennan appealed.

California Law

California's FEHA prohibits hostile work environment sexual harassment. See *Hughes v. Pair*, 46 Cal. 4th 1035, 1042-43 (Cal. 2009). To prevail on a hostile work environment claim, an employee must show that the allegedly harassing conduct was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex.

According to the California Supreme Court, the existence of a hostile work environment depends upon the totality of the circumstances. It said, "[T]o be actionable, a sexually objectionable environment must be both objectively and subjectively offensive . . . ." Therefore, a "plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail . . . if a reasonable person . . . , considering all the circumstances, would not share the same perception."

Conduct that "is occasional, isolated, sporadic, or trivial," said the Supreme Court, is not actionable. In addition, harassing conduct aimed at persons other than the plaintiff is considered less offensive and severe than conduct directed at the plaintiff. Thus, a plaintiff at whom harassing conduct was not directed must "establish that the sexually harassing conduct permeated [her] direct work environment."

Claim Rejected

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The appeals court found that Brennan was never subjected to unwelcome physical contact, propositioned, or had explicit language or "verbal abuse or harassment" directed at her. While Brennan had said O'Leary questioned her about her personal and sex life, she presented no evidence that she was offended by the conduct or found it unwelcomed. Therefore, she failed to establish severe or pervasive harassment.

The August 2004 e-mail was the only incident of alleged harassment directed toward Brennan. Although the e-mail was "rude, insulting, and unprofessional," the Court noted that it was an isolated event and there was no evidence that Montgomery or any other Townsend employee made any derogatory comments about Brennan. Further, the e-mail was not intended to be shared publicly. Brennan saw it only after Montgomery inadvertently forwarded it to Brennan's co-worker, who then forwarded it to her. The Court also found significant that Brennan was a vice-president at the time and Montgomery was not then, and never was, her supervisor. Based on the evidence presented at trial, the Court concluded that the trial court properly granted judgment notwithstanding the verdict in favor of the employer.

* * *

This case confirms that occasional incidents of boorish behavior in the workplace do not necessarily create a hostile work environment for employees. In addition, the employer in this case addressed the complaint and reprimanded the offender immediately, a course that courts usually look upon with favor. The best way for employers to reduce the risk of harassment claims is to maintain and enforce anti-harassment policies, train the workforce on the prevention of harassment, and respond to concerns promptly and effectively.

Jackson Lewis attorneys are available to answer questions about and provide anti-harassment training.