#METOO, #TIMESUP, #WESAIDENOUGH – real protection, finally?

Legislation that would make it easier to prosecute claims of sexual harassment and discrimination in the workplace has been introduced in Sacramento

By Elizabeth Riles

Though it has been more than 26 years since Anita Hill bravely stepped forward to testify about the sexual harassment that she endured, it has become abundantly clear in the recent months with the #MeToo movement, that sexual harassment is still a daily part of the lives of workers in all walks of life. Workers, mostly women, still endure a wide variety of sexual harassment, from sexual innuendos to all-out assault. In the wake of this movement, the California Legislature and several workers' rights organizations have been working feverishly to strengthen the protections California workers have against sexual harassment so that hopefully we will soon reach the day when sexual harassment is truly a thing of the past.

There are a large number of bills being considered by the legislature this term related to sexual harassment and/or employment. Here are the top five bills that could make a significant difference in your representation of workers with claims of sexual harassment. You should definitely watch out for what happens with them in the coming months.

California Senate Bill 1300 – the Sexual Harassment and Accountability Act

Senate Bill 1300 is a bill authored by Senator Hannah-Beth Jackson. If passed, this bill would clarify and reform key aspects of the Fair Employment and Housing Act ("FEHA") to ensure true protections for victims of sexual harassment.

First, this bill clarifies the meaning of the "severe or pervasive" standard. Generally, a claim of sexual harassment requires demonstrating that a plaintiff was subjected to unwelcome conduct that was based on sex and was sufficiently severe or pervasive to unreasonably interfere with the work environment. (See *Guthrey v. State* (1998) 63 Cal.App.4th 1108, 1122; *Fisher v. San Pedro* (1989) 214 Cal.App.3d 590, 609, *rev. denied*.) This standard has unfortunately been misinterpreted, leading to results that are contrary to the intent of the FEHA. Senate Bill 1300 provides guidance to the courts for interpreting this standard: It clarifies that a plaintiff does not need to show a decline in productivity to make a claim; rather, just that the conduct made work more difficult.

It eliminates the "one free grope" standard and makes it clear that a single incident of harassment is sufficient to create a triable issue regarding the existence of sexual harassment, rejecting the *Brooks v. City of San Mateo* (2000) 229 F.3d 917 case. It confirms that the totality of the circumstances must be reviewed to determine the existence of sexual harassment and specifically confirms the rejection of the "stray remarks" doctrine.

It confirms that sexual harassment should not vary based on type of workplace. In other words, unless "engaging in or witnessing prurient conduct and commentary is integral to the performance of the job duties" it should not matter whether you work in a construction site or an office in determining whether or not you were subjected to sexual harassment.

Finally, it makes it clear that sexual harassment cases are rarely appropriate to be disposed of on summary judgment.

Second, Senate Bill 1300 gives better effect to claims for failure to prevent discrimination or harassment. The current law is such that a plaintiff cannot bring and cannot succeed on this claim unless the plaintiff also alleges and succeeds on a harassment or discrimination claim, i.e., a sexual harassment plaintiff must allege and demonstrate that she suffered severe or pervasive conduct. This rule often leads to absurd results when an employee complains of sexual harassment and because the employer determines that the conduct, though offensive, was not "severe or pervasive," the employer takes no action whatsoever. Senate Bill 1300 makes it clear the employers would have an obligation to take reasonable steps to prevent harassment or discrimination on the first instance of offensive or unwelcome conduct.

Third, Senate Bill 1300 prevents employers from contracting around and out of sexual harassment claims and laws. It prohibits the release of harassment or discrimination claims as a condition of employment, or in exchange for continued employment, a raise or bonus. It would also prevent non-disparagement clauses under the same circumstances that are designed to silence victims and those who witness misconduct in the workplace. This would not prevent releases or non-disparagement clauses in severance agreements or actual settlement agreements, but it would prevent employers from sneaking them in as part of routine personnel papers.

Fourth, Senate Bill 1300 expands the training requirements for employers. Under Senate Bill 1300 all employers with five or more employees, not just those with 50 or more, would be required to train all their employees, not just supervisors, about sexual harassment. This training would require that employees know how and where to report claims of sexual harassment. It would also require bystander intervention training. This bill will help ensure that all employees know how and where to report harassment and that they are empowered with the confidence and the necessary tools to intervene in harassment should they choose to do so.

Senate Bill 1300, if passed, will greatly increase our effectiveness in preventing and combatting sexual harassment.

California Senate Bill 1038 – the Protect Victims from Retaliation Act

Senate Bill 1038 is authored by Senator Connie Leyva. If passed, this bill, would once again allow retaliation claims against individuals. In *Jones v. The Lodge at Torrey Pines* (2008) 42 Cal.4th 1158, the California Supreme Court held that the 1987 addition of the word "person" to the FEHA retaliation code, California Government Code §12940(h), did not confer individual liability for retaliation. (*Id.* at 1169.) Moreover, the Court held that it was bad public policy to make individual supervisors potentially liable for management and personnel decisions that must be made regularly. (*Id.* at 1167-1168.)

