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Appellate Reports

COURT SAYS A JURY SHOULD HEAR CLAIM OF HOSTILE WORK ENVIRONMENT CREATED BY A CUSTOMER

Title VII; 42 USC § 2000(d); sexual harassment; employer liability for hostile work environment caused by customer: *Christian v. Umpqua Bank* (9th Cir. 2020) __ F.3d __.

Plaintiff Jennifer Christian sued her former employer, Umpqua Bank (Bank) for gender harassment and retaliation under Title VII of the Civil Rights Act of 1964 and the Washington Law Against Discrimination. Christian alleges that a bank customer stalked and harassed her in her workplace and that the Bank failed to take effective action to address the harassment. The district court granted summary judgment in favor of the Bank, holding that no reasonable juror could conclude that (1) the harassment Christian endured was so severe or pervasive as to create a hostile work environment or that (2) the Bank ratified or acquiesced in the harassment. Reversed.

In late 2013 a Bank customer asked Christian to open a checking account for him. Shortly afterward, the customer began visiting the Bank to drop off "small notes" for Christian. The notes stated that Christian was "the most beautiful girl he'[d] seen" and that the customer "would like to go on a date" with her. Christian began to feel "concerned," as did her colleagues.

When Christian next saw the customer at the Bank, she told him that she would not go on a date with him. He responded, "Okay" and left the Bank. But his behavior toward her continued. In February 2014 he sent her a long letter stating that she was his "dream girl" and that they were "meant to be together." She showed the letter to her manager and other colleagues, who warned her to "be careful." Around the same time she learned that the customer had been repeatedly coming into the Bank when she was not at work, repeatedly asking the employees how he could get a date with Christian. She became increasingly concerned for her safety. The customer sent her flowers and a card on Valentines Day 2014, further alarming her. She spoke with her manager again, who did not seem to appreciate why the customer's behavior was alarming.

Christian told the manager that she did not want the customer to continue to be allowed to return to the Bank. The manager had Christian telephone the customer and tell him that it was inappropriate to send flowers. Christian had misgivings, but telephoned him and told him she would not date him and asked him to stop asking her out on dates and asking her co-workers about her. The customer said, "Okay," but he continued the behavior.

Christian did not have any direct contact with the customer again until September 2014. But the customer continued to go into the Bank and ask about her and badger her colleagues about dating her. Ultimately, the Bank branch closed the customer's account.

In September 2014, Christian and her manager volunteered at a Bank charity fundraiser and she noticed the customer sitting on a wall, staring at her, for over 30 minutes. A few days later, the customer came into the Bank and asked to reopen his account. Christian's manager directed her to do it. When she declined, he had another employee reopen the account, as the customer stared at Christian the whole time.

Christian called in sick afterward and refused to return to work, and her manager ordered her to return and directed her to "just hide in the break room" if the customer visited the Bank. The Bank later agreed to transfer her to a different branch, where there were fewer hours available for her to work. Shortly thereafter, Christian requested in writing that the bank close the customer's bank account and obtain a no-trespassing order against him. The Bank ultimately closed the customers' account and told him not to return, but Christian resigned and sued the Bank.

In reversing the summary judgment for the Bank, the court reached the following conclusions: First, the district court erred in isolating the harassing incidents of September 2014 from those of February 2014. They should have been evaluated together. Second, the district court erred in declining to consider incidents in which Christian "did not have any direct, personal interactions with the [c]ustomer," such as when he wrote her a letter describing her as his "soulmate," sent her flowers, and watched her in the bank lobby. Title VII imposes no such requirement.

Third, the district court erred in neglecting to consider record evidence of interactions between the customer and third persons, such as the customer's repeated visits to the Bank to badger Christian's co-workers about how he could get a date with her. "Offensive comments do not all need to be made directly to an employee for a work environment to be considered hostile."

Viewing all the evidence in the light most favorable to Christian, the court concluded that genuine disputes of material fact existed as to the severity or pervasiveness of the harassment such that a jury could find in Christian's favor. The court also found triable issues of fact on whether the Bank had ratified or acquiesced in the harassment. "Although [the Bank] eventually did close the customer's account, direct him not to return to the bank, and transfer Christian to a new branch location, a trier of fact reasonably could find that [the Bank's] glacial response – more than half a year after the stalking began – was too little too late.

Arbitration; unconscionability based on shortening statute of limitations: *Ali v. Daylight Transport, LLC* (2020) __ Cal.App.5th __ (First Dist., Div. 2).

