Filed 12/31/01

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

KARI CAMPISE,

Plaintiff and Appellant,

v.

MORRISON HEALTH CARE, INC.,

Defendant and Respondent.

F034128

(Super. Ct. No. 616761-2)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Lawrence Jones, Judge.

Doyle, Penner, Bradley & Armstrong, David Douglas Doyle and Peter Sean Bradley, for Plaintiff and Appellant.

Sheppard, Mullin, Richter & Hampton, Tracey A. Kennedy, and Lisa N. Davis, for Defendant and Respondent.

-ooOoo-

On August 13, 1998, Kari Campise (Campise) filed a complaint against Morrison Health Care, Inc. (Morrison) and Valley Children's Hospital (VCH) pursuant to Government Code[1] section 12900 et. seq., the Fair Employment and Housing Act (FEHA). Morrison filed a motion for summary judgment, which was granted. We reverse because the pleadings filed in support of and opposition to the motion for summary judgment disclose that there are triable issues of material fact.

PROCEDURAL SUMMARY

The initial complaint named VCH and numerous doe defendants and asserted a cause of action pursuant to section 12940. An amendment identifying Morrison as one of the doe defendants was filed on October 8, 1998. Campise's complaint set forth a single cause of action against VCH and Morrison, alleging sexual harassment and retaliation. VCH filed an answer on October 5, 1998. On November 23, 1998, Morrison filed an answer generally denying the allegations of the complaint and asserting various affirmative defenses.

Morrison and VCH filed separate summary judgment motions pursuant to Code of Civil Procedure section 437c. Morrison's motion was filed on June 3, 1999; VCH's on June 4, 1999. In addition to the motion, Morrison filed a memorandum of points and authorities, separate statement of undisputed facts, declarations, and numerous deposition transcripts.

Campise filed a response disputing purported undisputed facts contained in Morrison's statement of undisputed facts, declarations in opposition to the motion, a memorandum of points and authorities in opposition, and a separate statement of undisputed material facts.

---

[1] References to code sections are to the Government Code unless otherwise specified.

By order dated July 29, 1999, the trial court granted the motion for summary judgment filed by Morrison. Judgment was entered on October 28, 1999, in favor of Morrison.

DISCUSSION

Pursuant to Code of Civil procedure section 437c, subdivision (c), summary judgment is proper if the supporting papers are sufficient to sustain a judgment in favor of the moving party as a matter of law and the opposing party presents no evidence giving rise to a triable issue as to any material fact.

> "To prevail on a summary judgment motion, the defendant must conclusively negate a necessary element of the plaintiff's case or establish a complete defense. Where the evidence presented by defendant does not support judgment in his favor, the motion must be denied without looking at the opposing evidence, if any, submitted by plaintiff.… Where there is no material issue of fact to be tried and the sole question before the court is one of law, it is the duty of the trial court on a motion for summary judgment to hear and determine the issue of law." (*Varni Bros. Corp. v. Wine World, Inc.* (1995) 35 Cal.App.4th 880, 886, citations omitted.)

As the reviewing court, we determine de novo whether an issue of material fact exists and whether the moving party was entitled to summary judgment as a matter of law. (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1601.) In other words, we must assume the role of the trial court and reassess the merits of the motion. (*Pensinger v. Bowsmith, Inc.* (1998) 60 Cal.App.4th 709, 717.)

Ordinarily, we first identify the issues framed by the pleadings since it is these allegations to which the motion must respond. Second, we determine whether the moving party's showing satisfies its burden of proof and justifies a judgment in its favor. Third, if the summary judgment motion prima facie justifies a judgment, we finally determine whether the opposition demonstrates the existence of a triable, material factual issue. (*Ibid.*)

Our review and analysis of the evidence is governed by the premise that evidence of the moving party, Morrison, is to be strictly construed and that of the opposing party, Campise, liberally construed. (*Coppola v. Superior Court* (1989) 211 Cal.App.3d 848, 862.) For brevity's sake, we will focus on determining whether the existence of a triable, material factual issue was established by the pleadings in opposition to Morrison's motion.

