

CALIFORNIA WOMEN LAWYERS ANNUAL  
CONFERENCE  
SEXUAL HARASSMENT LAW IN THE  
#METOO ERA: FROM THE NEWSPAPERS  
TO THE COURTS

**Dorothy Chou Proudfoot, Administrative Law Judge**  
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# Is Anyone Immune?

## Victims

- Employees
- Students
- Athletes
- Actresses
- Lawyers

## Accused

- Owners
- Coaches
- Actors
- Legislators
- Judges
- Law firms

# Questions

- **Why has the silence been broken?**
- **Are more women coming forward and if so why?**
- **Do the claims differ and if so how?**
- **Are companies reacting differently to sex harassment claims and if so how and why?**
- **With so many women coming forward, does this tend to create an atmosphere of credibility or the opposite? Are women taking unfair advantage of the current notoriety for financial or other reasons with false claims?**

# Me Too Evidence

- **Evidence Code 1101**

(a) Except as provided in this section and in Sections 1101, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

(b) **Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.**

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

# Me Too Evidence

- In California, “me too” evidence may be relevant to show discriminatory intent or motive and to cast doubt on an employer's stated reason for an adverse employment action. (Evid.Code, § 1101, subd. (b); *Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, 760.)
- ***Pantoja v. Anton* (2011) 198 Cal.App 4th 87.**
  - The trial court excluded me-too evidence by other female employees who witnessed or were subjected to discrimination because the discrimination did not occur in the plaintiff's presence and/or not during the plaintiff's employment.
  - **The appellate court reversed, stating:**
    - The court's in limine ruling erroneously disregarded the possibility that this me-too evidence could be relevant to prove [the defendant's] intent when he used profanity and touched employees ... evidence that [the defendant] harassed other women outside [the plaintiff's] presence could have assisted the jury not by showing that [the defendant] had a propensity to harass women sexually, but by showing that he harbored a discriminatory intent or bias based on gender ... We conclude the evidence was admissible to show intent under Evidence Code Section 1101, subdivision (b), to impeach [the defendant's] credibility as a witness, and to rebut factual claims made by defense witnesses." *Id.* At 109-110

# Me Too Evidence

- However, some courts have found that evidence regarding the alleged mistreatment of others is not admissible to prove the litigant's claim. *Kelly-Zurian v. Wohl Shoe Co., Inc.*, 22 Cal. App. 4th 397, 410-11 (1994) (holding that other employees' harassment allegations against plaintiff's same supervisor was not relevant to plaintiff's own harassment claim)
- *Beyda v. City of Los Angeles*, 65 Cal.App.4th 511, 519 [if "the plaintiff neither witnesses the other incidents nor knows that they occurred, those incidents cannot affect his or her perception of the hostility of the work environment.... A reasonable person would not perceive a work environment to be objectively hostile or abusive based on conduct toward others of which she is unaware".]
- *Lyle v. Warner Bros.*, 38 Cal.4th 264 (2006) (Also relevant is whether the offensive comments were directed at the plaintiff, or were directed at others but witnessed by the plaintiff. If "the derogatory comments did not involve plaintiff, [she is] obligated to set forth specific facts from which a reasonable trier of fact could find the conduct 'permeated' [her] direct workplace environment and was 'pervasive and destructive.' " )

# Me Too Evidence

- *Hatai v. Department of Transportation (2013) 214 C.A. 4th 1287*  
(although a plaintiff alleging employment discrimination based on his race (Asian) was permitted to introduce evidence of discrimination by his employer against other persons of the same race as the plaintiff, the trial court properly excluded evidence of alleged discrimination against persons of other races. Plaintiff attempted to introduce evidence that his supervisor discriminated against all non-Arabs)
- *McCoy v. Pacific Maritime Association, (2013) 216 Cal.App.4th 283*  
("Because intent is an element in an unlawful retaliation claim, evidence that a defendant intentionally retaliated against other employees for the same conduct engaged in by the plaintiff would be relevant.")

# Evidence Code Section 783

- **In any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, if evidence of sexual conduct of the plaintiff is offered to attack credibility of the plaintiff under Section 780, the following procedures shall be followed:**
  - (a) A written motion shall be made by the defendant to the court and the plaintiff's attorney stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the plaintiff proposed to be presented.
  - (b) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated.
  - (c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the plaintiff regarding the offer of proof made by the defendant.
  - (d) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the plaintiff is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

# Picking An Impartial Jury

- Will all the publicity make it harder to pick an impartial jury?
- Employees have often been harassed or have friends or family members who have been harassed.

# Questions

- Has this led to more lawsuits alleging sexual harassment, or will it in the future?

