The Power Of 'Me-Too' Evidence In Calif. Employment Cases

By Aaron L. Osten

In a retaliation or discrimination case, evidence of wrongdoing against employees other than your client may provide the key evidence you need to show a pattern of misconduct that will give your employment case an edge. California law permits admission of “me-too” evidence under certain circumstances, applying a different criteria depending on the cause of action pursued.

For retaliation claims under The California Fair Employment and Housing Act (FEHA) or Labor Code §1102.5 “sufficient similarity” is required, which is a critical factor to help establish intent. If retaliatory intent can be shown, the jury will see your case through a retaliatory lens, making your case stronger and more compelling. While the focus is of course on what happened to your client, do not forget that you can broaden the scope with evidence of “sufficiently similar” retaliation against other employees. This me-too evidence is admissible to prove retaliatory intent. McCoy v. Pacific Maritime Association, (2013) 216 Cal.App.4th 283 at 297: “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.”

Whether evidence is “sufficiently similar” is “inherently fact intensive” and can be best established by showing the other employee held a similar position to the plaintiff, and that employee engaged in the same protected conduct as the plaintiff (such as complaining about the same improper conduct).

(McCoy at 297-298). While decisions to discharge or discipline other employees are often met with relevancy and privacy objections during discovery, it can be worth fighting for, particularly if that other employee was similarly situated to your client.

In the case of discrimination cases under the FEHA “sufficient similarity” is not required. Admission of me-too evidence in a FEHA discrimination claim, such as gender discrimination, does not require the same “sufficient similarity” as a retaliation claim under McCoy. In fact, discrimination against other employees need not even occur in the plaintiff’s presence or during the plaintiff’s employment to be admissible. In Pantoja v. Anton (2011) 198 Cal.App 4th 87 the plaintiff brought claims for gender discrimination and sexual harassment in the form of a hostile work environment.

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. After a defense verdict, an appeal followed and 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; See also Johnson v. United Cerebral Palsy/Spastic Children's Foundation (2009) 173 Cal.App.4th 740, 745.

It follows that under Pantoja and Johnson, evidence of discrimination against other employees, regardless if the plaintiff witnessed or was actually impacted by such discrimination, is admissible to show discriminatory intent against the plaintiff. Also, if there is a failure to prevent discrimination claim, the me-too evidence tends to show defendants had notice of other discrimination, and failed to prevent it.

Defendants will fight to keep this evidence out, and for good reason. Me-too evidence is often presented by a neutral third party, who has no stake in the outcome of the case. And even if that third party has their own lawsuit against the defendant, let the defense lawyers claim bias because once they do, you are only looking at yet another story of a defendant's discrimination told before the jury.

A common defense to admission of me-too evidence is that it is inadmissible character evidence and cannot be used to show a defendant discriminated against the plaintiff. Beyda v. City of Los Angeles (1998) 65 Cal.App.4th 511. While the character evidence argument is true, Pantoja rejected this argument as a blanket exclusion, noting that evidence of harassment of other employees, unknown to the plaintiff, is not admissible to prove a defendant's propensity to harass but this type of evidence is admissible to prove intent or the other matters listed in Section 1101, subdivision (b), and is distinguished by the court in Johnson at p. 760: "Beyda did not address whether the evidence could be admitted under the provisions of subdivision (b) of Evidence Code Section 1101 ... [M]any courts have held that evidence of the type sought to be introduced by the plaintiff in Beyda ... is admissible under rule 404 (b) of the Federal Rules of Evidence ... to show intent or motive, for the purpose of casting doubt on an employer's stated reason for an adverse employment action, and thereby creating a triable issue of material fact as to whether the stated reason was merely a pretext and the actual reason was wrongful under employment law."

Indeed, Beyda itself states: "The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." (Id. at p. 519.).

Me-too evidence will also greatly bolster your case should the jury find that a defendant acted with malice, fraud or oppression, warranting an assessment of punitive damages. Whether a defendant had a "pattern or practice" of malicious conduct is one factor for a jury to consider

when determining an amount of punitive damages. (See California Civil Jury Instruction 3942). While punitive damages cannot be awarded to punish a defendant for his conduct against people other than the plaintiff, me-too evidence is relevant to show a pattern or practice of misconduct. If a defendant's misconduct is widespread among several employees, the jury may feel a heightened sense and concern to deter future wrongdoing by punishing the defendant.

With the highly detailed employment case, often with thousands of emails and a myriad of witnesses, it can be easy to focus only on your client's story. But don't forget that me-too evidence is also part of your client's story, and if out there, is admissible and can greatly strengthen your case.

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