LOS ANGELES
Daily Journal
www.dailyjournal.com
THURSDAY, FEBRUARY 13, 2014

Employees alleging same-sex harassment gain footing

By Polina Bernstein and Diana Friedland

A few months ago, a Riverside County jury in *Moran v. Shah* awarded $1.25 million to a female plaintiff who alleged that her male manager propositioned her for oral sex in exchange for a pay raise, sent her pornographic emails, and made inappropriate sexually charged comments to her. It was only the latest in a string of large sexual harassment verdicts awarded to female workers in California.

The previous year, a California appellate court in *Moran v. Qwest Communs. Int'l* affirmed a verdict of nearly $2.25 million in favor of a female plaintiff alleging sexual harassment against her former employer and supervisor, finding both defendants liable. And before that, in *Chopourian v. Catholic Healthcare West*, a Sacramento jury in federal court unanimously reached a stunning verdict of more than $167 million in favor of a female plaintiff who alleged, among other claims, that male employees at the hospital in which she worked regularly made crude, unwelcome sexual advances to female employees and engaged in vulgar sexual behavior.

Until recently, it would have been unlikely to hear about these kinds of verdicts in a same-sex harassment case — a case involving allegations of harassment perpetrated by an individual of the same gender as the plaintiff.

In a traditional, opposite-sex hostile working environment claim, the plaintiff needs to prove:

(1) he or she was subjected to unwanted harassing conduct because of his or her sex;

(2) he or she considered the work environment to be hostile or abusive;

(3) the harassing conduct was so severe or pervasive that a reasonable person in the plaintiff's position would have considered the work environment to be hostile or abusive; and

(4) a supervisor with authority over the plaintiff engaged in the harassing conduct, or, alternatively, the employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action.

But in *Kelley v. The Conco Companies*, 196 Cal. App. 4th 191 (2011), a California appellate court ruled that in a same-sex harassment case, a plaintiff cannot prevail unless he or she can also prove that the harassment was "motivated by sexual desire" — an element not required in an opposite-sex harassment case.

With this reasoning, in *Kelley*, despite evidence that the male plaintiff's supervisor called him a "bitch," told him he would "fuck the shit out of [his] ass," "cum all over [his] ass," and that he belonged "on [his] knees," among other hostile and sexually charged comments and behavior, the court dismissed the case. Stating that "[c]ourts have routinely insisted on evidence that an alleged harasser was acting from genuine sexual interest," the court found that here, the plaintiff failed to carry his burden of proof because there was no "credible evidence that the harasser was homosexual" or that the harassment was "motivated by sexual desire."

The *Kelley* decision made succeeding on a same-sex harassment claim far more challenging because of the difficulty in many cases of proving whether conduct was indeed "motivated by sexual desire." Especially because the victims of same-sex harassment — and male victims in particular — may be more reluctant to vocalize such mistreatment in the first place, believing that they should just "man up" and tolerate such behavior, the decision served as a significant setback to eliminating certain kinds of harassment in the workplace.

But with the Jan. 1, 2014 enactment of Senate Bill 292, and with last month's state Court of Appeal decision in *Taylor v. Nabors Drilling*, 222 Cal. App. 4th 1228 (2014), our Legislature and judiciary have given employees alleging same-sex harassment a stronger footing to succeed on such claims.

SB 292 amended the Fair Employment and Housing Act (FEHA) — our state's primary workplace anti-harassment and anti-discrimination law — to provide that "[s]exually harassing conduct need not be motivated by sexual desire." The amendment's author expressly stated that its purpose was to overturn the decision in *Kelley*.

In *Taylor*, the appellate court approved an award of $150,000 in emotional distress damages and $680,520 in attorney fees in favor of Max Taylor, who alleged, among other things, that his employment was rife with sexually charged hostility. He testified that several times a day, his supervisor called him a "queer," "fagot" [sic], "homo," and "gay porn star." He testified that another supervisor repeatedly urinated on him and spanked his backside. He further testified, "I didn't have a name. My name was not Max. It was queer. It was homo. The whole time.... [E]verything was basically f'ing fagot [sic], come here, f'ing homo, come here, grab that.... It was the worst working environment I have ever been through in my life. Words can't describe [it].... It was inhumane ... the way they treated me."

The court concluded that substantial evidence supported the jury's sexual harassment verdict, expressly disagreeing with *Kelley* and stating that "a sexual motive or interest is not required for sexual harassment under the FEHA." In doing so, the court mentioned, but only in a footnote, SB 292, relying more heavily on prior California appellate court precedent in *Singleton v. United States Gypsum Company*, a 2006 case that held that "there is no requirement that the motive behind the sexual harassment must be sexual in nature" and stated that sexual harassment occurs whenever "sex is used as a weapon to create a hostile work environment."

The *Taylor* decision is significant for a number of reasons. First, it confirms the rights of all California employees to workplaces free of harassment irrespective of the "sexual desire" — or lack thereof — of their harassers. Second, it demonstrates that even in the less-traditional case of male-on-male harassment, jurors are willing to take such claims seriously, find liability, and award plaintiffs damages. Indeed, the message sent by the *Taylor* jury is that inappropriate conduct in men's interactions with each other will not be shrugged off as merely "boys being boys," and that such conduct can carry with it a hefty price tag when it occurs in the workplace.

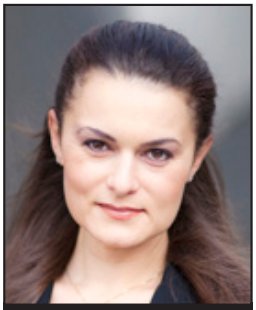
Finally, the holding in *Taylor*, along with SB 292's statutory foundation, should result in more such cases being filed, now that attorneys who represent employees may see fewer hurdles than before to succeeding on such claims.

For California employers, the decision underscores the need for proactively educating employees about the myriad ways that words and conduct can be viewed as harassment. It also emphasizes the importance of implementing policies and practices, including anti-harassment training and disciplinary procedures, designed to prevent such abusive conduct from occurring in the first place.

> The message sent by the *Taylor* jury is that inappropriate conduct in men's interactions with each other will not be shrugged off as merely 'boys being boys.'

Polina Bernstein *is a partner at Bernstein & Friedland, P.C. Her practice focuses on employment litigation and counseling. She can be reached at (818) 817-7570 or polina@laemploymentcounsel.com.*

Diana Friedland *is a partner at Bernstein & Friedland, P.C. Her practice focuses on employment litigation and counseling. She can be reached at (818) 817-7570 or at diana@laemploymentcounsel.com.*



POLINA BERNSTEIN
Bernstein & Friedland, P.C.

DIANA FRIEDLAND
Bernstein & Friedland, P.C.