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California discrimination and harassment standards

Why offensive conduct still falls through the cracks

By Katie Bain, Laura Mazza and Katie Debski

"When are you planning on retiring?"

"Your people can be so aggressive."

"Pretty girls do really well here."

"Are you sure you are going to want to come back to work after you have the baby?"

"I like to get to know the girls that work here on a personal level."

Our firm receives multiple calls per day from workers who have heard comments like these at work and are questioning whether they have a viable claim for harassment or discrimination, often after facing adverse employment actions at work. In many cases, the comments are made by non-decision-makers, and the potential client is left with only a gut feeling that the decision-maker shared the same illegal bias against them.

For example, a woman of color in her fifties suspects that her race, sex, and/or age were the reason she was selected for layoff by the all-white male executive team at her company, although there is little evidence other than a management-level colleague commenting that the woman didn't "fit in" around the office.

Another common story we hear: a pregnant woman is the only person in her department whose position is being eliminated as part of a restructuring. Her supervisor didn't say anything negative about her pregnancy, but a manager she doesn't report to questioned her childcare plans upon her return, and she feels certain she is being let go due to pregnancy and/or gender.

These examples can give rise to two potential types of claims in California – harassment and discrimination. While both harassment and discrimination are prohibited by the Fair Employment and Housing Act (FEHA), there are different legal standards that apply to each. While both standards have recently been modified under new case law and statute, there remains a lot of work to be done to fully protect California workers.

The recent evolution of discrimination claims in California

A plaintiff in an employment discrimination case under FEHA often faces an uphill battle to prove that an employer's adverse action was substantially motivated by discrimination due to the plaintiff being in a protected category (the standard set forth by the court in *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232.). Meeting the burden of proof requires coming forward with some form of evidence to establish the employer's illegal bias when it decided to discipline, demote, terminate or take other negative action against the plaintiff. (See *Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 354-355.)

The plaintiff must show it is more likely than not that the adverse employment action was "based on a [prohibited] discriminatory criterion." (*Ibid.*) Thus, a mere gut feeling that someone's protected status is the reason for an adverse employment action is insufficient, and until recently, even a direct comment made by a non-decision-maker was considered irrelevant in a discrimination case under the "stray-remarks" doctrine.

The term "stray remarks" was first used by Justice Sandra Day O'Connor in *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 277, although it was not directly addressed in a California case until the 2010 decision in *Reid v. Google* (2010) 50 Cal.4th 512, 539. The *Reid* Court found that an age-based remark not made directly in the context of an employment decision or uttered by a non-decision-maker may be relevant circumstantial evidence of discrimination. The Court rejected a rigid application of the "stray-remarks" doctrine, finding that fully excluding all "stray remarks" would mean that trial courts were improperly weighing evidence at the summary judgment stage and precluding the jury from considering relevant evidence.

A recent California appellate case, *Jorgensen v. Loyola Marymount University* (2021) 68 Cal.App.5th 882, has taken the holding in *Reid* even further by combatting the employer's hearsay and relevancy arguments, likely making these cases easier to prove. In *Jorgensen*, a female university employee brought claims for gender and age discrimination after her male supervisor promoted a younger female employee, Johana Hernandez – someone far less qualified whom Jorgensen had trained – to Assistant Dean over Jorgensen. The defendant university brought a motion for summary judgment. The motion was granted and plaintiff appealed. As part of her opposition, Jorgensen produced a declaration from a former employee of the university who heard Ms. Hernandez state that she wanted to hire "somebody younger" for an unrelated role. This comment did not apply to Ms. Jorgensen nor her position, nor was Ms. Hernandez the decision-maker in Ms. Jorgensen's case.

In *Jorgensen*, the defendant university objected to the declaration on the basis of conjecture, relevance, hearsay and speculation, but the appellate court found "[t]hese four objections were wide of the mark." (*Id.* at 885.) The fact that an assistant dean in this department had rejected a job candidate because she wanted someone younger was held to be relevant to Jorgensen's claim, as it presented evidence of the general culture and attitude toward older employees at the company. There was no conjecture or speculation, as the declaration repeated the statement word-for-word. The appellate court also found the declaration was admissible under the state-of-mind

exception to the hearsay rule, holding, "Hernandez *explicitly* described her state of mind when she said she was looking for somebody younger. This then was hearsay, but it fell within section 1250 of the Evidence Code because it recounted Hernandez's state of mind: Hernandez preferred younger employees."

As plaintiff-side advocates, we think the *Jorgensen* ruling is consistent with the real-life workplace dynamics we hear about daily from our client intake calls, as well as discrimination cases that we have litigated and brought to trial. Company higher-ups usually (though not always!) know better than to make explicit discriminatory statements, but a company culture of bias is often emulated by individuals at various levels of the company. Like the plaintiff in *Jorgensen*, we've encountered objections based on hearsay or arguments that the comments were made by someone far removed from our client and the employment decision at issue, and thus irrelevant. It's refreshing to see the court acknowledge that such comments can still be relevant to the overall culture of the workplace and can influence decision-makers at all levels of the company.

How do harassment claims compare?

The "stray remarks" doctrine in employment discrimination cases can be contrasted with the "severe or pervasive" standard for hostile work environment harassment cases. In order to prevail on a hostile work environment claim, the plaintiff must show that the harassment was "sufficiently severe or pervasive to alter the conditions of [his/her/their] employment and create an abusive working environment." (*Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 21.)

Shockingly, cases in California have held that even extremely offensive touchings or comments were not enough to meet this standard. For example, in *Brooks v. City of San Mateo*, colloquially known among plaintiff's employment attorneys as the "one free grope" case, the court held that a single incident in which a co-worker touched plaintiff's stomach and breast under her sweater without her consent did not rise to the level of harassment. (*Brooks v. City of San Mateo* (2000) 229 F.3d 917.) Similarly, in *Kelley v. The Conco Companies*, the court held that numerous extremely graphic sexual comments made by a supervisor were not severe or pervasive because they primarily occurred on one day. (*Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191.)

In 2019, in direct response to these cases, the California legislature attempted to clarify the severe or pervasive standard to ensure that future plaintiffs would not face the same unjust results by passing Government Code section 12923. Section 12923 codifies the legislative intent 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." (Govt. Code, § 12923, subd. (b).) Section 12923 explicitly disapproves of the holdings in *Brooks* and *Kelley*, although the code section is unfortunately not binding on the courts, and is instead intended as guidance. Section 12923 also affirms and approves of *Reid's* rejection of the stray-remarks doctrine. (Govt. Code, § 12923, subd. (c).) It remains to be seen whether section 12923 will encourage courts to modify the application of the severe or pervasive standard to the benefit of plaintiffs, but we certainly hope it will. It is encouraging to know that the legislature believes the above cases were wrongly decided and we are hopeful the courts will follow suit and overturn these decisions.

Conclusion

As plaintiffs' attorneys, we are encouraged to see some positive shifts in the law, but we believe that we still have a long way to go. It should never be acceptable for an employee to have to work in an environment where negative comments are made about their race, gender, national origin, or inclusion in another protected category. It is truly hard to comprehend that courts have held that it is *not* actionable harassment when someone has their breast groped at work or is told by their supervisor that they want to forcibly have sex with them. We are still forced to regularly turn away potential clients who have faced explicit harassing and discriminatory comments, yet still can't effectively meet the legal standards to be able to prevail at trial. Although the "me too" movement has led to positive changes as evidenced by section 12923, and *Jorgensen* has helped lower the bar to prove discriminatory intent, we still have not come close to where our workplaces should be in 2022 – an environment where diverse experiences and perspectives are celebrated instead of penalized.

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