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FOCUS ON EMPLOYMENT

Staring Contest

VIEWPOINT: Now, looking at someone for too long, or in the wrong way, can be the basis of a lawsuit if the court decides that it occurs as part of a set of harassing or retaliatory actions.

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In the context of harassment in the workplace, looking at someone for too long, may now give rise to a claim for hostile work environment sexual harassment in violation of the Fair Employment and Housing Act. The California appellate court addressed this issue in *Birschtein v. New United Motor Manufacturing Inc.*, 92 Cal App. 4th 994 (2001).

In *Birschtein*, employee Michelle Birchstein worked on an assembly line in an auto- manufacturing plant. In 1995, one of her coworkers, a forklift driver, asked her to go on a date with him three or four times. Each time, she declined. He also told her he wanted to "eat her." When she inquired what he meant, he said, "I want to eat you all over." Several days after this incident, he told her he was fantasizing about her, which he described in detail.

After she complained to the employer, the driver never spoke to her again. Intermittently through 1996 and 1997, he initiated what she described as "a campaign of staring" at her. Over several months, he would drive to her workstation, each time staring at her "for at least several seconds." Other times he sat on his forklift for five to ten minutes at a time, staring at her all the while.

Birschtein admitted generally that there was nothing sexually suggestive about the way he looked at her, other than the one time he "grabbed his genitals" while driving his forklift slowly by her workstation.

Birschtein again went to the company, this time complaining about the staring incidents. The employer automotive plant had a harassment policy in place and investigated Birschtein's complaints. However, it did not take disciplinary action because it felt the actions didn't warrant it. After these complaints, the staring incidents lessened in frequency, but nonetheless continued.

After Birschtein filed her lawsuit, the employer sought a court determination that, in the face of these facts, Birschtein could not, as a matter of law, establish a claim for unlawful harassment. The trial court granted the motion of several bases. Among others, it concluded that as a matter of law, the staring conduct was not based on Birschtein's gender finding that the conduct was not harassment based on sex. Secondly, the court ruled it was neither severe nor pervasive enough for the conduct to be actionable under the law.

The appellate court reversed the judgment, holding that under the facts in the case, the conduct "may indeed violate [the Fair Employment and Housting Act's] proscription on gender-based harassment in the workplace." Whether it does or doesn't is for the jury to decide.

In reaching its conclusion, the court reviewed the requirements necessary to state a claim for hostile work environment sexual harassment. The court found that this arises when "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment..'" quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

To allege a claim for hostile work environment, the plaintiff need not allege that sexual advances took place. Rather, it is "only necessary to show that gender is a substantial factor in the discrimination and that if the plaintiff "had been a man she would not have been treated in the same manner." Quoting *Accardi v. Superior Court*, 17 Cal.App.4th 341 (1993).

A New Look

The court's holding in Birschtein illustrates several new concepts:

- When investigating an employee's complaints, employers should look at all the conduct among all the relevant parties. This includes behavior throughout the course of employment of all those involved.
- Employers cannot breathe easy just because the statute of limitations on certain conduct may have expired. Under the continuing violation doctrine, even otherwise time-barred behavior can be made the subject of a lawsuit.
- Employers must instruct their employees not only to keep their hands and sex-related comments to themselves, but they also are prohibited from staring at co-workers in attempts to intimidate or retaliate against them.

Sexual harassment need not necessarily involve sexual conduct or conduct with clear sexual overtones. Any harassment or other unequal treatment of an employee ... that would not occur but for the sex of the employee may, if sufficiently ... pervasive, comprise an illegal condition of employment." Quoting *Hirase-Doi v. U.S. West Communications, Inc.,* 61 F.3d 777 (10th Cir. 1995) (ruling that threatening stares in apparent retaliation for complaints about sexual harassment, if sufficiently related to the prior alleged sexual harassment, can constitute continual sexual harassment).

The *Birschtein* court decided that the forklift driver's earlier acts of sexual harassment (the asking for dates, the "eat you" remarks, and the descriptions of his fantasies), were later "transmuted" by Birschtein's complaints to management into an "allegedly daily series of retaliatory acts ... [which] grew out of the antecedent unlawful harassment." The court ruled that the jury should decide whether the "retaliatory acts [the staring incidents] were sufficiently allied with the prior acts of harassment to constitute a continuing course of unlawful conduct."

The court also considered whether any of the earlier overt sexual harassment was actionable even though, standing alone, it was barred by the statute of limitations.
Under the Housing Act, a plaintiff must file an administrative complaint within one year from the unlawful conduct. Government Code Section 12960.

The issue in *Birschtein* then became whether the continuing violation doctrine tolled the statute of limitations because the co-workers' actions were all part of an unlawful series of related acts.

Despite the one-year statute of limitations, the court ruled the claims were actionable. It based its decision on *Richards v. CH2M Hills, Inc.* 26 Cal.4th 798 (2001). *Richards* involved a disability claim and an allegation that an employer failed to reasonably accommodate or eliminate a hostile work environment targeting a disabled employee. The court stated that acts which otherwise would be time-barred are actionable nevertheless if the employers' actions:

- Are sufficiently similar in kind, recognizing that similar kinds of unlawful employer conduct, such as, acts of harassment or failure to reasonably accommodate disability, may take a number of different forms;
- Have occurred with reasonable frequency; and
- Have not acquired a degree of permanence, meaning, in the context of an ongoing process of accommodation of disability, or ongoing disability harassment that an employer's statements or actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment would be futile.

Following *Richards*, the *Birschtein* court allowed the case to proceed to trial and ruled a jury would have to decide whether the earlier sexual harassment was nonetheless actionable.

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