A. Sexual Harassment Claim

Section 12940, subdivision (j)(1), provides that:

> "For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by 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. Loss of tangible job benefits shall not be necessary in order to establish harassment."

Due to the similarities of the FEHA and title VII of the federal Civil Rights Act (title VII), codified at 42 United States Code, section 2000e et seq., federal cases interpreting title VII may offer guidance. "While the California act and title VII differ in some particulars, their objectives are identical, and California courts have relied upon federal law to interpret analogous provisions of the state statute." (*Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 1316; accord *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354.) California courts, however, must construe FEHA liberally and are not bound by federal cases that apply a stricter view. (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 493.)

To prove a cause of action for sexual harassment based on hostile work environment, the plaintiff must show that she was subjected to unwelcome conduct that was based on sex and was sufficiently severe to create an abusive or hostile working environment. (*Aguilar v. Avis Rent A Car Sys., Inc.* (1999) 21 Cal.4th 121, 130.) To prevail on a cause of action for quid pro quo sexual harassment, the plaintiff must prove that an individual explicitly or implicitly conditioned a job benefit, or the absence of a job detriment, on plaintiff's acceptance of sexual conduct. (*Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1414.) Implicit conditions are far more likely to occur than explicit conditions. (*Nichols v. Frank* (9th Cir. 1994) 42 F.3d 503, 511.)

With respect to the sexual harassment claim, Morrison asserted that summary judgment should be granted because: (1) Negroe was not a supervisor, thus there was no strict liability; (2) Morrison took prompt remedial action after Campise formally complained about Negroe's conduct; (3) Campise was not subjected to a hostile environment; and (4) Campise continued to be able to perform her job duties.

The trial court granted summary judgment on the sexual harassment claim on the grounds that: (1) Negroe did not qualify as a supervisor as that term is used in section 12940, because he did not have "authority over the ultimate conditions of her employment" and the ability to direct day-to-day activities of employees did not qualify Negroe as a supervisor, thus strict liability did not apply; (2) if Negroe were a supervisor, Morrison had established an affirmative defense; and (3) even though Campise claimed "tangible employment actions" were taken against her, she was still able to perform her job.

Factual Summary

In our discussion, we address only those facts set forth in the various declarations and deposition transcripts which were submitted in support of, or in opposition to, Morrison's motion for summary judgment.

Campise was hired in 1996 by VCH as a Dietary Assistant and Kitchen Helper. Her position was eventually changed to Cook's Assistant. In late 1997, Morrison entered into a contract with VCH whereby Morrison agreed to manage the dietary department and cafeteria of VCH. To that end, the contract specified that Morrison would provide two full-time employees: Rod Miranda as Director of Dietary Services and Rafael Negroe as Executive Chef and Assistant Director of Food and Nutrition Services.

Between 1996 and 1998, Campise's job performance was satisfactory. After Morrison entered into its contract with VCH, Miranda divided the Dietary Department into teams and placed Campise on the culinary team. Miranda did not have the unilateral authority to hire, fire, promote, or fix the salary of the individuals on the culinary team; those actions had to be cleared through VCH. Negroe had the ability to assign job duties, direct daily activities; and adjust the schedules of those assigned to the culinary team. All employees were expected to be subject to the orders of all supervisors.

Supervisor

The term supervisor, as used in FEHA, is defined in section 12926, subdivision (r), as follows:

> " 'Supervisor' means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, *or the responsibility to direct them*, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not merely of a routine or clerical nature, but requires the use of independent judgment." (Italics added.)

