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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JANIS ADAMS, Plaintiff and Appellant, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Defendant and Appellant.	B159310 (Los Angeles County Super. Ct. No. BC235667)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kenneth R. Freeman, Judge. Affirmed with directions.

Jones Day, Elwood Lui, Scott D. Bertzyk, and Scott M. Lidman for Defendant and Appellant.

Orren & Orren, Tyna Thall Orren, Lowell H. Orren, for Plaintiff and Respondent.

I. INTRODUCTION

Plaintiff, Janis Adams, appeals from an order granting a new trial motion filed by defendant, Los Angeles Unified School District. Defendant in turn cross-appeals from an order denying its judgment notwithstanding the verdict motion. In 2003, the Legislature

enacted a two-sentence amendment to Government Code[1] section 12940, subdivision (j)(1) which is part of the Fair Employment and Housing Act (the act). As will be noted, we conclude: the 2003 amendment to the act applies to this case and an employer can be liable for nonemployee sexual harassment of an employee; the case was not tried using the second sentence of the 2003 amendment to the act; hence, we affirm the order granting the new trial motion; and we remand for a retrial where the new correct standard for evaluating nonemployee harassment of an employee will be presented to the trier of fact.

II. THE 2003 AMENDMENT TO THE ACT

1. Summary of analysis

Plaintiff argues defendant was required to take steps to prevent harassment directed at her by students. We agree. There are three versions of the sexual harassment provisions of the act in section 12940 that are relevant to our decision. The first is section 12940, subdivision (i) as it was adopted in 1984. (Stats. 1984, ch. 1754, § 2, pp. 6405-6406.) The 1984 version of section 12940, subdivision (i) was adopted as part of Senate Bill No. 2012 (1983-1984 Reg. Sess.) (Senate Bill No. 2012 hereafter.) This provision of the act has certain ambiguities that we will address shortly. Second, the same language concerning sexual harassment as enacted in 1984 as part of Senate Bill No. 2021 was included in section 12940, subdivision (h)(i) when other unrelated amendments to the act were adopted in 1999. (Stats. 1999, ch. 592, § 7.5.) The 1999 language was operative when the events giving rise to the present lawsuit occurred in the spring of 2000. Third, Assembly Bill No. 76 (2003-2004 Reg. Sess.) (hereafter Assembly Bill No. 76), according to the Legislature, clarified ambiguities arising from

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1 Other than as noted, all future statutory references are to the Government Code.

the 1984 enactment of section 12940, subdivision (i). (Stats. 2003, ch. 671, § 1.) It is unclear whether the relevant language in the 1999 version of section 12940, subdivision (h)(1), which was originally adopted in 1984, permitted an employer to be held civilly liable for failing to correct sexual harassment by students. The Legislature clearly intended Assembly Bill No. 76 to clarify ambiguities arising from the 1984 enactment of then section 12940, subdivision (i). That clarification now appears in section 12940, subdivision (j)(1). As a result, under controlling California Supreme Court authority, we must give Assembly Bill No. 76 and the changes it made to what is now section 12940, subdivision (j)(1) full retroactive effect.

2. The 1984 amendments to the act

At the beginning of 1984, section 12940, subdivision (i) provided in part: "It shall be an unlawful employment practice . . .: [¶] (i) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of . . . sex . . . to harass an employee or applicant. Harassment of an employee or applicant by an employee or applicant other than an agent or supervisor shall be unlawful if the entity, to its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment. The provisions of this subdivision are declaratory of existing law." (Stats. 1982, ch. 1193, § 2, pp. 4259-4260.)

In 1984, the anti-harassment provisions of the act were amended pursuant to Senate Bill No. 2012. As originally introduced, section 1 of Senate Bill No. 2012 stated in part: "It is the existing policy of the State of California, as declared by the Legislature, that procedures be established by which allegations of prohibited harassment and discrimination may be filed, timely and efficiently investigated, and fairly adjudicated,

and that agencies and employers be required to establish affirmative programs which include prompt and remedial internal procedures and monitoring so that worksites will be maintained free from prohibited harassment and discrimination by their agents, administrators, and supervisors as well as by their nonsupervisors and *clientele*." (Sen. Bill No. 2012 as introduced Feb. 16, 1984, § 1, p. 2; italics added.) Section 3 of Senate Bill No. 2012, as originally introduced, proposed an amendment to section 12940, subdivision (i) as follows: "For an employer, . . . or any other person, because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age, to harass an employee or an applicant. Harassment of an employee or applicant by ~~an employee~~ *any person* other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action." (Sen. Bill No. 2012 as introduced Feb. 16, 1984, § 3, pp. 6-7; original strikethrough and italics.) The deletion of the words "an employee" was referenced by the strikethrough and the addition of the language "any person" was a modification of this provision of the act as proposed by Senate Bill No. 2012. (Compare Stats. 1982, ch. 1193, § 2, pp. 4259-4260.)

