B142840

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 3

RAQUEL SALAZAR,

Plaintiff and Appellant

v.

DIVERSIFIED PARATRANSIT, ET AL

Defendants and Respondents

Appeal from Superior Court of Los Angeles County
Case No. YC 033143
Hon. Jean Matusinka, Judge.

AMICUS BRIEF BY THE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF/APPELLANT

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ISSUE PRESENTED:

Whether an employer violates the California Fair Employment and Housing Act's ("FEHA's") mandate to provide a discrimination free workplace by knowingly permitting a third party to harass one of its employees?

SUMMARY OF ARGUMENT:

Like Title VII, the California Fair Employment and Housing Act ("FEHA") prohibits discrimination in all "terms, conditions and privileges of employment," which includes one's working environment. Gov't Code Section 12940(a). Indeed, because severe or pervasive harassment alters one's working conditions, an employer engages in unlawful discrimination when it knowingly maintains a hostile working environment for one protected class, but a neutral working environment for others.

One's right to a harassment-free working environment does not depend on the job status of the perpetrator. The crux of a third party harassment case is ***its effect on the plaintiff's work environment***. And in these cases, an employer's liability stems from its non-delegable duty to maintain neutral terms and conditions of employment for its workers, not as the insurer over the acts of a third party. While FEHA does not necessarily require that an employer control all aspects of third party misconduct, FEHA absolutely requires that an employer control the working environment to which its employees are subject.

Where an employer is aware that a third party is sexually harassing one or more of its employees, and fails to act, that employer knowingly maintains different terms and conditions of employment based

upon the worker's sex. The employer's conduct is unlawful under Government Code Sections 12940(a),(j) and (k).

The primary purpose served through Govt' Code Section 12940(j) is to apply FEHA's anti-harassment provisions to employers with less than five employees (who are not otherwise subject to the Act). Aside from expanding FEHA's jurisdictional reach in this regard, the Legislature specifically stated that the anti-harassment provision was otherwise "declaratory of existing law." The legislative history upon which Respondent relies reflects only a debate over what types of obligations the Legislature sought to impose on small employers covered only by Section 12940(j); it reveals nothing about the types of obligations imposed on employers subject to Section 12940(a). And even this debate should be resolved by Section 12940(j)'s plain language and statement of legislative intent, both of which reflect a duty to prevent harassment caused by an employer's "clientele."

It is beyond dispute that federal law prohibits an employer from knowingly permitting third parties to harass employees. And it is beyond dispute that the statutory basis for this rule stems from the same obligation to ensure equal "terms, conditions and privileges of employment" that exists under FEHA Section 12940(a). To suggest that an employer's Title VII liability for third party harassment derives from a specific EEOC Guideline - and not from the text of the statute - is to ignore that this Guideline has the same non-binding, persuasive effect on the federal courts' interpretation of Title VII that it has on this Court's interpretation of FEHA. ***Moreover, this contention also ignores the critical fact that California's Department of Fair Employment and Housing interprets FEHA the same way that the EEOC interprets Title***

VII: as barring an employer from knowingly permitting third party harassment.

At bottom, the modern workplace is a melange of all sorts of relationships that were once commonly known as "employer-employee." Leased employees, temporary employees, independent contractors and payrolled employees now work along side one another. The defense's argument, if accepted, would abrogate any employer responsibility for harassment caused by these types of "third parties."

THE NATURE OF CELA'S INTEREST IN THIS MATTER:

The California Employment Lawyers Association ("CELA") is an organization composed of attorneys who represent primarily plaintiffs in employment discrimination and related cases. Through its undersigned attorneys, CELA is familiar with the questions involved in this case and the scope of their presentation. CELA has previously obtained leave of Court to submit this brief.

ARGUMENT:

A. An Employer That Knowingly Permits a Third Party to Sexually Harass One of its Employees Violates Gov't Code Section 12940(a) as that Employer Maintains Different Terms and Conditions of Employment Based Upon a Worker's Sex.

The California Fair Employment and Housing Act ("FEHA") and Title VII of the Civil Rights Act of 1964 (Title VII") adopt identical language in barring workplace discrimination. Under both statutes, an employer may not discriminate against an employee in any "terms, conditions or privileges of employment." Gov't Code Section 12940(a); 42

U.S.C. § 2000e-2(a)(1).