We have found no published decision interpreting this definition of "supervisor," perhaps because the language of the statute is abundantly clear. The plain language of the statute does not restrict that term to one who directly supervises the employee subjected to harassment, he or she need only be *a* supervisor within the company. (§ 12926, subd. (r).) Nor does the statute restrict the definition to one who has ultimate

authority over the employee's job. In order to qualify as a supervisor, it is sufficient if the harasser has the ability effectively to *recommend* personnel action. (*Ibid.*) A leading treatise on employment law considers this interpretation of the term supervisor to be an accurate reflection of the law. (Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2001) vol. 1, § 3.21, p. 129.) Moreover, the United States Supreme Court has determined that when one is imbued with apparent authority, as opposed to actual authority, that person may be held to be a supervisor for purposes of evaluating liability for harassment claims. (*Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 759-760.)

Declarations and deposition testimony from both Negroe and Miranda reveal that Negroe: (1) determined the job duties of the kitchen workers, including Campise; (2) was in charge of directing and overseeing food production in the kitchen and setting tasks for individual employees, including Campise; and (3) was expected personally to address employees whose performance was considered substandard and to recommend further action against such employees, if necessary. In his deposition, Miranda states that Morrison reorganized all the kitchen job duties, placing those duties under Negroe in the organizational chart. Later in the deposition, Miranda states that Campise's immediate supervisor would have been "one of the kitchen supervisors" who in turn would be supervised by and report to Negroe.

The statutory language of section 12926, subdivision (r), is clear and unambiguous and we need look no further to interpret the statute. (*Preston v. Bd. of Equalization* (2001) 25 Cal.4th 197, 213.) We decline to adopt the narrow definition urged by Morrison and adhered to by the trial court that a supervisor must have plenary authority over employees. There is no indication in section 12926, subdivision (r) or elsewhere in FEHA, that the meaning of the term "supervisor" is intended to apply only to one who is imbued with plenary control over other employees. The statutory definition clearly encompasses an individual in the chain of command over an employee, who has actual or

reasonably perceived power to control or direct the work environment. As Miranda's deposition discloses, Morrison clearly referred to Negroe as a supervisor and considered him to be a supervisor, despite Morrison's present claim to the contrary. The duties delegated to Negroe as a matter of law are sufficient to qualify Negroe as a supervisor under the definition set forth in section 12926, subdivision (r).

Furthermore, the Fair Employment and Housing Commission (FEHC) has determined that to create strict liability, the harasser need only be a supervisor, not necessarily the victim's supervisor. (*Hart & Starkey, Inc.* (1984) No. 84-23, FEHC Precedential Decisions 1984-1985, CEB 9, p. 31.) FEHC decisions interpreting FEHA are entitled to great weight. (*Page v. Superior Court* (1995) 31 Cal.App.4th 1206, 1214.) Therefore, to the extent Morrison contends that Negroe was not Campise's direct supervisor, such contention is irrelevant. Negroe need only be a supervisor, not necessarily Campise's direct supervisor.

Thus, the trial court's conclusion that Negroe was not a supervisor was erroneous because the evidence establishes that as a matter of law, Negroe was a supervisor for purposes of the FEHA.

Strict Liability

Under Title VII of the federal Civil Rights Act of 1964, an employer has an affirmative defense to sexual harassment engaged in by a supervisor as recognized in *Burlington Industries, Inc. v. Ellerth, supra,* 524 U.S. 742 and *Faragher v. Boca Raton* (1998) 524 U.S. 775. The affirmative defense is available if: (1) there is no tangible employment action; (2) the employer failed to exercise reasonable care to prevent harassment; and (3) the employee unreasonably failed to take advantage of corrective opportunities. (*Burlington Industries, Inc. v. Ellerth, supra,* 524 U.S. at p. 765.) However, "when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment," no affirmative defense is available. (*Ibid.*)

The California Supreme Court has determined that under the FEHA, an employer is strictly liable for an agent's or supervisor's acts of sexual harassment against an employee, as opposed to harassment by a nonsupervisor. (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136.) A policy against sexual harassment does not insulate an employer from strict liability for harassment by a supervisor, regardless of whether the employer knew of the harassment. Moreover, strict liability applies regardless of whether the harassment takes the form of a hostile environment or quid pro quo. (Wrongful Employment Termination Practice, *supra,* § 3.21, p. 128.)

