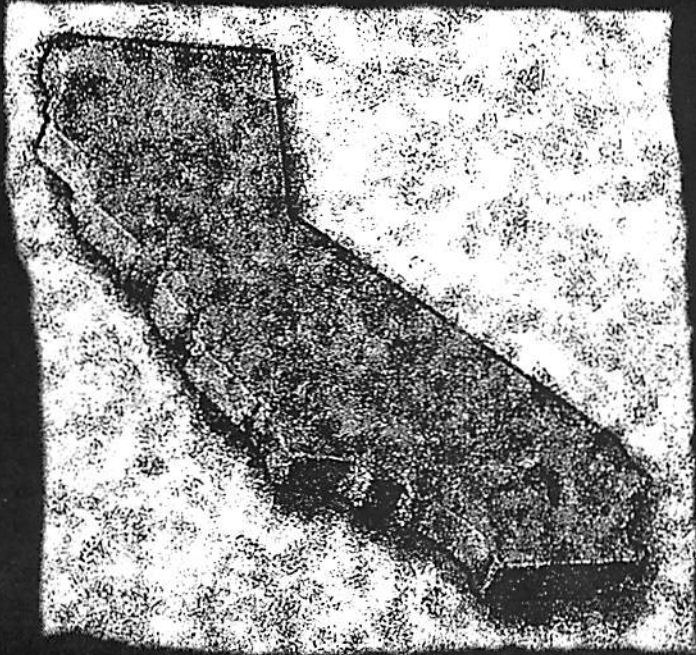


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# "Staring" Ruled an Actionable Offense

by Sue Bendavid-Arbiv, Attorney-at-Law

In entering a crowded department store, one may overhear a weary parent admonishing her child: "You may look, but don't touch." However, in the context of unlawful 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 (FEHA).

This issue was discussed in *Birschtein v. New United Motor Manufacturing, Inc.*, a case decided by the California Court of Appeal on October 9, 2001.

The facts were as follows: Michelle Birschtein was an assembly line worker in an auto manufacturing plant. In 1995, one of her co-workers, a forklift driver, asked her out on a date three or four times. Each time she declined. He also made suggestive comments to her. When she inquired what he meant, his comments were of a more explicit and descriptive suggestive nature. Several days after this incident, he approached her and told her he was having fantasies about her, which he proceeded to describe in detail.

After she complained to the Company, the driver stopped speaking to her and, in fact, never spoke to her again. Much later, (intermittently through 1996 and 1997), he started what she alleged was "a campaign of staring at her." Over the course of 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, all the while staring at her.

Ms. 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.

Ms. Birschtein again went to the Company this time complaining about the staring incidents. The employer automotive plant had an unlawful harassment policy and investigated Ms. 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 the lawsuit was filed, the employer sought a court order that, in the face of these facts, Ms. Birschtein could not as a matter of law, establish a claim for unlawful harassment. The trial court granted the motion for several reasons. Among others, it concluded that as a matter of law, the staring conduct was not based on Ms. Birschtein's gender; that is, it 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 Court of Appeals reversed the judgment holding that under the facts in this case, the conduct "may indeed violate FEHA'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 of Appeals reviewed the requirements necessary to state a claim for "hostile work environment" sexual harassment. 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 from a U.S. Supreme Court decision named *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 21.

Thus, to allege a claim for hostile work environment, it is not necessary to allege there were sexual advances. 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* (1993) 17 Cal.App.4th 341, 348.

In other words, 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.* (10th Cir. 1995) 61 F.3d 777 (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 suggestive 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." In short, the Court ruled the jury should decide whether the "retaliatory acts [the staring] were sufficiently allied with the prior acts of harassment to constitute a continuing course of unlawful conduct."

The Birschtein 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 FEHA, a plaintiff must file an administrative complaint within one year from the unlawful conduct. Government Code Section 12960 states:

"No [administrative] complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice . . . occurred."

The issue in Birschtein was whether the "continuing violation doctrine" "tolled" the statute of limitations (put in on hold) by virtue of the fact that the co-workers' actions were all part of an "unlawful series of related acts."

Despite the one-year statute of limitations, the Birschtein Court ruled the claims were actionable. It based its decision on the recent California Supreme Court ruling in *Richards v. CH2M Hills, Inc.* (2001) 26 Cal.4th 798. *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.

*“Employers must instruct their employees not only to keep their hands...to themselves, but they should also avoid “staring” at their co-workers in attempts to intimidate or retaliate against them.”*

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.

The lessons from Birschtein are as follows:

In investigating an employee's complaints, employers should look at all the conduct between the relevant parties, including 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 sexually-related comments to themselves, but they should also avoid “staring” at their co-workers in attempts to intimidate or retaliate against them.

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