LOS ANGELES
Daily Journal
www.dailyjournal.com
WEDNESDAY, MAY 15, 2013
PERSPECTIVE

Sexual harassment bill is necessary to fix the law

By James DeSimone

Every so often a Court of Appeal decision is so out of touch with common sense and a person's statutory rights that the Legislature has to step in and make it right. When a bill to overturn a decision gets bipartisan support coming out of the California Judiciary Committee, as Senate Bill 292 on sexual harassment recently did, you can bet that something went radically wrong in our justice system.

In order to understand the depths to which justice and fairness has sunk, consider the conduct to which Patrick Kelley was subjected by his supervisor at Conco Companies (with apologies in advance to the reader):

He was called a "bitch" and a "fucking punk" and told he had a "nice ass." His supervisor said he wanted to "fuck [Kelley] in the ass," that his pants "made [his] ass look good," and he would "look good in little girl's clothes."

To add insult to injury, the harassment escalated and the supervisor said he would "fuck the shit out of [Kelley's] ass," "cum all over [Kelley's] ass," and he would "turn [Kelley] out." Then a coworker joined in the humiliation and said he would "make [Kelly] suck [his supervisor's] dick."

And there was a physical component to these threats, as his supervisor made him bend over and get on his knees to perform tasks and then intimidatingly told him he was going to "fuck" him or make him "suck his dick." *Kelley v. Conco Companies*, 196 Cal. App. 4th 191 (2011).

Nearly three decades ago, the U.S. Supreme Court recognized that, "Surely, a requirement that *a man or woman run a gauntlet of sexual abuse* in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." *Meritor Savings Bank, FSB v. Vinson, 477 U.S.* 57 (1986) (emphasis added).

By any possible interpretation, Kelley was forced to run the gauntlet of sexual abuse as described by the U.S. Supreme Court in *Meritor Savings Bank*. The repulsive conduct more than satisfies the standard set by the Supreme Court as it held, "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"

> When a bill to overturn a decision gets bipartisan support ... you can bet that something went radically wrong in our justice system.

Yet recently, the state Court of Appeal published the *Kelley* decision while ruling that such conduct did not constitute actionable sexual harassment. The court looked at the intent of the harasser and found, while granting summary judgment, "[t]here was, however, no "credible evidence that the harasser was homosexual" or that the harassment was "motivated by sexual desire."

The court's focus on intent is extremely troubling. Do we really want a focused inquiry on a harasser's sexual orientation? And why should it matter? Kelley was clearly subjected to an abusive working environment. The fact that his supervisor may have been motivated by hostility instead of lust is immaterial.

The *Kelley* court would not have had to have looked far to find case law to support the notion that intent is irrelevant in a sexual harassment case. What is prohibited is unwelcome conduct which causes a hostile work environment.

In *Mogilefsky v. Superior Court,* 20 Cal. App. 4th 1409 (1993), the court reasoned that the "failure to deal with the undeniably sexual nature of the conduct to which [Plaintiff] was subjected is ... troublesome. Such conduct, *whether motivated by hostility or by sexual interest*, is always 'because of sex' regardless of the sex of the victim." (Empasis added.) And more recently, in *Singleton v. United States Gypsum Co.*, 140 Cal. App. 4th 1547 (2006), the court stated that it agreed with the well-considered reasoning of the *Mogilefsky* court and that there was "no requirement that the motive behind the sexual harassment must be sexual in nature."

So what we are left with is a muddled state of case law in which trial courts are free to follow whichever case it wants, depending on its own biases or preferences. What that means is that for an employee who is subjected to even the most demeaning and disgusting harassment, it is a crap shoot. His or her lawsuit can be summarily dismissed without having the opportunity to be judged fairly by a jury, if his trial judge prefers the *Kelley* line of reasoning over the *Mogilefsky* and *Singleton* opinions.

But there is hope. Recently, the bill that emerged from the Senate Judiciary Committee amends the Fair Employment and Housing Act to make clear that "for purposes of the definition of harassment because of sex under these provisions that sexually harassing conduct *need not be motivated by sexual desire."* California voters interested in the safety of California employees should help make sure the bill makes it way rapidly through the Legislature and is signed by the governor.

If we allow such bullying to permeate the work place, it threatens the safety of us all, as workplace violence, and the sometimes unfortunately violent reaction of the victims of bullying, is a tragic problem. We should allow for the redress of these grievances through the courts to help keep everyone safer. The Fair Employment and Housing Act should be amended so that our workplaces, and the workplaces of our children, are safer from demeaning and humiliating sexual bullying.

V. James DeSimone *is a partner in Schonbrun DeSimone Seplow Harris Hoffman & Harrison LLP, a civil rights law firm, located in Venice. He was lead appellate attorney in Mogilefsky v. Superior Court, was named as a Top Labor & Employment Lawyer by the Daily Journal in 2009, 2010 and 2011, and was honored as a Top 100 Superlawyer for Southern California in 2013.*

JAMES DESIMONE
Civil rights attorney

Reprinted with permission from the ***Daily Journal***. ©2013 Daily Journal Corporation. All rights reserved. Reprinted by ReprintPros 949-702-5390.