

Court Erred in Excluding “Me Too” Evidence Relating to Employee’s Claims of Sexual Harassment and Discrimination

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The California Court of Appeals recently issued an important ruling about the use of “me too” evidence in discrimination and harassment cases.

In this particular instance, a former law firm staff member filed suit against her employer after she was terminated, claiming that her boss touched her on the buttocks, asked for a shoulder massage, referred to his employees as “my Mexicans,” and called her a “stupid bitch.” On these grounds, she sued for wrongful termination, battery, sexual battery, intentional infliction of emotional distress, race discrimination, sex discrimination, and sexual harassment. The employer successfully filed motions in limine before trial in order to exclude the evidence that the employer used the word “Mexicans” in a derogatory fashion, given that the employee admitted she only heard him say it once. The employer also successfully obtained an order excluding all evidence of acts of discrimination/harassment unless the plaintiff-employee personally witnessed such acts and the acts adversely affected her working environment. After a jury trial, a verdict was rendered in favor of the employer. The employee filed a motion for a new trial claiming that the court erred when it excluded the “me too” evidence, among other reasons.

On review, the Court of Appeal agreed with the employee, stating that the order excluding the “me too” evidence disregarded the possibility that the evidence could have been relevant to demonstrate the employer’s intent when he touched other employees and used profanity in the workplace. The Court reasoned that:

“Evidence that [the employer] harassed other women...could have assisted the jury not by showing that [the employer] had a propensity to harass women sexually, but by showing that he harbored a discriminatory intent or bias based on gender. It would have enabled

the jury to evaluate the credibility of his and his other witnesses’ assertions that, although he yelled profanities in the office, he did not use the words [the employee] claimed; he did not direct profanities at [the employee]; and he did not have discriminatory intent.”

In reaching this decision, the Court looked to the recent decision in *Johnson v. United Cerebral Palsy/Spastic Children’s Foundation*, which held that “me too” evidence could be admissible under California’s Evidence Code as relevant evidence to show a defendant’s discriminatory intent and to rebut a defendant’s proffered innocent explanation for the conduct. Given the trial court’s error on this basis and other grounds, the Court reversed the judgment which was entered after the jury’s verdict.

More and more courts are permitting the use of “me too” evidence. To the extent “me too” evidence is elicited and/or expected to be introduced at trial, counsel and employers should work together to limit the nature and type of evidence admitted, and to ensure the jury is properly instructed as to the purpose of that evidence.

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