Unfortunately, this policy has led to absurd results. Because individuals can be held liable for harassment, but cannot be held liable for retaliation, there is an incentive for harassers or their compatriots to retaliate against victims of harassment to silence them, keep them from complaining, or remove them from the workplace as a means to hiding their harassment. With Senate Bill 1038, this gap in protection for victims would be closed.

California Senate Bill 224

Senate Bill 224 is authored by Senator Hannah-Beth Jackson. As stated before, it is clear that sexual harassment is prevalent in all walks of life and in every work place. In the last few years, we have heard about sexual harassment in Silicon Valley, in Hollywood, in the state capitol and the U.S. Capitol. Senate Bill 224 is an amendment to the Unruh Civil Rights Act that would ensure that people who work in these industries, whether directly employed or not, are protected from sexual harassment.

The Unruh Civil Rights Act covers sexual harassment in business and professional relationships. (See California Civil Code §51.9.) It was designed to prevent real estate agents, accountants, therapists, lawyers and others in these types of business relationships from abusing positions of power and trust by engaging in sexual harassment. The act includes a non-exhaustive list of professions to which it applies. Senate Bill 224 expands that list to make it clear that investors, lobbyists, elected officials, directors and producers are explicitly covered under the law.

California Assembly Bill 3080

Assembly Bill 3080 is authored by Assembly Member Lorena Gonzalez Fletcher. This bill, if passed, could be the beginning of the end of forced arbitration in employment in California. More and more employers are including arbitration agreements and clauses as a condition of employment. Often employees do not realize that they have signed away their rights to a jury trial, appeal and in many cases the opportunity to seek redress of their rights as a class.

Assembly Bill 3080 makes it unlawful to retaliate against or terminate an employee for refusing to sign an arbitration agreement. It would also make it unlawful to prohibit a person from disclosing any instances of sexual harassment as a condition of employment. Many of the harassers we have heard about recently were able to escape liability for many years because they required employees or contractors working for them to sign non-disclosure agreements as a condition of employment or continued employment. Moreover, even if there was any adjudication of claims, they often happened in arbitration, a secret process. Assembly Bill 3080 would prevent that from happening. It would break the silence about sexual harassment so that perpetrators can be stopped before they become repeat offenders.

Notably, this bill avoids preemption under the Federal Arbitration Act (FAA), because it only governs when a worker chooses not to enter into an arbitration agreement. Under *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) and its progeny, the U.S. Supreme Court has interpreted FAA preemption to mean that states cannot place limitations on how arbitration agreements are enforced under state law. If a worker refuses to sign an arbitration agreement, there would be no issue of contract formation or enforceability, because there would simply be no agreement. Furthermore, this bill would not frustrate the purpose of the FAA because that purpose follows the basic precept, emphasized numerous times by the Supreme Court, that arbitration "is a matter of consent, not coercion." (*Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468; *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 US 52.)

California Assembly Bill 1870 – the Stopping Harassment and Reporting Extension (SHARE) Act

Assembly Bill 1870 is authored by a number of Assembly Members.[1] Assembly Bill 1870 extends the statute of limitations for all claims under the FEHA. Currently, claims under the FEHA must be filed within one year of termination or the last act of discrimination or harassment. This is one of the shortest statutes of limitations that exists. The statute of limitations for fraud is three years, for other personal injury claims, it is two years, and for contracts, it is two years for oral contracts and four years for written contracts.

People who experience harassment or discrimination on the job often experience serious emotional distress. Victims of sexual harassment particularly, can suffer from trauma, anxiety and depression. It can take time for these individuals to come to terms with their experiences, particularly if they suffered a sexual assault. It does not make sense to require them to decide whether to pursue claims or to face the difficult legal process while still trying to recover from anxiety, depression or trauma. Assembly Bill 1870 will extend the statute of limitations for FEHA claims from one year to three years. It will give workers who have endured harassment or discrimination a real opportunity to recover and to be in a better position to decide about pursuing legal claims.

Conclusion

These are only five of the many bills that the state legislature is considering this year, but the passage of these bills in particular could make a huge difference in protecting workers from discrimination and

harassment. Keep an eye out for these bills. Their passage could significantly enhance your ability to assist your clients with their employment claims in the future.

Elizabeth Riles is a partner in the Law Office of Bohbot & Riles *and has been practicing employment litigation for the last 20 years. She has successfully tried numerous cases throughout the Bay Area and Southern California. If you are looking for further information on this subject, or any related employment matter, contact Bohbot & Riles directly at (510) 273-3111 or Ms. Riles at eriles@strikebacklaw.com.*


Riles