Because the two schemes rely upon identical language, the court should interpret the scope of prohibited conduct consistently. Accordingly, the phrase "terms, conditions and privileges of employment" should mean the same thing under FEHA as it means under Title VII. Mixon v. FEHC, 192 Cal.App.3d 1306, 1316-1317 (1987) (California courts rely upon federal discrimination law to interpret analogous provisions under state law).

1. An Employer That Permits Severe and Pervasive Sexual Harassment Imposes a Discriminatory Term and Condition of Employment

Under federal law, discrimination in one's "terms, conditions and privileges of employment" includes hostilities within the environment under which one is expected to work. As noted in Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65, 106 S.Ct 2399, 91 L.Ed.2d 49 (1986):

> "[T]he phrase 'terms, conditions and privileges of employment'...is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.... One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers." (Quoting from Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)).

Whether the underlying harassment stems from race, religion

sex or other protected characteristic, federal courts recognize that workers experiencing severe and pervasive harassment are subject to different "terms, conditions and privileges of employment" from others not experiencing the same sort of workplace hostility. Id.

California also regards "harassment" to be a form of discrimination. Murillo v. Rite Stuff Foods, Inc., 65 Cal.App.4th 833, 848 (1998) ("once discriminatory conduct in the form of sexual harassment meets this requirement, the wrong and the injury occasioned by it are complete..."). Moreover, California goes beyond federal law in specifically prohibiting "harassment" separate and apart from prohibiting "discrimination[1]." Gov't Code § 12940(j).

In enacting Government Code Section 12940(j), however, the Legislature did not ***create*** liability for harassment in this State. Indeed, the Legislature expressly stated that this FEHA amendment was "declaratory of existing law." See Gov't Code § 12940(j) and its predecessors. FEHA has always prohibited sexual harassment because FEHA has always prohibited discriminatory "terms, conditions and privileges of employment under Gov't Code § 12940(a). The purpose and effect of Section 12940(j) was not to establish new statutory obligations, but to extend FEHA's anti-harassment provisions to employers with less than five employees who were not otherwise covered by the Act[2]. Gov't Code Section 12940(j)(4)(A).

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[1] Title VII does not expressly prohibit "harassment." Federal law prohibits "harassment" only as a form of discrimination in one's "terms, conditions and privileges of employment."

[2] See Stat. 1984, Ch. 1754. Indeed, the Legislative Counsel's Digest which accompanies the amendment noted that existing law already made harassment

There is simply no basis for suggesting that the scope of Gov't Code § 12940(a) is any different from the scope of Title VII. The two statutes share common language and a common purpose: to combat workplace discrimination. And Section 12940(a) establishes liability independently of Section 12940(j). Fisher v. San Pedro Peninsula Hosp., 214 Cal.App.3d 590, 605-606 (1989) (sexual harassment implicates FEHA Sections 12940(a), (f), (i) and (j)), as they existed at that time).

2. Harassment Perpetrated By Third Parties Can Also Result in Discriminatory Terms and Conditions of Employment

Petitioner's brief describes the wealth of federal authorities holding employers liable for knowingly permitting third parties to sexually harass employees. See, for example, Folkerson v. Circus Circus, 107 F.3d 754 (9th Cir. 1997). And Respondent does not appear to dispute that federal law prohibits the very conduct presently at issue. There is simply no reason to treat this same conduct any differently under FEHA.

Under Title VII, an employer's liability for knowingly

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unlawful, and already mandated that employers covered by FEHA "take all reasonable steps to prevent harassment from occurring." Five v. Chaffey Joint Union High School Dist., 225 Cal.App.3d 1548, 1555 (1990) (Legislative Council's Digest is a proper resource to determine the intent of the Legislature). Any legislative history pertaining to this amendment must be construed in light of this purpose, as the Legislature was only considering what additional obligations, if any, to impose on employers not otherwise covered by FEHA. This is not the first instance where the Legislature has codified anti-discrimination obligations in separate but co-extensive provisions. Compare Labor Code § 1197.5 with Gov't Code § 12940(a), both of which prohibit unequal pay on account of gender.

permitting third party harassment derives exclusively from its duty to maintain nondiscriminatory "terms, conditions and privileges of employment." The identical language under Gov't Code Section 12940(a) compels an identical result.

