Supplement to the Los Angeles and San Francisco
Daily Journal
MAY 1, 2024

COLUMN

# Is summary judgment appropriate in single or few incident hostile work environment cases in California?

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For parties litigating FEHA cases that include a claim of harassment/hostile work environment, a common question in the litigation, and in turn in mediation, is whether summary judgment is likely to be granted based on the argument that the conduct is not "severe" or "pervasive" as required by both FEHA and Title VII. If there is a decent chance that summary judgment will be granted, a plaintiff's expectations in mediation must be adjusted. Conversely, if summary judgment is unlikely to be granted, a defendant should know that it will incur significant costs getting to trial and that its fate will sit in the hands of an unpredictable jury. Its expectations in mediation must be adjusted.

In the past, courts had wide latitude in granting summary judgment motions in harassment cases with a single incident or a few incidents. But with the passage of Government Code Section 12923, effective Jan. 1, 2019, questions remain as to whether such claims are ever appropriate for summary judgment.

## PRIOR CASE

Prior to the passage of Section 12923, courts often granted summary judgment in cases involving single incidents or a handful of incidents of harassment, relying on *Lyle v. Warner Bros. Television Prods.* ((2006) 38 Cal. 4th 264), in which the California Supreme Court held that a single incident of harassment or discrimination, unless very egregious, was not enough to establish a hostile work environment.

Based on this principle, courts found that the following acts did not rise to the level of "severe" or "pervasive" under the law. Calling a coworker a "wetback" and a "Puerto Rican spic," even though "utterly deplorable" was not sufficient (*Long v. Ford Motor Co.* (6th Cir.2006) 193 Fed.Appx. 497, 502). Two sexually suggestive remarks, a racially derogatory comment, and an incident of rubbing an arm across a breast, all of which "demonstrate[d] rude, inappropriate, and offensive behavior," were not sufficient (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 68 Cal. Rptr.3d 568). Multiple "crude and offen-sive" comments about women's bodies, as well as ogling and gestures, were not sufficient *(McCoy v. Pac. Mar. Assn.*, (2013) 216 Cal. App. 4th 283, 294, 156 Cal. Rptr. 3d 851). In all of these cases, summary judgment was granted because the courts found the conduct to be too sporadic or not offensive enough.

## AMENDED LAW

The California legislature shifted the landscape with the passage of Section 12923. The amended law clarified that "[a] single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment."

The law even went a step further in subsection (e) by stating that "[h]arassment cases are rarely appropriate for disposition on summary judgment." With this amendment, the legislature clarified that judges have significantly less discretion to find that a single incident or a few incidents of alleged harassment are not sufficient to state a claim for harassment.

## INTERPRETING THE LAW

While it may seem like Section 12923 changed the law, one court noted that the amendment "did not change the substantive law of sexual harassment, but addressed how the trial courts were to apply that law, particularly and specifically in the context of summary judgment." (*Beltran v. Hard Rock Hotel Licensing, Inc.*, 97 Cal. App. 5th 865, 879–81, 315 Cal. Rptr. 3d 842, 854–55 (2023), review filed Jan. 16, 2024.). The court therefore held that the amended statute applied in cases filed prior to the amendment's effective date, because it merely clarified how judges were to apply the law.

Since the amended statute took effect, courts seem more reluctant to grant summary judgment for harassment claims. (*See*, e.g., *Doe v. Wells Fargo Bank, N.A.* (C.D.Cal., Aug. 19, 2019, No. CV 19-5586-GW-PLAx; 2019 WL 3942963, at p. 6. ("[W]hat Defendants fail to recognize is that even one instance of harassment can be sufficient."); *(Milner v. TBWA Worldwide, Inc.* (C.D. Cal., Oct. 30, 2019, No. CV-19-08174 DSF(AFMx) 2019 WL 5617757, at p. 4.) ("Defendants ... claim that even if [the alleged] conduct constituted harassment, it was 'neither severe nor pervasive as a matter of law.' … However, under California law, even one instance of harassment can be sufficient" to establish a harassment claim under FEHA.).)

Thus, summary judgment has been denied in cases that, pre-Section 12923, would likely have been dismissed. When a plaintiff alleged ongoing verbal harassment and one incident of physical harassment by a coworker, the court found that "a reasonable jury… could conclude that it was more than

'annoying or merely offensive.'" A triable issue was thus raised and summary judgment was denied. (*Vargas v. Vons Companies, Inc.*, No. B315167, 2022 WL 17685801, at 10–11 (Cal. Ct. App. Dec. 15, 2022)) When another plaintiff was allegedly called a "sucker," a loser," a "fool," "weak," and "pathetic" for "not standing up to his ex-wife," the court found that "a reasonable jury could conclude" that the plaintiff was harassed based on his marital status and his gender, and so summary judgment was denied (*Masterton v. Johnson Controls Bldg. Automation Sys., LLC,* No. SACV2101691CJCJDEX, 2024 WL 649261, at 5 (C.D. Cal. Jan. 17, 2024)).

Despite the fact that summary judgment in single incident and few incident harassment cases is now less likely, the amendment did not, however, alter the requirement that harassment be "severe" or "pervasive." A defendant may still argue that a single comment, even if distasteful or improper, did not by itself create an intimidating, hostile, or offensive working environment. In an unpublished case from the Court of Appeal for the Second District (*Nguyen v. Gumaer*, Dec. 8, 2023), a single comment suggesting that the plaintiff, who was Vietnamese, use his karate black belt to "take care" of another employee was found insufficient to establish a triable issue as to hostile work environment. The court cited Lyle: "Common sense, and an appropriate sensibility to social context, will enable courts and juries to distinguish between simple teasing or roughhousing ... and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.' " (Lyle, supra, 38 Cal.4th at p. 283.)

This issue is particularly relevant in California, where a company is strictly liable for the acts of supervisors under FEHA (*See State Dep't of Health Servs. v. Superior Ct.*, 31 Cal. 4th 1026, 1042, 79 P.3d 556, 563 (2003)). In single or few incident cases, the plaintiff will likely not have complained about the conduct to the company, but the company is still liable.

## IMPACT OF THE AMENDED LAW

The principal impact of the amended law is to lower the bar for bringing hostile work environment claims to trial. Judges are less likely to grant defendants' summary judgment motions, and defendants are more likely to incur the costs of taking a case through trial, ultimately putting their fate in the hands of a jury. However, even under the amendment, some conduct will still not be sufficiently "severe" or "pervasive" and summary judgment may be appropriate.

Because the odds of summary judgment being granted in any given case is a key consideration that often drives the value of settlements, parties should view harassment cases through the lens of the amended statute when they are evaluating claims in mediation. Over time, a new body of law will clarify what conduct is sufficiently "severe" or "pervasive" even under the amended statute to create a hostile work environment.

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