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Harvey Weinstein and Sexual Harassment Law: “Me Too”

Article By:

David Augustus Garcia

The reports of women who went on the record to accuse Hollywood businessman Harvey Weinstein of sexual harassment, sexual assault, and other abuses, evoked the following recent Twitter message by Alyssa Milano: “If you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.” This call to action led thousands to step forward and tell their stories as the #MeToo movement—a campaign started approximately 10 years ago by activist Tarana Burke—gathered momentum and focused the public’s attention on the issue of sexual harassment and sex discrimination.

The phrase “me too” has powerful cultural and personal resonance—and it has legal significance. Employment lawyers frequently encounter the phrase in the context of evidence presented in sexual harassment cases and investigations. “Me too” evidence, in fact, may have an impact on cases of hostile work environment sexual harassment brought against Weinstein, should any arise in California based on his alleged misdeeds.

“Me Too” Evidence

Employment harassment and discrimination cases can be difficult to prove. Rarely does an employee have conclusive proof that directly shows that his or her employer discriminated or had intent to harass unlawfully. Without eyewitnesses and incriminating documents, employees often have to show prohibited discriminatory animus by means of circumstantial evidence.

In many cases, then, an employee in a lawsuit seeks to introduce “me too” witnesses and indirect evidence that an employer’s justification or explanation for a certain offensive employment or workplace action was either false or misleading. Often, damaging indirect evidence involves testimony from other employees to show that the same employer mistreated similarly situated individuals on other occasions. The employee may cite this evidence as proof that the employer had an unlawful intent to discriminate against the employee.

“Me Too” Evidence Upheld: The Case of *Pantoja v. Anton*

Consider the California Court of Appeal decision in *Pantoja v. Anton*, 198 Cal. App. 4th 87 (2011), a precedent-setting case involving sexual harassment and workplace discrimination allegations. The plaintiff, Lorraine Pantoja, accused her former boss, Thomas J. Anton, and his law firm, Thomas Anton & Associates, of slapping and touching her buttocks, touching her leg while offering her $200,

asking for a shoulder massage, referring to his employees as “my Mexicans,” and calling Pantoja a “stupid bitch.” Anton fired Pantoja.

Pantoja sued Anton and the corporation for employment discrimination, wrongful termination in violation of public policy, battery, sexual battery, and intentional infliction of emotional distress. At trial, in support of her case, Pantoja asked that the court allow her to introduce witnesses who would testify that Anton had also harassed them on other occasions. One witness would testify that Anton had put his arm around her shoulders; daily yelled words such as “fuck,” “shit,” and “bitches” in the office; told Pantoja’s coworker that “monkeys could do your job better than you”; and called an employee 5 to 10 times while she was on vacation to leave angry, obscene messages such as “You fucking bitch, you fucked everything up.” Another employee would testify that Anton had said “I could see right through that skirt”; used obscene language in speaking to other employees; told employees they were monkeys and stupid; yelled, “Why can't I get a competent staff?”; and had engaged in actions such as putting his arms around other employees. He fired and rehired his entire staff.

Pantoja offered proof that more male and female witnesses would testify similarly. Ultimately, the trial court ruled against Pantoja and held that her “me too” evidence was inadmissible to prove Anton’s intent or to impeach him, because it did not concern facts that took place while Pantoja was an employee or have an effect on Pantoja’s “experience” as an employee. The jury found for the defense and for Anton. To the question, “Was Lorraine Pantoja subjected to unwanted harassing conduct because she was a woman,” the jury answered no. It also found that gender was not a motivating reason for Pantoja’s discharge.

The court of appeal reversed the jury’s verdict. The court of appeal concluded that the trial court had erroneously disregarded the possibility that Pantoja’s “me too” evidence could be relevant to prove Anton’s intent when he used profanity and touched employees. Applying evidence and the harassment law to Pantoja’s case, the court of appeal also articulated the applicable law: A sexual harassment claim based on a hostile work environment exists under both federal and state law, generally, where the employee was subjected to unwelcome conduct or comments because of his or her sex and the result was harassment so severe or pervasive that the conditions of the employment were altered.

The employee need not show that the conduct was motivated by sexual desire because the law prohibits all severe and pervasive demeaning misconduct based on an employee’s sex. As such, evidence was admissible to prove Anton’s intent or motive even if the conduct did not take place in Pantoja’s presence and was unknown to her, because an employer’s intent, policies, and practices regarding harassment are facts relevant to a cause of action. The court of appeal noted that it would make “little sense” to limit, to Pantoja’s personal observation, the introduction of valid evidence of intent, a pattern and practice of sexual harassment, or policies and practices condoning harassment. The court observed that, “[t]here was no reason to believe that Anton suddenly adopted policies or practices during the nine months of Pantoja’s employment and abruptly discontinued them after, or vice versa.”

Since 2011, the case of *Pantoja v. Anton* has been cited to frequently for the proposition that courts may consider “me too” evidence in harassment and discrimination cases.

Conclusion

Given the potential use of “me too” evidence in California harassment cases, and given recent reports, it is possible that Harvey Weinstein could see different “me too” accusers in the same case,

should one arise. At least 70 women have reportedly accused Weinstein of sexual harassment, assault, or worse. Recent news articles have chronicled a long history of sexual harassment allegations against Weinstein.

Persuasive proof can nevertheless be stubbornly difficult to establish. Workplace gossip is insufficient. Hearsay is not enough. Indeed, based on evidence law, courts regularly preclude irrelevant evidence, overly prejudicial evidence, unfair character evidence, and unsubstantiated hearsay. Weinstein might even emphasize that in the case of *Pantoja v. Anton*, the defendant Anton placed his intent in issue by characterizing his “profane tirades” as directed at “situations, not individuals.” In other words, Anton opened the door to “me too” evidence by arguing that his actions were intended to be directed at “situations” and not at Pantoja directly. These types of evidentiary issues are typically pivotal in a sexual harassment “me too” case.

Whether and how a court would rule on “me too” evidentiary issues in a hypothetical Weinstein harassment case is, at this moment, a matter of speculation and debate. What is not speculation, however, is that Weinstein and employers sued for harassment can face a potentially pivotal “me too” legal battle in court.

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