In supplemental letter briefing, Morrison asserts that *Kohler v. Inter-Tel Technologies* (9th Cir. 2001) 244 F.3d 1167 is dispositive. We disagree. In *Kohler,* the Ninth Circuit speculates that the California Supreme Court will adopt the federal affirmative defense set forth in *Farragher* and *Ellerth.* The *Kohler* court failed really to address the *Carrisales* case, which was decided a year after *Farragher* and *Ellerth*. In *Carrisales,* the California Supreme Court reiterated that under FEHA an employer was "strictly liable for harassment by an agent or supervisor, but liable for harassment by others only if the employer fails to take immediate and appropriate corrective action when reasonably made aware of the conduct." (*Carrisales v. Dept. of Corrections, supra,* 21 Cal.4th at pp. 1136-1137.) This quoted statement is inconsistent with the federal affirmative defense under Title VII, as the Third District Court of Appeal held in *Dept. of Health Services v. Superior Court (McGinnis)* (2001) 94 Cal.App.4th 14 [2001 Daily Journal D.A.R. 12511]). We agree with *McGinnis*'s holding that the affirmative defenses set forth in *Farragher* and *Ellerth* are not available in FEHA actions. (*Dept. of Health Services v. Superior Court (McGinnis), supra,* 94 Cal.App.4th at p. ___ [2001 Daily Journal D.A.R. at p. 12512].)

Contrary to Morrison's assertion and the trial court's ruling, California does not recognize as an affirmative defense to actions under FEHA the defense set forth in *Burlington Industries, Inc.* and *Faragher*. (*Carrisales v. Department of Corrections,*

supra, 21 Cal.4th at pp. 1136-1137, *Dept. of Health Services v. Superior Court (McGinnis), supra,* 94 Cal.App.4th at p. ___ [2001 Daily Journal D.A.R. at p. 12516].) As such, the trial court's conclusion that Morrison had established an affirmative defense to Campise's complaint is erroneous.

Hostile Environment – Quid Pro Quo

In the alternative, Morrison took the position in its summary judgment motion that Negroe's conduct did not give rise to a hostile environment, nor was it quid pro quo harassment. Sexual harassment is defined as including unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1146.) Sexual harassment typically occurs in one or both of two forms: (1) quid pro quo harassment, where submission to sexual conduct is made a condition of concrete employment benefits; or (2) hostile work environment, defined as conduct having the purpose or effect of creating an intimidating, hostile, or offensive work environment. (*Ibid.*) The California Code of Regulations sets forth examples of types of prohibited conduct, including, but not limited to: (1) verbal harassment, such as the use of epithets, derogatory comments, or slurs; (2) physical harassment, including impeding or blocking movement; (3) sexual favors, defined as unwanted sexual advances; and (4) visual harassment, including derogatory posters, cartoons, or drawings. (Cal. Code Regs., tit. 2, § 7287.6, subd. (b)(1).)

Campise's declaration in opposition to the summary judgment motion stated that Negroe: (1) touched her breast without permission; (2) made vulgar and sexual comments to her and to other female employees in her presence; (3) demanded to see tattoos on Campise's hip and back, on more than one occasion; (4) cornered Campise in a walk-in refrigerator for 40 minutes and would not release her; (5) massaged her shoulders and touched her arms without permission; and (6) frequently directed her to bend over, telling her he wanted to watch. These actions, according to Campise, occurred virtually on a

daily basis over a three-month period. Campise's declaration further states that she found Negroe's conduct intrusive and offensive and that it made her uncomfortable.