Aside from textual overlap, the ***reasoning*** behind the federal rule applies with equal force to claims brought under FEHA. Under both federal and state law, an employer has a duty to eradicate discrimination. And under both federal and state law that duty is breached when a third party is allowed to infect a workplace with targeted harassment. As the court held in Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1073-4 (10th Cir. 1998):

> The focus of the inquiry in a hostile work environment claim, as the name suggests, is on whether the workplace is permeated with discriminatory intimidation, ridicule, and insult. An employer who condones or tolerates the creation of such an environment should be held liable regardless of whether the environment was created by a co-employee or a nonemployee, since the employer ultimately controls the conditions of the work environment. (Internal quotes and citations omitted).

An employer's liability for third party harassment does not derive from an obligation to control the acts of third parties, but from an unwillingness to control its employees' work environment. The legal issues underlying third party harassment are simply no different from the legal issues underlying employer-related harassment: both are unlawful where discriminatory harassment results in differential "terms, conditions

and privileges of employment."

3. The Cause of One's Hostile Work Environment is Largely Irrelevant as Employer Liability Stems from its Effect in Creating Discriminatory Working Conditions.

An employer violates FEHA when it requires its employees to work in an environment permeated with harassment. Kelly-Zurian v. Wohl Shoe Co., 22 Cal.App.4th 397, 409 (1994) ("when the workplace is permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, the law is violated."). Liability is a function of whether or not the harassment is severe or pervasive enough to alter one's working conditions, and the extent to which the employer has allowed this to occur.

Tracing the source of the harassment is largely beside the point: what is important is whether an employer provides a workplace free from discriminatory animus. An employer cannot just bury its head in the sand when a third party seeks to infect the workplace with bigotry.

4. Federal Law Does Not Turn on the EEOC'S Guidelines: California's Administrative Agency Has Promulgated a Similar Directive Which Interprets FEHA as Barring Employers from Knowingly Permitting Third Party Harassment

In distinguishing FEHA from federal law, Respondent makes much of the fact that the EEOC has promulgated guidelines that specifically refer to liability for third party harassment. So what? The federal decisions turn on statutory language and legal analysis; the views of the EEOC, while helpful in interpreting the statute, are not controlling. Vinson, supra 477 U.S. at 65 (EEOC Guidelines, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.") (citations omitted).

Moreover, Respondent glosses over the fact that the California Department of Fair Employment and Housing ("DFEH") promulgated an Enforcement Division Directive that interprets FEHA in the same way that the EEOC interprets Title VII. Enforcement Division Directive No. 207 states in pertinent part at Sect. 4(A)(2):

> "The primary respondent's liability for outsider harassment is the same as that for non-supervisory harassment. The respondent is liable if it had actual or constructive knowledge of the outsider harassment, and failed to take immediate and appropriate corrective action."

The Court should defer to the DFEH's interpretation of California law every bit as much as the federal courts defer to the EEOC. County of Santa Barbara v. Connell, 72 Cal.App.4th 175, 185 (1999) (California courts give great weight and respect to the administrative agency's interpretation of a statute governing its powers and responsibilities).

5. The Legislative History of Section 12940(j) Reveals Nothing About the Scope of Section 12940(a)'s Prohibition on Workplace Harassment

As noted above, FEHA contains a specific anti-harassment provision at Section 12940(j). Unlike FEHA's general prohibition against discrimination at Section 12940(a), Section 12940(j) bars harassment at all workplaces ***regardless of an employer's size***. Any legislative history underlying Section 12940(j) must be interpreted within the specific context under which it was enacted: extending FEHA's jurisdictional bar against harassment to employers otherwise exempt from the statute. Gov't Code Section 12940(j)(4)(A). Section 12940(j) did not change the law that applied to employers already covered by Section 12940(a).

One simply cannot rely on the legislative history underlying Section 12940(j) in order to interpret an employer's obligations under Section 12940(a). Even if the Legislature had relieved ***small employers*** of any obligation to prevent known harassment by third parties under Section 12940(j) - which it did not - this says nothing about the obligations imposed on ***larger employers*** to do so under Section 12940(a). When the Legislature permits these small employers to engage in workplace discrimination, is it really surprising that the Legislature would have some hesitancy in requiring these employers to prevent known harassment by third parties? Jennings v. Marralle, 8 Cal.4th 121 (1994) (employers with less than five employees are not subject to anti-discrimination laws). Just as employers with less than five employees are treated differently under FEHA from employers with five or more employees, the legislative history underlying Section 12940(j) should be treated differently from the intent and purpose

of Section 12940(a).

