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Management Alert

California Court Takes The "Sex" Out Of Sexual Harassment

On January 13, 2014, in *Taylor v. Nabors Drilling USA, LP*, the California Court of Appeal held that, under the California Fair Employment and Housing Act (FEHA), a heterosexual male is subjected to harassment because of sex when workplace attacks on his heterosexual identity are used as a tool of harassment, regardless of whether the attacks are motivated by sexual desire.

The Facts

The plaintiff, Max Taylor, worked for Nabors Drilling as a "floorhand" on an oil rig. His co-workers subjected him to homophobic epithets such as "queer," "faggot," "homo," and "gay porn star," even though they knew that he was not homosexual. Taylor sued his former employer after he was discharged for performance issues.

The jury found that Taylor had been sexually harassed and awarded him $160,000 in damages. Nabors Drilling appealed.

The Appellate Court Decision

The FEHA prohibits harassment because of an employee's "sex, gender, gender identify, gender expression . . . or sexual orientation." A plaintiff claiming hostile work environment sexual harassment must show he was subject to sexual advances, conduct, or comments that were (1) unwelcome; (2) because of sex; and (3) sufficiently severe or pervasive to alter the conditions of his or her employment and create an abusive work environment.

Nabors Drilling argued that Taylor had failed to prove the harassment was "because of sex," in that the harassing supervisors knew Taylor was not homosexual and had no sexual desire or interest in Taylor.

The Court of Appeal was not persuaded. It acknowledged that a plaintiff claiming sexual harassment must show that the offensive conduct was not merely tinged with offensive sexual connotations, but actually was harassment because of the plaintiff's protected status. But all that was needed here, the Court found, was evidence that gender was a substantial factor in the harassment. Thus, the FEHA does not require proof that a sexual desire or interest motivated the harassment; attacks on an employee's heterosexual identity as a tool of harassment are sufficient to satisfy the "because of sex" element.

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What *Taylor* Means For Employers

The *Taylor* court analyzed the FEHA as it existed at the time of the trial. The ruling is not surprising, as the sexual nature of offensive conduct typically is only one method of proving that harassment was gender-based, as opposed to being the exclusive method. Any doubt regarding the matter was removed as of January 1, 2014, with a FEHA amendment stating: "Sexually harassing conduct need not be motivated by sexual desire." This amendment responded to a 2011 decision in *Kelly v. The Conoco Companies*, which indicated that a plaintiff must prove that allegedly sexually harassing conduct was motivated by sexual desire.

In light of the expanding view as to what constitutes same and opposite sex sexual harassment, it is more important than ever for employers to take a proactive role in training employees—emphasizing that sexual harassment need not involve sexual motive or interest, but can appear also in various forms of bullying, e.g., making homophobic remarks.

Furthermore, because a sexual harassment plaintiff must still show that the conduct alleged is sufficiently severe or pervasive to alter the conditions of employment, employers can minimize liability through adequate complaint protocols, informing employees of a zero tolerance policy, and encouraging them to report any inappropriate workplace behaviors. Employers can thus position themselves to rectify a harassing situation before it becomes severe or pervasive.

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