After unrelated amendments were made to Senate Bill No. 2012, a report was prepared for the Committee on Industrial Relations for a hearing set for April 9, 1984, which stated, "Makes employers responsible for harassment by any person rather than only by their employees, when the employer knows the problem and fails to take immediate steps to correct it." (Sen. Com. on Industrial Relations Rep. on Sen. Bill No. 2012 as amended March 19, 1984, p. 3.) On April 24, 1984, Senate Bill No. 2012 was amended to modify the reference to "any person" in proposed section 12940, subdivision (i) to: "Harassment of an employee or applicant by ~~any person~~ *an employee* other than an agent or a supervisor shall be unlawful if the entity, or its agents or its supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action." (Sen. Bill No. 2012 as amended April 24, 1984, § 2, p. 6; original strikethrough and italics.)

On April 11, 1984, in a statement to the Senate Education Committee, Senator Diane Watson stated that Senate Bill No. 2012 would codify the federal Equal Employment Opportunity Commission Guidelines for workplace sexual harassment. (Sen. Diane Watson, Statement to Sen. Education Com. on Sen. Bill No. 2012 (April 11, 1984) p. 1.) She repeated that statement before the Senate Finance Committee. (Sen. Diane Watson, Statement to Sen. Finance Com. on Sen. Bill No. 2012 (May 22, 1984) p. 1.) In 1984, when Senator Watson addressed the Senate Education and Finance Committees, the Equal Employment Opportunity Commission Guidelines stated in relevant part: "An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees." (29 C.F.R. § 1604.11(e); *Royer ex rel. Estate of Royer v. City of Oak Grove* (8th Cir. 2004) 374 F.3d 685, 688, fn. 5; *Little v. Windermere Relocation, Inc.* (9th Cir. 2002) 301 F.3d 958, 968.) As can be noted, the federal law adverted to by Senator Watson provides for employer liability for customer sexual harassment of an employee under federal law.

On June 13, 1984, Senate Bill No. 2012 came before the upper house for a third reading. It did not pass but the Senate granted reconsideration on the motion of one of the authors of Senate Bill No. 2012—Senator Watson. (8 Journal of the Senate (1983-1984 Reg. Sess.) p. 14609.) On June 14, 1984, a memorandum entitled "FACT SHEET ON SB 2012 On Third Reading File" was prepared for distribution to all of the members of the Senate. The June 14, 1984, memorandum states: "The bill does not hold an employer responsible for outside harassment. This was amended out of the bill in the Senate Industrial Relations Committee." (Original underscore; see *Salazar v. Diversified Paratransit, Inc.* (2004) 117 Cal.App.4th 318, 327.)

On June 15, 1984, Senate Bill No. 2012 passed the upper house and was sent to the Assembly. (8 Journal of the Senate, *supra*, p. 14609.) On June 22, 1984, while Senate Bill No. 2012 was pending in the Assembly, Senator Watson sent a letter to Mr. Breining, counsel for the California Manufacturers Association, stating: "Your letter expresses concern over employer's responsibility for *customer harassment.* This provision has been amended out of the bill." (Diane Watson, letter to Michael J. Breining, June 22, 1984, italics added; see *Salazar v. Diversified Paratransit, Inc.*, *supra*, 117 Cal.App.4th at p. 327.) No further relevant changes were made to Senate Bill No. 2012. Every amended provision of Senate Bill No. 2012 contained the aforementioned language in section 1 indicating that it was designed to protect employees from harassment by the employer's "clientele" as well as coemployees and supervisors. (Sen. Bill No. 2012 as introduced Feb. 16, 1984, § 1, p. 2.) Senate Bill No. 2012 became law without the signature of the Governor. (Stats. 1984, ch. 1754, p. 6403.)