Campise's declaration in opposition to the motion for summary judgment clearly sets forth sufficient facts to raise a triable issue of material fact with respect to whether she was subjected to a hostile work environment. A single incident of harassment may be sufficient to establish a hostile environment. (*Etter v. Veriflo Corporation* (1998) 67 Cal.App.4th 457, 467.) It cannot be said as a matter of law that the evidence is insufficient to establish a hostile or offensive working environment, thus summary judgment was not warranted.

As for the trial court's conclusion that Campise could not establish sexual harassment unless she was "unable to carry out her assigned job responsibilities," this is not the standard. A victim need establish that the complained of conduct interfered with her job performance *or* that the conduct created an offensive, intimidating, or hostile work environment. (*Weeks v. Baker & McKenzie, supra*, 63 Cal.App.4th at pp. 1146-1147.)

With respect to the quid pro quo allegation, Campise's declaration asserts that Negroe took tangible employment actions against her. Tangible employment actions are the means by which the supervisor brings the official power of his position to bear on the employee. (*Burlington Industries, Inc. v. Ellerth, supra*, 524 U.S. at p. 762.) Campise states that after she made it clear to Negroe that his conduct was offensive, her job duties were made much more onerous. When she confronted Negroe about the change in duties, she was told she could find another job. She also asserts that after she encountered problems with Negroe, Negroe denied her a promotion to baker, without just cause. An undesirable reassignment of duties, and/or denying a promotion or reassignment to the more desirable position of baker, constitutes tangible job benefits. (*Id.* at pp. 761, 765.)

Ultimately, the determination of whether there was in fact a hostile environment or quid pro quo harassment is in the province of the fact finder. (See *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872.)

B. Retaliation

It is an unlawful employment practice to retaliate against an individual who has complained about, or filed a complaint regarding, sexual harassment. Employers are precluded from harassing, discharging, expelling, or otherwise discriminating against a person because he or she has sought to exercise rights under FEHA. (§ 12940, subd. (h).) Under FEHA, an employer's liability for retaliation parallels that of the underlying harassment. Thus, an employer is strictly liable for a supervisor's retaliation. (See, e.g., Cal. Code Regs., tit. 2, § 7286.6, subd. (b);Wrongful Employment Termination Practice, *supra,* § 3.6, p.120.)

In order to establish a prima facie case of retaliation, plaintiff must prove "that she engaged in a protected activity, that she was thereafter subjected to adverse employment action by her employer, and there was a causal link between the two." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 614; accord *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476.) Overburdening an employee with work has been recognized as a form of retaliation. (*Dominic v. Consolidated Edison Co. of New York, Inc.* (2d cir. 1987) 822 F.2d 1249, 1255.)

Campise asserts that after complaining of Negroe's conduct, she experienced hostility and retaliation from Negroe and the other supervisors. She alleges she was given more onerous job duties by Negroe; Campise's place in a baking class necessary for promotion to baker was given to another employee; and at least one telephone call from a family member regarding a medical emergency involving her son was not put through to her. In addition, another Morrison employee, Adrian Taylor, instructed her to perform physical duties which were not part of her job description. The physical labor resulted in a debilitating injury to her back. She also claims to have been told that

Miranda would no longer allow her to work in the kitchen. Miranda acknowledged that after Campise complained about Negroe, all the supervisors exhibited "animosity" toward Campise.

Whether these actions constitute retaliation, or had a legitimate business purpose, is a factual determination that cannot be resolved by summary judgment. (*Southern Cal. Rapid Transit Dist. v. Superior Court* (1994) 30 Cal.App.4th 713, 729-730.)

DISPOSITION

The order granting Morrison's summary judgment motion is reversed in part. The dismissal of the cause of action for sexual harassment and retaliation pursuant to section 12940 is vacated and the action is reinstated. The matter is remanded for further proceedings consistent with this opinion. Campise is awarded costs on appeal.

_____
Cornell, J.

WE CONCUR:

_____
Vartabedian, Acting P.J.

_____
Wiseman, J.