$1.50 VOL. 36 NO. 49 www.ocbj.com DECEMBER 9-15, 2013

ORANGE COUNTY BUSINESS JOURNAL

RUTAN

RUTAN & TUCKER, LLP

No Sexual Desire Required: New Law Amends the Definition of Sexual Harassment

by Edson McClellan, Partner, and Yusuf Zakir, Associate, Rutan & Tucker LLP

A host of new California employment laws take effect in the new year, including a new law amending the definition of sexual harassment. Effective Jan. 1, 2014, an employee is no longer required to prove that sexually harassing conduct was motivated by "sexual desire." The new law is memorialized in SB 292, which amends California's Fair Employment and Housing Act ("FEHA"). As discussed below, this expansion of what constitutes unlawful harassment is a further reason that employers must vigorously enforce strong anti-harassment policies.

Background on Sexual Harassment Claims

The FEHA prohibits harassment and discrimination in employment on a number of grounds, including prohibiting sexual harassment, gender harassment, and harassment based on pregnancy, childbirth or related medical conditions.

There are two general theories of sexual harassment in the workplace: (1) quid pro quo (*i.e.*, offering employment benefits in exchange for sexual favors) and (2) a hostile work environment (*i.e.*, pervasive harassment creating an abusive work environment). For years in California, a hostile work environment could be demonstrated in these three ways: (1) sexual intent or desire; (2) general hostility toward a particular sex; or (3) a demonstrated difference in how members of both sexes were treated. In June 2011, the California Court of Appeal caused a stir by departing from this rule in its decision in *Kelley v. Conco Companies*, 196 Cal. App. 4th 191 (2011). The *Kelley* decision motivated the change in law brought by SB 292.

The *Kelley* Decision

In *Kelley*, a male employee alleged he was sexually harassed by his male supervisor. The supervisor bombarded the employee with graphic, vulgar and sexually explicit language, including gay innuendo, profanity and suggesting – in harsher language – that he sought to sodomize the employee. Even though the court found that the "literal statements expressed sexual interest and solicited sexual activity," the court found there was "no 'credible evidence that the harasser was homosexual,'" or that he was "motivated by a sexual desire." While the court acknowledged that the harasser's statements were "crude, offensive and demeaning," and intended as such, there was no evidence of actual sexual desire and, therefore, no sexual harassment.

Kelley has since been interpreted as holding that same-sex sexual harassment can be proven *only* by demonstrating sexual desire or intent.

Overturning *Kelley*: SB 292

SB 292, signed into law by Governor Jerry Brown on Aug. 12, 2013, was enacted to overturn *Kelley*. According to the legislative history behind the bill, *Kelley* created confusion regarding a plaintiff's evidentiary requirement for a sexual harassment claim based on a hostile work environment. The legislative commentary in support of SB 292 found that *Kelley* was incorrect in its conclusion that proving sexual desire is a requirement to prevail on a sexual harassment claim. Rather, as SB 292 provides, a plaintiff need *not* prove an alleged harasser's sexual intent or desire in order to prove sexual harassment. While a plaintiff *may* prove sexual intent or desire, a plaintiff is *not* required to. According to the bill's author, Senate Majority Leader Ellen M. Corbett (D-East Bay), SB 292 "protects all individuals whenever they are sexually harassed in the workplace, regardless of motivation."

Consequences of SB 292

While SB 292 does not create a new theory of employer liability under the FEHA, it does change the requirement, set forth by *Kelley*, that an employee is required to prove sexual intent or desire in order to prevail on a claim for sexual harassment. In other words, an employee no longer has to prove that the inappropriate conduct or language was motivated by the harasser's desire to have sexual relations with the employee; therefore, it makes it easier for an employee to prevail.

Employers should take steps to ensure compliance with SB 292. Employers should update their sexual harassment training to educate employees, especially regarding conversations between people of the same sex. Based on SB 292, "locker room" type conversation that leads to the use of profane or vulgar language could constitute sexual harassment. Employer policies should also be updated to reflect the change in law. Specifically, policies should be revised to state that harassment need not be motivated by a sexual desire, and that the use of profane or vulgar language alone, even between members of the same sex, may be sexual harassment.

Conclusion

SB 292 is yet another example of the widening breadth of what is considered to be unlawful harassment. The trend in the law continues to expand potential liability for employers. In order to avoid potentially costly litigation and liability, employers should ensure that they are complying with the law in their conduct, in how they train their employees, and in their policies.

Edson McClellan

Edson McClellan is a partner in the firm's Employment and Labor Section. His practice focuses on complex civil litigation matters. He has significant experience in litigation involving theft of company trade secrets, employee raiding, noncompetition agreements, breach of fiduciary duty, and contract disputes. McClellan's practice also involves all areas of employment law, including counseling and litigation. He regularly counsels employers on a variety of topics including terminations, wage-and-hour issues, employment agreements, leaves of absence, and accommodating disabilities. He can be reached at 714.641.3411 or emcclellan@rutan.com.

Yusuf Zakir

Yusuf Zakir is an associate in the firm's Employment and Labor section where he handles a wide variety of employment-related litigation including wage and hour class actions; employment discrimination, harassment and retaliation claims; wrongful discharge litigation and dispute resolution; and workplace investigations. Zakir also provides counseling to businesses regarding all aspects of the employer-employee relationship, including compliance with state and federal laws; workplace policies; employment agreements; and accommodation issues. He can be reached at 714.338.1804 or yzakir@rutan.com.

About Rutan & Tucker LLP

Rutan & Tucker has enjoyed a leading role in shaping Orange County and California businesses and communities, today standing as the largest full-service business law firm based in Orange County. With approximately 151 attorneys, Rutan & Tucker is well-positioned to meet the legal needs of a broad range of clients doing business in California and beyond.

Rutan & Tucker represents a broad spectrum of clients, from major multinational corporations and financial institutions to family-owned businesses and private individuals; from high-technology and industrial enterprises to agricultural firms; from real estate developers to governmental agencies, educational institutions and charities. The firm's practice extends throughout the United States and includes both the representation of foreign companies doing business in the United States and domestic companies engaged in activities abroad.