2nd Civ. B115206

IN THE COURT OF APPEALS FOR THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

CARLA CAVALIER,	)
	)
Plaintiff and Appellant,	)
	)
vs.	)
	)
NATE HOLDEN, et al.,	)
	)
Defendants and Respondents.	)
	)
	)

Appeal from the Superior Court of Los Angeles County

Assigned to the Honorable Byron K. McMillan,

Judge Orange County Superior Court

Superior Court No. BC-074336

REQUEST BY CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF AND APPELLANT CARLA CAVALIER

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2nd Civ. B115206

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TO THE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL, SECOND DISTRICT, DIVISION ONE:

The California Employment Lawyers Association (CELA) requests permission to file a brief as amicus curiae in support of plaintiff and appellant Carla Cavalier. CELA is a statewide organization of attorneys primarily representing plaintiffs in employment termination and discrimination cases.

CELA, through its undersigned attorneys, is familiar with the questions involved in this case and the scope of their presentation and believes that there is necessity for additional argument on the following points:

- Defense depositions of a sexual harassment plaintiff are not a quest for truth but are instead an attempt to elicit testimony to fit into a preconceived, illusory plan which has no connection to how events really happened.

- Defense motions for summary judgment often distort reality by focusing on irrelevancies and minor discrepancies. A plaintiff's deposition testimony is not a substitute for what the plaintiff would say on direct examination should the case be tried.

- This court should reaffirm the concept of the continuing violation theory since many trial courts are either hostile to it or do not understand what it is all about.

If this request is granted, the following brief in support of plaintiff and appellant is respectfully submitted.

Respectfully submitted,

JOSEPH POSNER, INC.

By_____
JOSEPH POSNER
Attorneys for California Employment
Lawyers Association, Amicus Curiae

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TO THE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL, SECOND DISTRICT, DIVISION ONE:

ARGUMENT

1. EMPLOYMENT DEFENDANTS COMMONLY MISUSE THE DEPOSITION PROCESS TO FIT THE "FACTS" INTO A PRECONCEIVED PLAN OF ILLUSION. DEFENSE-TAKEN DEPOSITION TESTIMONY SUBMITTED IN SUPPORT OF A MOTION FOR SUMMARY JUDGMENT MUST BE VIEWED WITH DISTRUST.

Plaintiff and appellant Carla Cavalier's discussion of the use and abuse of depositions in her reply brief (pages 1 to 5) is very true but she does not go far enough.

As a general rule, defense depositions in FEHA cases are anything but an attempt to search for the truth. Instead, defendants try to gather tidbits which they can fit into a preconceived scenario bearing little resemblance to truth in support of a pre-planned motion for summary judgment. If the plaintiff's deposition produces any facts favorable to the plaintiff, the typical defendant simply ignores those facts when creating the separate statement of material facts.

To understand just how these tactics play into the defense plans, it is necessary to understand the dynamics of what reallyhappens in a typical sexual harassment case. In almost all instances encountered by this writer and others, the sexual harassment is usually committed by an individual who has actual or apparent power over the plaintiff. It has been said many times and continues to be a truism that sexual harassment in most instances is an abuse of power and not a request or demand for sexual gratification.

What is the reaction of the typical plaintiff when sexual harassment first appears? Usually she is the underdog in the power equation. Often, she is a single parent who needs the job simply

to survive. Other times, she is an individual with a history of either sexual mistreatment or other emotional abuse. In any event, the result is the same: Just as the junior high school bully has an unerring instinct for picking out a target to be taunted, sexual harassers have an almost radar-like ability to select victims who are weak or are in no position to complain.

When the first incident of harassment happens, the typical plaintiff's response is not to go screaming to higher management (assuming that there is a higher management). She is in a dilemma - she wants the conduct to stop but she is afraid to complain. So most victims try to shrug off and ignore the incident, giving silent but visible signs of disenchantment with the harasser's conduct in hopes that the harasser will go away and leave them to do their work in peace. They hope, often against hope, that the harasser will get the message and back off.

They also know that someone who starts complaining on a job is about as popular as the snitch in the school yard. In an employment situation there is a tremendous pressure to get along by going along. Complainers often become unpopular not just with their supervisors and managers but with their coworkers, who see them, instead of the perpetrators, as the creators of unnecessary dissension. Thus, the harassment victim will often laugh along with everybody else at the perpetrator's dirty jokes, sexual innuendos and the like. To take offense is to mark yourself as some kind of oddball, and oddballs do not do well on jobs.

This is true particularly for younger women without much work experience. One client whom the writer recalls vividly was a recent immigrant to the United States without much local experience. She said that when the harasser started to grab and fondle, at first she did not know what to think or do because she didn't know whether such conduct was allowed in the work place.

Harassment, though, is a disease that doesn't stop by itself in most instances. Eventually things get bad enough that the plaintiff complains to someone - either the harasser himself,

another manager, or somebody higher in the hierarchy. If the plaintiff was afraid to complain before because she was afraid of retribution, now she finds out just how right her fears really were. The harasser and his friends usually redouble their attacks, partly in retaliation for the plaintiff's having made the complaint and partly just because they enjoy their misconduct.

