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PERSPECTIVE

Mediating single-incident harassment claims post-*Bailey*

By JJ Johnston

Imagine an employee who is subjected to racial disparagement by a coworker. She tells others about the incident but decides against reporting it to HR for fear of being reassigned or treated negatively. Instead, she goes in every day and works alongside the same person who denigrated her. Nothing more to report.

Now imagine that the company somehow learns about the alleged harassment. It calls the employee in for questioning and also talks with the alleged offender. It concludes that the incident likely happened, it was racially motivated, and it was offensive. It occurred just once, however, and did not involve a manager or supervisor. The employer concludes that no further action is warranted.

Is there an actionable claim against the employer? If they choose to bypass the courtroom, how will the parties establish their respective positions when they attempt to resolve the matter through mediation?

Single-incident claims

At one time, a single incident would not have been sufficient to support a hostile work environment claim. Only harassment that was pervasive and ongoing had a chance of going to trial; anything else had little to no settlement value. That changed in 2019, when Government Code Section 12923 recognized that a single incident could be enough to support a claim “if the harassing conduct has unreasonably interfered with the plaintiff’s work performance or created an intimidating, hostile, or offensive working environment.”



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The California Supreme Court has now opened the door for more employees to bring harassment claims under FEHA while, presumably, making it harder for employers to defend against those claims. On July 29, 2024, in *Bailey v. San Francisco District Attorney’s Office*, the state’s high court overturned summary judgment for an employer, ruling that a coworker’s one-time use of the “N” word, coupled with the employer’s failure to take appropriate action and its complicity in possible retaliatory action against the plaintiff, was sufficient grounds to state a claim.

The *Bailey* case

Twanda Bailey, a Black woman, was an investigative assistant at the Dis-

trict Attorney’s Office. She worked alongside another investigative assistant of a different race/ethnicity. One day, Bailey’s coworker Larkin used the “N” word toward her, and she was understandably upset. She told colleagues, but chose not to tell HR because she had heard about other employees being harassed and discriminated against following incidents with Larkin and she understood that the personnel officer to whom she would report the incident was best friends with Larkin. She reasonably worried that if she reported the harassment, she would be the one to suffer negative consequences.

The story might have ended there but for the fact that the employer did learn of the incident

and took action. Office management assured Bailey that it “would address the issue,” interviewed both Bailey and Larkin, counseled Larkin about the employer’s harassment-free workplace policy, and documented matters. Then it did nothing more.

Specifically, the HR representative charged with reporting incidents of workplace harassment to the city’s Department of Human Resources - also Larkin’s best friend - failed to file a formal complaint as required by city policy. She expressly refused to do so later when Bailey requested that a complaint be filed and allegedly made implicit threats intended to prevent Bailey from pursuing further relief.

Factors considered by the court

According to the California Supreme Court, the key question in *Bailey* was whether a coworker’s one-time use of a racial slur was so severe as to alter the conditions of employment and create a hostile work environment, making that conduct actionable under FEHA. After reviewing the facts of the case, the court found that an isolated act of harassment “may be actionable if it is sufficiently severe in light of the totality of the circumstances,” and it concluded that “a coworker’s use of an unambiguous racial epithet, such as the N-word, may be found to suffice.”

The court was also asked to assess “whether a course of conduct that effectively seeks to withdraw an employee’s means of reporting and addressing racial harassment in the workplace is actionable in a claim of retaliation.” Again, the court concluded that it might.

That the original conduct giving rise to the plaintiff's claim involved a coworker rather than a supervisor was immaterial to the court's findings. Government Code Section 12940 (j) (1) provides that "[h]arassment of an employee . . . 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." FEHA does not require proof of intent to establish negligence, so an employer can be liable for harassment by a nonsupervisory employee regardless of motive.

Mediating single-incident claims

When employees bring workplace harassment claims into the mediation setting, they are dealing with a range of emotions: anger, frustration, vulnerability. They may believe that the employer did not do enough to protect them from offensive words or conduct and that they are owed significant damages for their suffering. Employers often see things differently. The alleged offense,

they might claim, was an isolated incident, it involved a co-worker, and it was quickly dealt with. It did not significantly alter the work environment.

The mediator's task is to listen to both sides and help find common ground for resolving the matter. This involves asking questions, delving into the reasons behind each party's beliefs. It also includes identifying gaps or holes in the stories, trying to fill in the blanks.

Was the alleged offender a co-worker or a supervisor? When the alleged harassment occurred, were there witnesses? Was HR notified? How and when did the employer learn of the incident? How did it respond?

The value of the case for settlement purposes may hinge on the answers to those questions. If an employer makes a strong showing that it had no reason to know about the conduct, the plaintiff's case will be much harder to make. If the plaintiff establishes that the alleged offender was a manager or supervisor, the defense's best hope is that the incident did not involve

a protected class or was so minor that it didn't alter the work environment.

As for the employer's response to the conduct, the California Supreme Court, citing *Bradley v. Department of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1612, 1630), noted that "[t]he reasonableness of the remedy depends on its ability to stop the current harassment and deter future harassment." Anything less than a strong and meaningful response is unlikely to meet this standard.

Conclusion

In the wake of the *Bailey* decision, both plaintiffs and defendants in FEHA harassment cases brought to mediation should be fully prepared with documentation and other evidence that clearly buttresses their positions. If an alleged incident is sufficiently egregious, the defendant should be able to demonstrate that it had no knowledge or reason to know of the incident or that it acted promptly and effectively to stop any further occurrence of the alleged conduct

JJ Johnston is a nationally recognized employment and class action mediator. He has been mediating cases for more than two decades and has more than three decades' experience as an employment attorney representing both plaintiffs and defendants in a wide range of cases, including wage and hour class actions, PAGA claims, wrongful terminations, discrimination and retaliation cases, sexual harassment cases, prevailing wage claims, fair pay act claims, and defamation claims.