# EEOC Charges of Sex Harassment or Sex Based Harassment

- **Number steady between FY 2010 and FY 2017 (September 30, 2017)**
- **About 16% filed by males**

# Lawsuits With Sex Harassment (and other claims) Filed in US Per Courthouse News

- April – June 2017: 733 (244 per month)
- July – September 2017: 742 (247 per month)
- October – December 2017: 771 (257 per month)
- January – March 2018: 799 (266 per month)

# Sex Harassment Verdicts (Often Combined With Other Claims, Including Discrimination and Retaliation) April – June 2017 – Pre Weinstein Article

- *Rojas v. Albaba* April 2017 Riverside County \$5000 unpaid wages, \$21,600 lost wages, \$300,000 past emotional distress, \$200,000 future emotional distress, \$100,000 punitive
- *Tony Olivas-Dean (male) v. American Meizhou Dongpo* April 2017 Los Angeles Superior \$20,000 emotional distress, \$80,000 lost wages, \$250,000 punitive
- *Navarro v. 4Earth Farms* May 2017 Los Angeles Superior \$200,000 emotional distress, \$9310 lost wages, \$100,000 punitive.
- *Pearl (male) v. City of Los Angeles* June 2017 \$15,000,000 emotional distress, \$450,053 past lost wages, \$1,944,199 future lost wages.
- *Stinson v. Pepperdine* June 2017 Los Angeles Superior Defense verdict

# Sex Harassment Verdicts (Often Combined With Other Claims, Including Discrimination And Retaliation) – August 2017 - Pre-Weinstein Article

- *Santos-Vidal v. Hongye* August 2017 Los Angeles Superior \$15,500,000 pain and suffering, \$44,413 lost wages.
- *Diab v. Global Interpretation* August 2017 San Diego Superior \$25,000 emotional distress, \$25,001 punitive, \$109,841 in attorneys fees
- *Garcia v. Gavrieli* August 2017 Los Angeles Superior (bench trial) \$30,000 emotional distress \$3,096 lost wages

# Sex Harassment Verdicts (Often Combined With Other Claims, Including Discrimination And Retaliation) – Post-Weinstein Article

- *Flores v. White, County of LA* October 6, 2017 Los Angeles Superior \$37,500 emotional distress \$24,627 lost wages \$687,000 attorneys fees
- *Whitfield v. BROADSPECTRUM* November 2017 Los Angeles Superior. \$5000 emotional distress, \$25,000 past lost wages, \$12,500 future lost wages, \$250,000 punitive.
- *Maldonado v. Crown Building* November 2017 San Francisco Superior Defense Verdict

# Sex Harassment Settlements – NOTE: Most Settlements Are Not Reported.

- *Jackman v. City of Los Angeles* June 2017 \$900,000
- *Mills v. City of San Diego* August 2017 \$175,000
- *Silverman ad Mokayef v. County of Los Angeles* August 2017 \$700,000
- *Pavek v. County of Los Angeles.* September 2017 \$400,000
- *Sandoval (male) v. San Francisco* September 2017 \$120,000
- *EEOC v. Clougherty Packing* October 12, 2017 \$100,000

# Questions

- **The importance of a proper investigation.**
  - **When to hire an outside investigator?**
  - **Should the complaining party participate?**
  - **Should counsel be present?**
  - **Should there be greater transparency in investigations?**
  - **How much information should be provided to the complaining party on the results of the investigation?**
  - **Should companies investigate anonymous complaints, and if so how?**

# Questions

- **Does the training need to change?**
  - **Should companies do implicit/unconscious bias training?**
  - **Should the company conduct a workplace culture assessment?**
  - **Should companies be conducting live training?**
- **Can and should companies prohibit workplace relationships?**
- **Is there a risk of undermining mentoring and development of women by senior male leaders?**

# Questions

- **Should arbitration agreements exclude sex harassment claims?**
- **Are there consequences to the new tax law that allows deductibility of settlement payments and attorneys' fees in sexual harassment cases?**

# Tax Deductibility Of Settlements Of Sex Harassment Claims With Confidentiality Provisions

- The new tax law added a new section 162(q) that states no deduction is allowed for “(1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney's fees related to such a settlement or payment.”
- Given the broad general scope of this language, taken literally, this would not permit defendant employers to deduct payments made to their own counsel to defend sexual harassment claims or for attorney's fees awarded to the plaintiff in a settlement related to sexual harassment, *as well as* forbidding a plaintiff to deduct their own attorney's fees related to the claim.
- Typically both employers and employees want confidentiality – i.e. they are buying peace between them.

# Tax Deductibility Of Settlements Of Sex Harassment Claims With Confidentiality Provisions

- This provision will complicate the negotiations because it now costs defendants more to obtain nondisclosure agreements as part of settlements, and may lower the amount at which defendants are willing to settle.
- The provision may also incentive defendants not to settle at all if they cannot obtain the confidentiality they seek to protect their brand and reputation (even if the defendant concludes the claim has no merit) and therefore result in more cases going to trial.

# Tax Deductibility Of Settlements Of Sex Harassment Claims With Confidentiality Provisions

- Unanswered questions, particularly when there are multiple claims:
  - What if the sex harassment claims are subject to disclosure but not the other claims?
  - What if only the amount of the settlement is confidential but the employee can discuss the facts underlying the claim?
  - Can there be separate settlement agreements for the sex harassment claim and the other claims?
  - How do you allocate how much of the settlement related to the sex harassment claim?
  - Can the employee withdraw the sex harassment claim?
  - Does this provision cover a non-disparagement clause?

# Questions

- **How to encourage employees to make complaints**
- **How to improve civility in the workplace**
- **How leaders can ensure safe and inclusive workplaces.**