

EMPLOYMENT LAW UPDATE

Jennifer A. Becker
David P. Borovsky
Shoshana Y. Chazan
Chip Cox
Edward F. Donohue, III
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Kathleen A. Foley
Bruce N. Furukawa
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Irene K. Yesowitch

October 14, 2002

Issue No. 67

California Law

Herberg v. California Institute of the Arts
(2nd Dist. August 13, 2002)
02 C.D.O.S. 7400

A single 24-hour display of a lewd drawing of the plaintiff did not constitute “hostile work environment” sexual harassment.

By Jason A. Geller and Shoshana Y. Chazan

Plaintiff Mary Herberg, 82 years old, was an administrative employee of the California Institute of the Arts (CalArts), a private fine arts college. CalArts had a written policy that it would not censor any work of art on the basis of content. CalArts also had a written policy in its employee and student handbooks prohibiting all forms of unlawful harassment.

In the early hours of May 13, 1999, two art students displayed a drawing of Herberg, partially naked, and several other CalArts employees and students engaged in various sexual acts. The drawing appeared in the school’s main gallery. Despite complaints by Herberg and her relatives (also CalArts employees) about the drawing, CalArts did not immediately remove it, pursuant to its policy against censorship. Eventually, CalArts removed the drawing, but not until roughly 24 hours after its initial display and after a reception attended by 100 people in the

main gallery. Herberg and her employee relatives sued the school for “hostile work environment” sexual harassment based on the display of the drawing.

The California Fair Employment and Housing Act (“FEHA”) makes it unlawful for an employer, or any other person, to sexually harass an employee. FEHA also requires an employer to “take all reasonable steps necessary to prevent discrimination and harassment from occurring.” In dismissing the case in favor of CalArts, the California Court of Appeal applied a “totality of the circumstances” test to conclude that the drawing did not constitute “severe and pervasive” harassment. The Court considered: (1) the nature of the drawing; (2) the frequency of the display; (3) the total number of days over which the drawing was displayed; and (4) the context in which the drawing was displayed.

The Court found that this single incident did not involve “egregious” behavior to support a claim of harassment. The Court considered other cases in which a single incident of sexual touching was held to be insufficient to constitute “severe and pervasive” harassment. The Court noted that, generally, a single incident of misconduct will not support the claim unless it is particularly harsh, such as a rape. The Court concluded that isolated events without actual or threatened physical contact are insufficient. The Court observed that Herberg and the others were not physically touched, the relatives were not depicted in the drawing, and Herberg did not see it until long after it had been taken down. Moreover, although Herberg and her relatives were understandably embarrassed and upset about the drawing, it was undisputed that the drawing was not intended to harass plaintiffs, but rather to make a point about representational art.

Although this case has unusual facts that might have limited application, it provides employers with some guidance about the level to which behavior must rise before a plaintiff may prevail on a claim of hostile work environment harassment. Of course, the case also reminds employers to maintain strong anti-harassment policies and to discipline employees for violating them, even where the conduct would not support a legal claim of harassment.

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