3. The enactment of Assembly Bill No. 76 in 2003

At the time of the conduct at issue, the anti-harassment provision of the act, section 12940, subdivision (h)(1) stated: "It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: . . . [¶] For an employer . . . or any other person, because of sex . . . to harass an employee . . . . Harassment of an employee . . . other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring." (Stats. 1999, ch. 592, § 7.5.) In 2003, our colleagues in Division Three of this appellate district ruled in *Salazar v. Diversified Paratransit, Inc.*, review granted January 22, 2003, that section

12940, subdivision (h) did not apply to harassment of an employee by a customer. The plaintiff's review petition was granted on January 22, 2003.

While the review petition was pending, Assembly Bill No. 76 was introduced on December 23, 2002. (Assem. Bill No. 76 as introduced Dec. 23, 2002, p. 1.) The Legislature unequivocally intended Assembly Bill No. 76 to be a clarification of perceived ambiguities in the anti-harassment language then existing in section 12940, subdivision (h) which was originally adopted in 1984 as part of Senate Bill No. 2012. (Legis. Counsel's Dig. Assem. Bill No. 76, __ Stats. 2003, p. __; Legis. Counsel's Dig. Assem. Bill No. 76 as amended August 28, 2003, p. 2; Legis. Counsel's Dig. Assem. Bill No. 76 as amended June 26, 2003, p. 2; Legis. Counsel's Dig. Assem. Bill No. 76 as amended June 19, 2003, p. 2; Legis. Counsel's Dig. Assem. Bill No. 76 as amended Mar. 11, 2003, p. 2; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 76 as amended Aug. 28, 2003, pp. 3-4; Assem. analysis of Sen. Amendments to Assem. Bill No. 76 as amended Aug. 28, 2003, p. 1; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 76 as amended June 26, 2003, p. 3; Sen. Judiciary Com. rep. on Assem. Bill No. 76 as amended June 19, 2003, p. 2; Assem. Com. on Appropriations rep. on Assem. Bill No. 76 as amended Mar. 11, 2003, prepared for June 2, 2003, hearing, p. 1; Assem. Com. on Labor and Employment rep. on Assem. Bill No. 76 as amended Mar. 11, 2003, p. 1; Assem. Com. on Judiciary, rep. on Assem. Bill No. 76 as amended Feb. 27, 2003, prepared for Mar. 4, 2003, hearing, p. 2.)

On October 3, 2003, former Governor Joseph Graham Davis signed Assembly Bill No. 76 which inserted the following new language in section 12490, subdivision (j)(1): "An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the

employer's control and any other legal responsibility which the employer may have with respect to the conduct of those nonemployees shall be considered."

The parties dispute whether the 2003 amendment to section merely clarified an ambiguity or constituted a substantive change in section 12940, subdivision (j). In *Salazar*, two of our Division Three colleagues, Presiding Justice Joan Dempsey Klein and Associate Justice Richard Aldridge concluded that the 2003 amendment merely clarified an ambiguity in section 12490, subdivision (j) discussed above. The *Salazar* majority held: "We conclude [Assembly Bill No.] 76 is nothing more than a clarification of section 12940. Thus, an employer may be held liable under [the act] for sexual harassment by clients or customers. Because [Assembly Bill No.] 76 is a clarification of section 12940, rather than a substantive change, it applies to this case." (*Salazar v. Diversified Paratransit, Inc.*, *supra*, 117 Cal.App.4th at p. 328.) Hence, the majority in *Salazar* held that an employer could be held liable under the act for sexual harassment by a non-employee on an employee occurring before January 1, 2004, the effective date of Assembly Bill No. 76. (*Id.* at pp. 326-328.) An untimely review petition was filed in *Salazar*. The employer's request for relief from default was denied. (http://appellatecases.courtinfo.ca.gov/search/dockets.cfm?dist=0&doc_id=322603.)

Even if the language concerning nonemployee sexual harassment is a new enactment, it may constitutionally apply retroactively to the present case. The Supreme Court has discussed the situation where a legislative declaration that a new statute is merely a "clarification" is unconvincing. In such a case, the unpersuasive legislative declaration that the Legislature is only clarifying an existing law may effectively reflect its intention that the new enactment apply retroactively. The Supreme Court has held: '"[A] subsequent expression of the Legislature as to the intent of the prior statute, although not binding on the court, may properly be used in determining the effect of a prior act.' (*California Emp. etc. Com. v. Payne*[(1947)] 31 Cal.2d [210,] 213-214.) Moreover, even if the court does not accept the Legislature's assurance that an