Plaintiffs sued their employer, Daylight Transport, in a putative class action alleging that they had been misclassified as independent contractors. Daylight Transport moved to compel arbitration, but the trial court denied the motion, finding that the arbitration agreement was unconscionable and therefore unenforceable. Affirmed. The court affirmed the trial court's finding that the arbitration agreements in the employment agreement were procedurally unconscionable because they were presented on a take-it-or-leave-it basis and could not be negotiated, and

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neither plaintiff was given a chance to consult an attorney before signing.

The court further found that the trial court had correctly found the element of substantive unconscionability because, among other things, the arbitration clause shortened the three-year statute of limitations in the Labor Code to 120 days. The agreement was also substantively unconscionable because it required the employees to bear expenses to pursue their claims in a trial court, such as administrative fees and fees for the arbitrator. Third, the agreement purported to carve out a category of claims that would not be subject to arbitration, which were claims only available to the employer.

Negligence; federal preemption; Federal Aviation Administration Authorization Act (FAAAA); trucking accidents; claims against freight brokers: *Miller v. C.H. Robinson Worldwide, Inc*. (9th Cir. 2020) 976 F.3d 1016.

Plaintiff Miller was rendered a quadriplegic in an automobile accident with a big-rig truck in Nevada. He sued the trucking company as well as the freight broker who hired that company to haul the load, alleging that the broker had been negligent in hiring the trucking company. The district court granted the broker, C.H. Robinson, judgment on the pleadings, finding that the preemption clause in the FAAAA preempted Miller's claim. Reversed.

49 U.S.C. § 14501(c) contains the FAAAA's preemption clause. It provides:

(1) General rule. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of two or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ..., broker, or freight forwarder with respect to the transportation of property;

(2) Matters not covered. Paragraph (1)-(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles ....

District courts across the United States have split on whether the FAAAA preempts negligence claims against brokers. *Miller* is the first Circuit opinion to weigh in on that issue. The court held that Miller's claim did "relate to" a claim against brokers, and therefore fell within the scope of paragraph (1) of the preemption clause. But it also concluded that the claim was saved from preemption by paragraph (2), the so-called "safety exception," which gives states the power to regulate motor-vehicle safety.

Federal Civil Procedure; whether defendant must file a new answer to reassert affirmative defenses after an amended complaint is filed that contains the same material obligations as the prior complaint: *KST Data, Inc. v. DXC Technology Company* (9th Cir. 2020) 980 F.3d 709.

A data-services subcontractor, KST, filed its original complaint in the superior court against ES, the company who retained it. After the case was removed to federal court KST filed a first-amended complaint asserting claims for (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) unjust enrichment, and (4) quantum meruit. ES filed an answer and affirmative defenses, and asserted a counterclaim against KST for breach of contract and other claims. After the district court granted ES's motion to dismiss, KST filed a second-amended complaint asserting the same four claims. ES again moved to dismiss all but the breach of contract claim. The court granted the motion without leave to amend. ES never filed an answer to the second-amended complaint. The parties later moved for summary judgment on the sole remaining claim for breach of contract.

ES argued in opposition to the motion that KST could not recover damages for breach of contract because of its affirmative defenses of unclean hands, fraud, and misrepresentation, which it had pleaded in its answer to the first-amended complaint. The district court found that, because ES had not filed an answer to the second-amended complaint, it had waived those defenses. The court then granted summary judgment for KST. Reversed.

The Ninth Circuit has not previously addressed when a defendant is required to reassert its affirmative defenses in response to an amended pleading. Federal Rule of Civil Procedure 8(c) requires a party to "affirmatively state any avoidance or affirmative defense" in response to a pleading. Generally, an affirmative defense that is not asserted in an answer to the complaint is waived or forfeited by the defendant. But the circumstances of this case do not allow for the simple application of this rule. Here, ES asserted its affirmative defenses – in response to the Complaint and First Amended Complaint.

The Ninth Circuit held that a defendant is not required to file a new answer to an amended complaint when the allegations in the amended complaint do not change the theory or scope of the case. Because KST's Second Amended Complaint contained the same material allegations with respect to the breach of contract claim as the First Amended Complaint, ES therefore was not required to file a new answer to preserve its previously asserted affirmative defenses. Before granting summary judgment sua sponte in favor of KST, the district court should have given ES notice and an opportunity to assert its affirmative defenses in response to KST's breach of contract claim.