This reality exposes one of the biggest fallacies in the way that defendants defend these cases. Defendants like to put these cases in neat little boxes. But in the real world, there are no neat little boxes. In the real world, the perpetrator does not get up one morning and say, "Today I am going to harass Jane." He doesn't get up the next day and say, "Today I am going to retaliate against Jane." Nor on the third day does he rise from sleep and decide that on that day, he is going to discriminate against Jane. Real perpetrators just go about doing what they do in a more or less ongoing pattern with absolutely no thought of what aspect of the law they are violating (if indeed the subject ever crosses their perverted minds).

Therefore, the little legal pigeon holes of which defendants are so fond, i.e., discrimination, harassment, retaliation and the like, come nowhere near being adequate to describe what really goes on. A perpetrator doesn't think in those terms and doesn't act in those terms.

Nor, for that matter, does a plaintiff. A plaintiff who has been victimized by a perpetrator does not sit down and categorize the conduct into the little legal boxes so beloved of defense counsel. All the plaintiff knows is that she is suffering a continuing series of adverse actions, and she usually has no idea, if she thinks about the subject at all, into what legal categories those actions may fall.

But in deposition, all of a sudden the plaintiff is supposed to be a legal analytical expert, according to the defense. She is expected to say which acts constitute discrimination and which acts constitute retaliation and which acts constitute something else with a photographic memory

and a precision in classification which not even experienced employment lawyers have. Further, her chronology - what happened first and what happened next - must be 100%. If she can't meet these impossible goals, then defendants seize upon those "failures" as a way to do exactly what plaintiff Cavalier has argued - divide and conquer.

2. MOTIONS FOR SUMMARY JUDGMENT OFTEN DISTORT REALITY BY FOCUSING ON IRRELEVANCIES AND MINOR DISCREPANCIES IN A PLAINTIFF'S TESTIMONY.

Plaintiff Cavalier argues cogently about the use and abuse of summary judgment at pages 5 through 7 of her reply brief, but again, doesn't go far enough. One particularly egregious defense abuse is to recite only those facts in support of the motion which favor the defense, even if those facts have absolutely nothing to do with the elements of the tort in question. Any testimony which goes against the hypothetical factual model created by the defense or which constitute the real elements of the torts are either ignored, misquoted or miscited.

For example, in one sex and age harassment case, a material fact proffered by the defense in its motion for summary judgment was that plaintiff was an at-will employee. Since when does being an at-will employee have anything to do with whether one is fondled, groped, asked for sexual favors, or disparaged because of her age or sex?

Another favorite defense tactic is to attempt to limit a plaintiff's declaration to exactly what she said in deposition. As even the most neophyte lawyer knows, a plaintiff's testimony in deposition is not direct testimony. Competent employment lawyers train plaintiffs to answer the question simply, concisely and directly, without volunteering any extra information. Thus, because defendants are afraid to ask the real questions which will elicit just how hostile the work environment was or just how the plaintiff felt or just what the atmosphere was really like at the office, plaintiffs rarely testify about these things in full measure. Their first chance to explain to the court what really went on, instead of what the defense said did not go on, is through a

declaration submitted in opposition to the defense motion for summary judgment. Despite numerous cases allowing a party opposing summary judgment to explain or elaborate upon deposition answers (see, for example, Jack Rowe Associates v. Fisher Corp., 833 F.2d 177 (1987) (plaintiff allowed to explain in affidavit conflicting interpretations and inferences which could be taken from his deposition testimony), many trial judges simply do not understand - or do not care - about the reality of how defense depositions are conducted. Somehow, they expect a plaintiff to put on her case in chief during her deposition. As Ms. Cavalier says (appellant's reply brief, p. 6), defendants have no more desire to look at the totality of circumstances "than one would have a desire to look directly into the noon day sun." Unfortunately, the same can be said of certain trial courts.

In Messick v. Horizon Industries, Inc., 62 F.3d 1227 (9th Cir. 1995), Horizon fired Messick from his employment. Messick sued for age discrimination and other claims. The trial court granted summary judgment but the Ninth Circuit reversed on his age claim. The defense tried to keep Messick from explaining his deposition testimony to the court, but the Ninth Circuit said that he could do so:

> "Mohawk (Horizon's successor in interest) contends that the affidavit submitted by Messick in opposition to the motion for summary judgment should not be considered because it 'contradicted his deposition testimony.' As the foregoing discussion of the evidence shows, the deposition testimony given by Messick and Fields, plus the relevant exhibits and affidavits of other witnesses, suffice to establish the existence of triable issues with respect to age discrimination. In any event, Mohawk's argument amounts to more than a series of quibbles about peripheral details in the deposition and the affidavit. While this court has held that a party may not 'create his own issue of fact by an affidavit contradicting his prior deposition testimony,' ...the non-moving party is not precluded

from elaborating upon, explaining or clarifying prior testimony elicited by opposing counsel on deposition; minor inconsistencies that result from an honest discrepancy, a mistake, or newly discovered evidence afford no basis for excluding an opposition affidavit." 62 F.3d at ____.