unmistakable change in the law is merely a 'clarification,' the declaration of intent may still effectively reflect the Legislature's purpose to achieve a retrospective change. (*Id*. at p. 214.) Whether a statute should apply retrospectively or only prospectively is, in the first instance, a policy question for the legislative body enacting the statute. (*Evangelatos v. Superior Co*urt[(1988)] 44 Cal.3d [1188,] 1206.) Thus, where a statute provides that it clarifies or declares existing law, '[i]t is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment. In accordance with the general rules of statutory construction, we must give effect to this intention unless there is some constitutional objection thereto.' (*California Emp. etc. Com. v. Payne*, *supra*, 31 Cal.2d at p. 214; cf. *City of Sacramento v. Public Employees' Retirement System* (1994) 22 Cal.App.4th 786, 798 []; *City of Redlands v. Sorensen* (1985) 176 Cal.App.3d 202, 211 [].)" (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243; accord *Plotkin v. Sajahtera, Inc.* (2003) 106 Cal.App.4th 953, 961-962; *Salazar v. Diversified Paratransit, Inc.*, *supra*, 117 Cal.App.4th at p. 326.) A legislative statement of intent to clarify existing law is strong evidence of an intent that the new law apply retroactively. (*Preston v. State Bd. of Equalization* (2001) 25 Cal.4th 197, 222; *Plotkin v. Sajahtera, Inc.*, *supra*, 106 Cal.App.4th at p. 961.) One thing is clear, the Legislature repeatedly and clearly expressed its understanding that it was clarifying the issue of non-employee harassment under the act.

Further, it was reasonable for the Legislature in 2003 to conclude it was clarifying an ambiguous legislative anti-harassment and discrimination scheme. No doubt, in 1984, the Senate deleted the "harassment of an employee . . . *by any person* . . ." language in Senate Bill No. 2012 as originally introduced. Further, Senator Watson explained to the full Senate on June 14, 1984, the "outside harassment" provisions of Senate Bill No. 2012 had been deleted. On the other hand, as noted previously, the 1984 uncodified provision of Sen. Bill No. 2012, in every one of its versions explained one of the purposes of the Legislation was to protect employees from harassment by their

employer's "clientele." (Stats. 1984, ch. 1754, § 1, pp. 6403-6404; *Salazar v. Diversified Paratransit, Inc.*, *supra*, 117 Cal.App.4th at p. 327.) Also, the provisions of section 12940, subdivision (h) as it existed in 1984 prior to the passage of Senate Bill No. 2012 expressly prohibited harassment by enumerated entities and "any other person" which could include customers or students. (Stats. 1984, ch. 1754, § 2, pp. 6405-6406.) The first sentence of then section 12940, subdivision (h)(1) identified the proscribed harassment as being perpetrated by a list of entities and "any other person." The act defines a "person" as "one or more individuals." (§ 12925, subd. (d); Stats. 1980, ch. 992, § 4; *Reno v. Baird* (1998) 18 Cal.4th 640, 644.) Further, when Assembly Bill No. 76 was under consideration, then section 12940, subdivision (h)(1) provided, as it does now, that an employer must "take all reasonable steps" to prevent harassment from occurring. (Stats. 1999, ch. 592, § 7.5.)

III. CONCLUSIONS CONCERNING RETROACTIVITY

Given the foregoing, we reach the following conclusions. There was an ambiguity in Senate Bill No. 2012 concerning employer duties when any person, including clientele, sexually harassed an employee. In 2003, the Legislature reasonably declared it was clarifying the ambiguous state of the law concerning employer liability for customer harassment by passing Assembly Bill No 76. As required by *Western Security Bank v. Superior Court*, *supra*, 15 Cal.4th at page 243, we therefore hold that the 2003 Assembly Bill No. 76 amendment to the act in section 19240, subdivision (j)(1) is to be retroactively applied.

IV. THE EFFECT OF THE RETROACTIVE APPLICATION OF THE 2003 AMENDMENT TO THE ACT

Because the 2003 amendment to section 12940, subdivision (j)(1) is to be retroactively applied, the parties remaining contentions which relate to the merits of the jury verdict are all moot. We reach this conclusion for four reasons. First, as noted previously, the Legislature believed its 2003 amendment merely clarified the application of the act to nonemployees or, as in this case, students. But the two-sentence 2003 amendment also created a special rule for non-employee sexual harassment. As previously noted, the second sentence in the 2003 amendment to section 12940, subdivision (j)(1) states, "In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of those nonemployees shall be considered." (§ 12940, subd. (j)(1).) There is no evidence the Legislature intended or contemplated the second sentence in the 2003 amendment to section 12940, subdivision (j)(1) was to be treated differently from the first sentence. Both sentences in the 2003 amendment to section 12940, subdivision (j)(1) involve the same misconduct, nonemployee harassment, and were enacted at the same time. More pertinently, common sense suggests the two sentences should be applied exactly the same in terms of retroactivity.

