Weekly Law Resume

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Edited by David Blinn and Mark Hazelwood

WEEKLY LAW RESUME™

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Employment Law—Admissibility Of "Me Too" Evidence

Lorraine Pantoja v. Thomas J. Anton, et al.
Court of Appeals, Fifth District (August 9, 2011)

Under California Evidence Code section 1101, "character" evidence relating to a person's character or character trait is inadmissible to prove his or her conduct on a specific occasion. However, under this section "character" evidence is admissible to prove some other fact in issue, such as the person's intent or state of mind. In *Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, the Appellate Court concluded that in a case for employment-related discrimination and harassment, evidence of discrimination or harassment experienced by other employees ("me too" evidence) could be admissible under Evidence Code section 1101 to show a defendant employer's discriminatory intent. This case affirmed that rule while holding that "me too" evidence is admissible even if it did not specifically concern incidents that occurred while the plaintiff was present or had specific knowledge of.

Plaintiff Lorraine Pantoja was an employee of defendant, attorney Thomas Anton, and his law firm Thomas Anton & Associates. According to Ms. Pantoja, Mr. Anton sexually harassed her during her 10-month long employment by inappropriately touching her; using sexually charged language including obscene language in her presence; and calling her a "stupid bitch" before firing her. She also alleged that Mr. Anton referred to his employees, some of whom were Hispanic, as "my Mexicans." Ms. Pantoja alleged race and gender discrimination and harassment in violation of California's Fair Employment and Housing Act ("FEHA"), wrongful termination, battery, and intentional infliction of emotional distress.

At trial, Ms. Pantoja proffered evidence of Mr. Anton's behavior directed to herself and other employees. This included the testimony of several female former employees that Mr. Anton often yelled at them, used obscene language in their presence and had inappropriately touched them. One employee, who was Hispanic, testified that Mr. Anton stated in

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her presence, "Usually you hire Mexicans to do your maid work." It was undisputed that for the most part, Ms. Pantoja and these other employees did not work for Mr. Anton at the same time.

In his defense, Mr. Anton acknowledged that while he did sometimes use obscene language in the office, he never did so with any discriminatory intent toward women or persons of color. According to Mr. Anton, he swore in the presence of both women and men, but the swearing was never directed at any particular individual. He further argued that his firm had a policy of not tolerating harassment and that he never engaged in any of the sexually harassing conduct alleged by Ms. Pantoja.

Ms. Pantoja moved for the admission of the "me too" evidence from the other employees and the defense tried to exclude it. The trial court agreed with the defense. After the presentation of the evidence, a defense verdict was rendered in Mr. Anton's favor, upon which the trial court entered judgment.

The Appellate Court reversed the judgment, concluding that the trial court had abused its discretion by having excluded the "me too" evidence. The Appellate Court found the "me too" evidence was admissible under Evidence Code section 1101 because it could be relevant to prove Mr. Anton's intent in his alleged conduct toward Ms. Pantoja, including whether his decision to fire her was motivated by gender or race-based bias. Additionally, the "me too" evidence was relevant to show Mr. Anton's mental state required to prove Ms. Pantoja's claims for harassment. Additionally, the Appellate Court found that not only was the "me too" evidence relevant to prove gender or race-based bias and harassment, it was also admissible to rebut the defense's evidence that Mr. Anton had a policy of not tolerating harassment or directing profanity at individuals. In dicta, the Appellate Court further noted, "[i]n fact, evidence of one type of discriminatory conduct can even be probative of a defendant's mental state in engaging in *another* type of conduct." [Italics added.]

In addition, the Appellate Court found that the trial court erred in one of its jury instructions that a "hostile work environment" for purposes of proving harassment is not established where a supervisor simply uses crude or inappropriate language in the presence of employees without directing gender-related language toward an individual. While this was a correct statement of law, an additional instruction was necessary to make clear that abusive language or behavior indicative of a hostile working environment can be in many forms, gender-related or not. Without this clarifying instruction, the jury may be misled to focus on the presence or absence of gender-related language and ignore the possibility that other abusive conduct may evidence gender bias.

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COMMENT

In cases for employment-related discrimination, harassment, retaliation, and wrongful termination of employment (based on discrimination or retaliation), the employer's intent or state of mind is central to both the plaintiff's and defense's case. *Pantoja* supports the admissibility of "me too" evidence to support the inference that if the employer also behaved in a certain way toward another member of a protected class, then the employer must have had similar intentions with the plaintiff. Plaintiff-employees will likely cite this case to support the admission of "me too" evidence. To oppose, the defense/employer-side must be prepared to demonstrate why the "me too" evidence is not relevant to prove intent by, for example, arguing that the employer's conduct is not probative of the particular type of bias at issue (e.g., gender, race, age, etc.).

Additionally, the court's holding regarding the jury instruction indicates the importance of the employer's intent in a case for employment-related discrimination or harassment, and that intent may be proven by many forms of evidence. This means that courts will likely be inclined to admit many forms of evidence (including "me too" evidence) to prove intent.

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