Likewise, in Sada v. Robert F. Kennedy Medical Center, 56 Cal. App. 4th 138 (1997), an FEHA action for national origin discrimination, plaintiff was an independent contractor who had been working for the hospital and applied for a permanent position. She was rejected, allegedly because of her supervisor's anti-Hispanic bias. In opposition to the defense motion for summary judgment she submitted a declaration in which she stated her qualifications, she described the interview process, she disputed what the supervisor had said in the supervisor's declaration, she detailed her experience at the hospital, she repeated bigoted remarks made by the supervisor and so forth. The defendant quibbled with Sada's evidence but the Court of Appeal wasn't buying it: "The evidence concerning Sada's qualifications (e.g., her deposition testimony and the information on her job application) does not consist of conclusory allegations or mere self-serving opinions.... Consequently, the evidence is adequate to establish her qualifications." 56 Cal. App. 4th at 154, fn. 14.

Another favorite defense tactic is to load up the separate statement with many more facts than are needed to establish the claimed defense. We have seen motions for summary judgment or adjudication with literally hundreds of supposed undisputed facts, most of which are unnecessary to the point being made and many of which are irrelevant. Further, many supposed facts are taken out of context and are incomplete.

The overloaded separate statement forces the plaintiff to spend hours on what are at best tangential or trivial matters. The incomplete items are more difficult to deal with because they are often true in part but do not explain the entire story. For example, if the issue is what plaintiff did

to resist the perpetrator, one such fact proffered by the defense might read "Plaintiff did not tell perpetrator that his supposed advances on May 6, 1997 were unwelcome." The answer to that may be technically true - the plaintiff may not have said anything in words - but does not tell the reader that the plaintiff ran screaming from the room.

The problem with the irrelevant facts is more complex. It is very difficult to convince some judges that an asserted fact really is irrelevant. Neither the summary judgment statute, CCP 437c, nor the state or local rules on the proper way to respond to a separate statement, cover this item. This writer has seen judges take into consideration unimportant facts to which he had objected as completely irrelevant to the controversy. Worse, there are no really effective sanctions against defendants who indulge in any of these perversions of the summary judgment process.

CELA submits that this court should recognize these realities in considering the issues in Ms. Cavalier's case and in others which are similar.

3. MANY COURTS ARE HOSTILE TO THE CONTINUING VIOLATION THEORY IN HOSTILE WORK ENVIRONMENT CASES.

As we point out above, human beings in the real world do not act in one continuous, organized, well-thought-out pattern of events which fit neatly into legal cubby holes. Perpetrators, for example, may commit a wrongful act on one day, do nothing for a week and a half, do something else then, do nothing for several months, take some adverse actions then, lay off for awhile, mount a new attack and so forth in a sort of on-again-off-again pattern of activity. Indeed, pattern seems to be too strong a word; sporadic is a better description for what really happens in most work places. As Ms. Cavalier points out in her reply brief at page 14, too few incidents, not pervasive or severe; too many incidents remote in time, than time barred.

Experience has taught us that many trial judges either do not understand the continuing violation doctrine or are opposed to it. Despite Watson v. Dept. of Rehabilitation, 212 Cal. App. 3d 1271, 1290-1291 (1989), Accardi v. Superior Court, 17 Cal. App. 4th 341 (1993) and others, some courts act as if the continuing violation doctrine simply does not exist. Whether this is due to unfamiliarity with the subject matter, hostility to it or an inability to understand the concept we do not know; what we do know is that it happens, time after time.

What we also know is that human beings have long memories, and sometimes a long ago event that is seemingly forgotten rises like the Phoenix to torpedo the plaintiff. In one such case, plaintiff and the perpetrator had worked together for the same company many years before at the company's Mississippi facilities, where they had an argument. At the time, they were peers. It took the perpetrator ten years to get into a position of power over the plaintiff. Almost as soon as he did, he told the plaintiff, "You think I forgot what happened in Mississippi ten years ago, but I haven't." A few months later, plaintiff was standing in the unemployment line.

Yes, these things really happen, and when the plaintiff gets a chance to demonstrate such happenings to a jury, he or she should be allowed to do so. See, for example, the respondent's brief in Green v. City of Los Angeles, 2nd Civ. B104980 and 2nd Civ. B107901, presently pending before this court in Division Five, detailing a 15 year pattern of racial discrimination by an agency of the City of Los Angeles at pages 4-22.

The continuing violation doctrine is nothing more than a recognition of reality. CELA submits that this court reaffirm the doctrine strongly.

CONCLUSION

Ms. Cavalier deserves the chance to prove that the City of Los Angeles and Councilman

Holden committed an open, blatant and continuing violation of one of our state's most important laws. She will never get the chance to do that unless this court sees through the reality of what happens when a defendant in a case such as this moves for summary judgment. Most cases of this type arenot amenable to such a procedure. These cases are human stories which happen over a time period, involving complex emotions and often convoluted facts. There is no way that a plaintiff is able to present the full reality of what he or she went through on paper.

For these reasons, amicus respectfully submits that this court reverse and allow Ms. Cavalier to bring her case to trial.

Respectfully submitted,

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By_____
JOSEPH POSNER,
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