B. An Employer That Knowingly Permits a Third Party to Harass Employees Also Violates the Obligation Under Gov't Code §§ 12940(j) and (k) to Prevent Harassment From Occurring

The plain language of Gov't Code § 12940(j) is clear: "***An employer shall take all reasonable steps to prevent harassment from occurring***." (Emphasis added). This mandate is unequivocal. This mandate is unambiguous. And this mandate does not turn on the identity or job status of the perpetrator. Debates over the legislative history of this portion of § 12940(j) are simply irrelevant. See Lungren v. Deukmejian, 45 Cal.3d 727, 735 (1988) ("If the language [of a statute] is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature..."); Civil Code § 1858.

Moreover, as a remedial statute, FEHA must be construed broadly to further its remedial objectives. People ex. rel. Lungren v. Superior Court, 14 Cal.4th 294, 314 (1996). And any attempt, through "provisos" or "qualifiers," to limit the scope of § 12940(j) must be strictly construed. Lundren v. Deukmejian, supra at 735-736.

An employer's obligation to prevent harassment under § 12940(j), like its obligation to "prevent discrimination and harassment from occurring" under § 12940(k), gives rise to legal duties sounding in tort. Trujillo v. North County Transit Dist., 63 Cal.App.4th 280, 286-7 (1998) (requiring that one show actual harassment in order to support a tort claim for breach of the duty to prevent harassment from occurring). Where, as here, an employee can show breach, causation and damages, she should

prevail. Id. In this respect, the present case differs substantially from Trujillo itself, where the employee was unable to show either causation or damages flowing from defective procedures that did not otherwise result in actual harassment.

If, as Respondent suggests, an employer has absolutely no duty to prevent known third party harassment, then the statutory obligations underlying Sections12940(j) and (k) are superfluous. Under Respondent's reading of the law, the tort action described in Trujillo is merely co-extensive with an employer's existing respondeat superior liability for supervisory or co-worker harassment. This is nonsense. The Legislature imposed a duty to prevent harassment FEHA ***in two separate sections of the Act***. And the Trujillo court recognized that breach of this duty ***gives rise to tort claims***. To have independent significance, the scope of an employer's duty to "prevent harassment" must be broader than the scope of its respondeat superior liability [3]. This Court should not adopt a construction of FEHA which renders the duty to prevent harassment pointless. See People v. Martin, 32 Cal.App.4th 656, 663 (1995) (courts shall avoid constructions that render statutory provisions superfluous or unnecessary)[4].

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[3] While the Trujillo court required an employee to show actual harassment as a predicate for maintaining a tort claim relating to the duty to prevent harassment, it did not state the such harassment had to derive from the activities of one's fellow employees. As shown above, a workplace permeated by third party harassment adversely affects one's employment conditions to the same extent as harassment perpetrated by co-workers. Lockard v. Pizza Hut, Inc., supra.

[4] Furthermore, there is no legislative history that suggests any intent to limit the scope of Section 12940(k); this history pertains only to Section 12940(j).

C. By Prohibiting Harassment By "Any Other Person," Gov't Code Section 12940(j) Reaches Harassment Perpetrated By an Employer's Customers or Clients

In its solicitation for amicus assistance, the Court queried whether Section 12940(j) reached the conduct of third parties where the statute prohibits "an employer, labor organization, employment agency...***or any other person***... [from harassing] an employee..." (Emphasis added). By its plain language, the statute embraces a wide variety of potential third party perpetrators, which must include an employer's customers and clients.

There is simply no basis for invoking the doctrine of *ejusdem generis* to limit the term "any other person" in the first sentence of § 12940(j) to other employees of the employer. As held in Moore v. Cal. State Bd. of Accountancy, 2 Cal.4th 999, 1012 (1992):

> In construing a statute a court's objective is to ascertain and effectuate the underlying legislative intent. This fundamental rule **overrides the *ejusdem generis* doctrine**, just as it would any maxim of jurisprudence, if application of the doctrine or maxim would frustrate the intent underlying the statute. (Citations omitted) (Emphasis added).

