

Same Sex Harassment is Actionable, California Court of Appeal Affirms

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In *Lewis v. City of Benicia*, the [First Appellate District](#) affirmed once again that in California, same-sex harassment is actionable.

Brian Lewis, a volunteer and later paid intern at the City of Benicia's water treatment plant, claimed he was sexually harassed by two male supervisors (Hickman and Lantrip) in violation of the California Fair Employment and Housing Act (FEHA), that he was subject to retaliation when he complained of the harassment, and that the City was liable for failing to prevent sexual harassment.

Among other rulings challenged on appeal, the trial court granted summary judgment in favor of Hickman and Lantrip, and granted the City's motion for judgment on the pleadings. Lewis challenged these and other rulings.

First, the Court of Appeal reversed the trial court's granting of Hickman's motion for summary judgment. As the Court of Appeal explained,

"Sexual harassment can occur between members of the same gender as long as the plaintiff can establish the harassment amounted to discrimination because of sex."

California appellate districts had been divided as to the meaning of the term "because of sex," with some courts ruling that the plaintiff needed to show evidence that the alleged harasser was acting out of genuine sexual interest, and others ruling that same-gender harassment could also consist of comments amongst heterosexuals designed to humiliate the plaintiff and challenge his gender identity.

In 2013, the California Legislature resolved this split among appellate courts by amending the FEHA to clarify that "[s]exually harassing conduct need not be motivated by sexual desire." However, as the Court ruled, there was no need to address the effect of this amendment on the present case (i.e., whether the 2013 amendment could operate retroactively as to events that occurred in 2008 and 2009), because "the present case allows an inference that Hickman was motivated by sexual interest."

As the Court noted, many of Hickman's alleged acts had sexual connotations. According to Lewis, over a period of months, Hickman showed sexually explicit images to Lewis on his laptop computer, made sexually explicit jokes,

gave Lewis 30 different items as gifts (including “tuxedo underwear”), frequently bought him lunch, made the comment “[w]hy don’t you just kiss me[?],” and said Lewis should visit his home. Based on this evidence, the Court ruled, a reasonable jury could conclude Hickman engaged in sexual advances, conduct or comments and acted from “genuine sexual interest.”

Furthermore, the Court ruled, such conduct satisfied the requirement under the FEHA that the “hostile work environment . . . [be] severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex.” Hickman’s conduct, “which included numerous gifts and frequent lunch purchases, along with some sexual jokes and displays of pornographic computer images, over a period of several months” was such that “a reasonable jury could conclude Hickman engaged in a pervasive pattern of harassing conduct.” For this reason, summary judgment in favor of Lewis was not appropriate, and the matter should have gone to trial.

The Court, however, affirmed the granting of summary judgment in favor of the second supervisor, Lantrip. The alleged harassing conduct did not rise to the level of Hickman’s.

Lantrip had allegedly displayed pornographic images in his general facility, which Lewis was free not to view. Lewis also alleged that Lantrip told “obscene” jokes at work (the specifics of which Lewis could not remember), and Lantrip frequently massaged or rubbed the shoulders of a female secretary in the presence of other employees. This just was simply not enough to rise to the level of harassment actionable under the FEHA.

Based in part on the reasoning above, the Court reversed judgment on the pleadings as to causes of action against the City for sexual harassment and failure to prevent sexual harassment. Furthermore, based on the erroneous exclusion of evidence of sexual harassment and of expert psychological testimony at trial, the Court reversed the judgment as to the retaliation claim that had been rendered in the City’s favor at trial.

If you have any questions regarding FEHA or the elements of a sexual harassment claim, please contact the author of this article.

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