LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
THURSDAY, OCTOBER 17, 2019

PERSPECTIVE

The legal norms are a-changin' in the post #MeToo era

By Nancy Yaffe

Shutterstock

Women's March protesters in front of the City Hall in San Francisco, Jan. 20, 2018.

What used to be OK, tolerated, and even justified as (i.e., "that's just the way he is") is simply not OK in workplaces in the post-#MeToo era.

It used to be OK to date (or hook up) with work colleagues. Many people have done it. Many still do, but the risk of workplace dating, and the aftermath of the break-up, is a heck of a lot riskier (especially for the person in the more powerful position).

People used to justify such behavior by saying it was consensual, in legal terms, not unwelcome. But welcome-ness is very hard to prove when one of the individuals claims (after the fact) that she (or he) was pressured into the relationship, or to stay in it, and couldn't leave. Sometimes years after the fact the victim's opinion on the relationship changes. Those disputed issues mean more cases are harder to resolve.

More types of behavior are also triggering claims of sexual harassment. What used to be considered small stuff, such as dirty dancing at a holiday party, or some slightly inappropriate conversation over drinks after work (or on a business trip), are now ample fodder for the plaintiff's bar to send a demand or file a lawsuit. Those claims now often include allegations of sexual battery for what previously would have been considered an inadvertent harmless touch. I have seen cases filed and demands sent over a single butt slap, or an attempt to get someone to dance, a greeting or goodbye hug that was too tight, or a hand that wandered over to a thigh at dinner. I have seen more claims of alleged sexual battery in the last two years then in the prior twenty years combined. And for much less egregious behavior.

Of course, these cases are harder to settle now once a lawsuit is filed. Confidentiality provisions can only be negotiated as long as the claimant wants them. *See* Cal. Code of Civil Procedure Section 1001 (formerly SB 820). And if the claimant will not agree to confidentiality, and insists that she (or he) wants to be able to tell the allegations to anyone who asks, then the lawsuit must be litigated. Very few employers (or alleged harassers) are interested in paying to resolve a harassment claim without confidentiality. And many harassment victims prefer compensation and closure, as opposed to retaining the right to speak out. Keep in mind there is no way to prevent someone from testifying under oath if subpoenaed, even with a confidentiality provision. So the real impact is that settling claims in private is much more expensive, and is often done pre-litigation.

When litigated, the burden to prove harassment is much diminished. A "stray remark" can now be deemed "severe or pervasive" given the FEHA's expanded definition of that standard. *See* Cal. Government Code Section 12923 (formerly SB 1300). One single thoughtless comment that "crosses the line" can be sufficient to prevent summary judgment for an employer and send a case to a jury. Even if the person apologized after he (or she) said it. Under the same code section, the nuances of each work environment can no longer be considered either. So no more breaks for foul language on a construction site or in a creative work environment. Context no longer matters.

While it has always been a steep uphill battle for a prevailing defendant to get attorney fees even if they win a harassment case, that standard is now close to impossible. To award fees and costs to a prevailing defendant, the court must find that "the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so." See California Government Code Section 12965 (formerly SB 1300).

All of these trends heavily favor claimants/plaintiffs in the harassment landscape. More alleged harassers are being seriously investigated, and often terminated. Even just five years ago a successful manager or executive would be given another chance (or many chances) to fix his (or her) behavior. His (or her) behavior would be justified, excused away, ignored. Not anymore. It is simply too risky to keep an alleged harasser on the payroll for fear of future claims, including claims for failure to take reasonable steps to prevent harassment from occurring. Investigations have expanded. Outside investigators are retained to look into issues. And more guys (and yes it is mostly guys) are getting fired for harassment related claims. And even when they get fired, plaintiff's counsel argue that they weren't fire fast enough!

I have been practicing law for 24 years. It is amazing how fast the legal landscape can change. The changes in the two years since #MeToo have been fast and furious. This is good news for employees who have been harassed at work, and great news for the plaintiff's bar. But for men (and some women) who are used to getting away with a touch here, a kiss there, and some inappropriate conversation over a glass of wine after work, the news is not so good. Those folks need to change with the times. ■

Nancy Yaffe *is a partner at Fox Rothschild LLP who focuses her practice on employment law counseling and litigation for businesses, with an emphasis on problem prevention. She proudly serves as co-chair of the firm's Women's Initiative.*