Here, the intent of the Legislature is clear not only by the

Once again, the impact of Section 12940(j)'s legislative history must be confined to the specific circumstances under which it arose: extending FEHA's anti-harassment provisions to employers with fewer than five employees.

plain language of the statute, but by its published statement of legislative intent. See Statutes 1984, ch. 1754, Section 1 ("...worksites will be maintained free from prohibited harassment and discrimination and their agents, administrators, and supervisors, as well as by their nonsupervisors ***and clientele***."). (Emphasis added). Although uncodified, this language serves to explain the Legislature's purpose in enacting Section 12940(j), (People v. Goodloe, 37 Cal.App.4th 485, 491 (1995), and has the same legal significance as the codified portions of the statute. See Crespin v. Kizer, 226 Cal.App.3d 498, 510, fn 8 (1990). A court simply may not rely upon the doctrine of *ejusdum generis* to override an application of FEHA that the Legislature specifically contemplated[5].

Moreover, even where it applies, the doctrine of *ejusdum generis* merely limits the scope of a statute's general catch-all provision to "similar" items specifically enumerated thereunder. Kraus v. Trinity Management Services, 23 Cal.4th 116, 141 (2000). This merely begs the question as to what similarity exists between unions, temporary agencies, and training programs, all of which are specifically identified in Section 12940(j)? Indeed, the only similarity that appears to exist amongst these three is that they ***all contemplate and prohibit harassment by persons outside the scope of a victim's employment relationship***[6].

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As noted above, any attempt, through "provisos" or "qualifiers," to limit the scope of § 12940(j) must be strictly construed. Lundren v. Deukmejian, supra at 735-736.

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It would be one thing if the statute proscribed harassment by "employers, supervisors, co-workers or any other person." In that case, one may have been able to convincingly argue that *ejusdum generis* should dictate a construction of "any other person" that is limited to employees of the employer.

At bottom, an employer's liability for allowing a third party to harass its employees does not derive from this sentence of Section 12940(j): it derives from its non-delegable duty to eradicate discriminatory working conditions. The sentence, by its very terms, addresses only who may be sued for harassment, not the scope of an employer's liability for knowingly allowing a third party to contaminate one's work environment with animus.

D. FEHA's Legislative History Envisions a Broad Remedial Scheme, and Recognizes that the Adverse Effects of Discrimination Extend Beyond Workplace Borders.

The Legislature has declared that FEHA's purpose is to "eliminate" discriminatory employment practices. Gov't Code § 12920. Moreover, the Legislature has also declared that discrimination in the terms of one's employment "forments domestic strife," "deprives the state of its fullest utilizations of its capacities for development and advancement," and "adversely affects the interests of...the public in general." Id. Because of its societal impact, Legislature declared the opportunity to hold employment without discrimination to be a "civil right." Gov't Code §12921.

Severe or pervasive harassment denies one the civil rights that the Legislature sought to provide. As the United States Supreme Court recognized in Vinson, supra at 66:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a

> man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets. (Citing Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982).

Requiring an employee to endure a third party's "gauntlet of abuse" is simply no less a barrier to equality than where the perpetrator is on an employer's payroll. The Legislature sought to ***eliminate all of the adverse effects caused by discrimination*** at the job, and FEHA should be construed in light of this remedial purpose. Fisher v. San Pedro Peninsula Hosp., 214 Cal.App.3d 590, 605 (1989) ("the Legislature has directed that the FEHA is to be construed 'liberally' so as to accomplish its purposes); Gov't Code Section 12993.

E. An Employer's Liability for Allowing Known Harassment Should Not Turn on a Perpetrator's Payroll Status

One cannot limit the legal issues addressed herein to an employer's liability for allowing a customer or client to harass an employee. The points and authorities raised by the defense apply with equal force to harassment perpetrated by so-called independent contractors, leased employees or temporary workers, all of whom may be deemed third parties whose conduct lies outside the scope of FEHA. Liability for permitting harassment should not turn on whether the perpetrator is on a defendant employer's payroll.

The rule suggested by the defense only invites more

gamesmanship than already exists in the use of contingent workers. Does Respondent really suggest that a company can skirt around its FEHA obligations by retaining problematic rainmakers on a contract basis?

An employer's statutory obligations under FEHA are to control that which it can control, i.e., the work environment provided for employees. An employer cannot ignore this obligation simply because a third party is the one infecting its workplace with unlawful animus.

CONCLUSION

For the foregoing reasons and authorities, Amicus California Employment Lawyers Association respectfully requests that the Court reverse the trial court's ruling, and recognize an employer's liability under FEHA for knowingly permitting a third party to harass one of its employees.

Dated: March 14, 2002 LAW OFFICES OF JEFFREY K. WINIKOW

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