Arbitration; PAGA waivers; viability of *Iskanian v. CLS Transportation Los Angeles* in light of *Epic Systems, Corp. v. Lewis*: *Olson v. Lyft, Inc.* (2020) 56 Cal.App.5th 862 (First Dist., Div. 2)

In *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, the California Supreme Court recognized that the Federal Arbitration Act (FAA) preempted a state's refusal to enforce an arbitration agreement including a class-action waiver based on unconscionability or violation of public policy. But the Court further held that this rule did not apply to

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PAGA claims. In *Epic Systems Corp. v. Lewis* (2018) ___ U.S. ___, 138 S.Ct. 1612, the U.S. Supreme Court held that the National Labor Relations Act (NLRA) does not confer a right to proceed on a class basis, and therefore the NLRA did not create any exception to the FAA. In this action, Olson, a driver for Lyft, signed an employment agreement stating that he could not bring a PAGA claim in court and requiring that all disputes with Lyft be resolved by arbitration. In response to Olson's suit, Lyft filed a petition to compel arbitration, which the trial court denied based on *Iskanian*. Lyft appealed, arguing that *Epic Systems* functionally overruled *Iskanian*. Affirmed.

The Court of Appeal rejected Lyft's position based on *Correia v. NB Baker Electric, Inc.* (2019) 32 Cal.App.5th 602, an opinion that rejected the identical argument made by Lyft in this case. Other post-*Epic Systems* cases have agreed, including the only two other published Court of Appeal decisions and numerous California federal cases. Accordingly, the court affirmed the order denying arbitration. The essence of the court's analysis was that PAGA claims, unlike private arbitration claims, are not bringing the action on their own behalf or on behalf of other employees; a PAGA claim is fundamentally a qui tam claim asserted on behalf of the State, not the other employees. "In sum, *Epic Systems* addressed the question whether the NLRA renders unenforceable arbitration agreements containing class action waivers that interfere with workers' right to engage in "concerted activities." (*Epic Systems*, *supra*, 138 S.Ct. at pp. 1624-1628.) It did not address private attorney general laws like PAGA or qui tam suits.

References under Code Civ. Proc. § 638; trial court's power to set aside referee's decision: *Yu v. Superior Court* (*Bank of the West*) 56 Cal.App.5th 636 (Second Dist., Div. 3.)

Yu filed a lawsuit against Bank of the West and Commercial Loan Solutions LLC (CLS), asserting claims arising from a nonjudicial foreclosure of his property. The defendants moved the trial court to assign all issues in the case to a referee pursuant to a reference clause in certain forbearance agreements. The trial court granted the motion and assigned the matter to a retired trial judge as referee. The referee tried the case in phases and ultimately issued a 53-page decision in favor of Yu, awarding him over $2 million in compensatory damages, equitable relief, and $6 million in punitive damages. The referee then filed his final decision in the trial court pursuant to section 638 of the Code of Civil Procedure.

Defendants moved in the trial court to set aside the referee's decision. The trial court found legal errors in the decision. The trial court declined to adopt the referee's findings and award. Instead, it set the matter for a new trial on all issues. Yu sought a writ, which the Court of Appeal granted, but which effectively affirmed the trial court's decision.

Section 644 of the Code of Civil Procedure, which governs the effect of a referee or commissioner's decision, states in subdivision (a): "in the case of a consensual general reference pursuant to Section 638, the decision of the referee or commissioner upon the whole issue must stand as the decision of the court, and upon filing of the statement of decision with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court." Section 645 of the same code states, "The decision of the referee appointed pursuant to Section 638 or commissioner may be excepted to and reviewed in like manner as if made by the court. When the reference is to report the facts, the decision reported has the effect of a special verdict."

Viewing section 644, subdivision (a) harmoniously in the context of modern civil procedure, all parties agree that the first clause – "the decision of the referee or commissioner upon the whole issue must stand as the decision of the court" – means that the referee's decision becomes the trial court's decision when the referee files it.

However, use of the word may in the second clause – "upon filing of the statement of decision with the clerk of the court, judgment *may* be entered thereon in the same manner as if the action had been tried by the court" – cannot mean that the *trial court* has discretion *whether* to enter judgment. This second clause is directed at the clerk, as use of the word "entered" indicates. Entry of judgment is a ministerial act done by the clerk. Section 664 specifies that when, such as here, "the trial has been had by the court, judgment *must be entered by the clerk*, in conformity to the decision of the court, *immediately upon the filing of such decision*." (§ 664, italics added.) That is, once the referee's statement of decision is filed, it becomes the decision of the court and "the clerk enters judgment 'in the same manner as if the action had been tried by the court," i.e., immediately.

Hence, "the general, consensual referee's decisions here were binding and stood as the decision of the court when issued, with the result judgment should have been entered thereon immediately by the clerk. (§§ 644, subd. (a) & 664.) The aggrieved party's remedy for any error committed by the referee was by a post-judgment proceeding or appeal."

"Under the parties' agreement here, the referee's powers were exhausted when he filed his decisions with the trial court. Real parties sought a new trial by the court, effectively objecting to the reference. In the absence of mutual consent for a new reference, therefore, the trial court properly ruled that the new trial be conducted before the court."

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