Second, because of our retroactivity conclusion, the second sentence in the 2003 amendment to the act, which is limited solely to nonemployee harassment, is applicable to the present appeal. The effect of the retroactive application of a statute is as follows: "The retroactive application of a statute is one that affects rights, obligations or conditions that existed before the time of the statute's enactment, giving them an effect different from that which they had under the previously existing law. (*Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 153 []; *Armstrong v. County of San Mateo* (1983) 146 Cal.App.3d 597, 613 []; *Fullerton Union High School Dist. v. Riles* (1983) 139 Cal.App.3d 369, 386 [].) Legislation imposed retroactively applies 'the new law of

today to the conduct of yesterday.' (*Pitts v. Perluss* (1962) 58 Cal.2d 824, 836 []; followed in *Fox v. Alexis* (1985) 38 Cal.3d 621, 626 [].)" (*In re Cindy B.* (1987) 192 Cal.App.3d 771, 779; see *Kizer v. Hanna* (1989) 48 Cal.3d 1, 7; *Rosasco v. Commission on Judicial Performance* (2000) 82 Cal.App.4th 315, 322; *In re Joshua M.* (1998) 66 Cal.App.4th 458, 469, fn. 5.) In other words, the remaining issues posited by the parties must be resolved under the current provisions of section 12940, subdivision (j)(1) which includes a special rule for nonemployee harassment.

Third, this case was quite obviously not tried utilizing the new standard for nonemployee harassment in section 12940, subdivision (j)(1). The judgment was entered on April 8, 2002. The judgment notwithstanding the verdict and new trial motions were ruled upon on June 7, 2002. Assembly Bill No. 76 was not signed by former Governor Davis until October 3, 2003, and did not go into effect until January 1, 2004. Therefore, we cannot judiciously evaluate any of the parties' remaining contentions utilizing the applicable law—the second sentence in the 2003 amendment concerning nonemployee harassment. Although the jury was vaguely instructed as to the "reasonableness of an employer's remedy" and "the remedy's ability to persuade potential harassers to refrain" from harassment, no instructions were given that were materially consistent with the 2003 amendment to section 12940, subdivision (j)(1). Simply stated, because of the post judgment change in the law, all of the parties' contentions, except for the issue of whether an employer may be liable for nonemployee harassment, are moot.

Fourth, because we cannot reach the merits of the parties' contentions, the correct course of action is to remand for a new trial using the new standard for evaluating employer liability for nonemployee harassment in section 12940, subdivision (j)(1). The application of the facts to the new standard of nonemployee harassment is a matter for a jury to initially consider. In other situations, where new statutes have been retroactively applied which materially affect the issues, courts have simply remanded for retrial utilizing the correct legal standards. (*In re Marriage of Taylor* (1984) 160 Cal.App.3d 471, 474, disapproved on another point in *In re Marriage of Buol* (1985) 39

Cal.3d 751, 763, fn. 10; *In re Marriage of Martinez* (1984) 156 Cal.App.3d 20, 31, disapproved on another point in *In re Marriage of Buol*, *supra*, 39 Cal.3d at p. 763, fn. 10.) Further, Code of Civil Procedure section 906 provides that if it is necessary and proper an appellate court may order that a retrial and further proceedings be had. The appropriate analysis is as follows: "'"It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points." [Citation.]' (*Pandol & Sons v. Agricultural Labor Relations Bd.* (1979) 98 Cal.App.3d 580, 591 []; see also *Burkhart v. Department of Motor Vehicles* (1981) 124 Cal.App.3d 99, 113 [].)" (*McManigal v. City of Seal Beach* (1985) 166 Cal.App.3d 975, 982.) We so order.

V. DISPOSITION

The order granting the new trial motion is affirmed solely for the reasons expressed in this opinion. The order denying the judgment notwithstanding the verdict motion is affirmed. Plaintiff, Janis Adams, is to recover her costs On appeal from defendant, Los Angeles Unified School District.

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TURNER, P.J.

We concur:

GRIGNON, J.

ARMSTRONG, J.