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The Current Landscape of Employer Liability for Supervisor Sexual Harassment under California's FEHA

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The California Court of Appeal has once again weighed in on employer liability for a supervisor's sexual harassment under the California Fair Employment and Housing Act through its decision in *Atalla v. Rite Aid Corporation* (2023) 89 Cal.App.5th 294.

In *Atalla*, Plaintiff and a district manager for Rite Aid had developed a years-long friendship prior to Plaintiff joining Rite Aid as a staff pharmacist. The friendship began in 2017 and Plaintiff began employment at Rite Aid in 2018. The district manager supervised staff pharmacists. Plaintiff and the district manager had frequently and consistently engaged in conversation over text message regarding a variety of topics, including vacations, family, personal matters, and work.

In 2019, during a late-night text message conversation, the district manager sent an inappropriate photo to Plaintiff. The district manager sent a text message about being drunk and that he meant to send the photo to his wife. Plaintiff deleted the photo and the text. The district manager then sent another inappropriate photo and Plaintiff sent a text asking him to stop.

The trial court granted Rite Aid's summary judgment motion. In affirming the trial court's ruling, the Court noted that Plaintiff did not raise a triable issue of fact that the district manager was acting as a supervisor during the text exchange. The Court noted that Plaintiff and the district manager had a prior texting relationship, and the photos were sent as a result of that personal relationship. It also pointed out that the texts occurred outside of the workplace and well after working hours.

The Court notes that its decision is consistent with the current landscape of the law on point. It points to the following four cases, which we have listed with a brief discussion of their facts and holdings.

Capitol City Foods, Inc. v. Superior Court (1992) 5 Cal.App.4th 1042

Plaintiff worked at Defendant's Burger King franchise. Plaintiff and a coworker asked the supervisor to go out with them for a drink. The supervisor could not go that time but suggested another time. Plaintiff and the

supervisor planned to go out a later date. On the later date, neither Plaintiff nor the supervisor were scheduled to work, but Plaintiff's schedule had been changed and she was scheduled to work that night.

That night, the supervisor picked up Plaintiff, who was in her work uniform, at a grocery store. The coworker did not show up. They drove around for approximately 45 minutes. During the drive, the supervisor called the Burger King and told them that they should not have changed the Plaintiff's schedule without his approval. The supervisor also called his parents.

The supervisor brought Plaintiff to his parents' house where they had sexual intercourse. The supervisor dropped Plaintiff off at an auto repair store and he went to Burger King. The next day, Plaintiff told the manager what happened and quit shortly after. Plaintiff then filed a complaint for sexual harassment.

In upholding the trial court's decision to grant the employer's motion for summary judgment, the Court found that it was undisputed that the supervisor had not "forced [the] plaintiff to accompany him or coerced her in any way prior to entering his bedroom." *Id.* at 1050. Further, the Court held that the supervisor's phone call to excuse Plaintiff from work was insufficient to show that the conduct was work-related.

Doe v. Capital Cities (1996) 50 Cal.App.4th 1038

Plaintiff, an aspiring actor, met a casting director for ABC in July of 1993. Over the next several weeks, the director worked with Plaintiff to help Plaintiff secure a role in ABC programs. One Saturday, Plaintiff spent the day at the director's office preparing for auditions. After they finished, the director took Plaintiff to dinner with ABC executives. After the dinner, the director advised Plaintiff that they needed to go to a brunch the next morning and to be at the director's home at 8:00 AM.

The next morning, August 15, Plaintiff was drugged, beaten, and raped by the director and four other men. Plaintiff later filed suit against ABC for sexual harassment.

The trial court sustained ABC's demurrer, a pleading that challenges the sufficiency or adequacy of another party's pleadings, without leave to amend. In overturning the trial court's decision, the Court explained that for pleading purposes, Plaintiff's presence at the director's home was sufficient to show a nexus between the rape and the Plaintiff's employment. Further, the Court noted, Plaintiff's ability to attain employment required participation in different activities at various locations.

Myers v. Trendwest Resorts, Inc. (2007) 148 Cal.App.4th 1403

Plaintiff's supervisor made sexual advances on Plaintiff during two separate "driving for dollars' trips." In the first instance, the supervisor "tried to touch her hair and leg, pretended to be lost, parked on an isolated dirt road," and engaged in physical touching. The supervisor told her he was her project director, and he would guarantee that she achieved performance recognition. In the second instance, the supervisor drove Plaintiff to his house, saying he needed to show her work documents. The supervisor then engaged in physical touching before Plaintiff threatened to use pepper spray on him.

The trial court granted the employer's motion for summary judgment. In reversing the trial court, the Court held that the harassment did not result from a completely private relationship. It noted that there was no prior personal

dating relationship. It also noted that the "driving for dollars' trips" were connected with employment and benefited the enterprise. Further, although it was unclear whether Trendwest approved of the trips, the Court noted that it was aware of the practice, would benefit from the practice, and did nothing to stop the practice.

Doe v. Starbucks, Inc., Case No. SACV 08-0582 AG (C.D. Cal., Dec. 18, 2009)

Plaintiff, a minor, and an adult supervisor engaged in a sexual relationship while they were both employed by Starbucks. The adult supervisor repeatedly asked the minor to go on dates with him and the minor initially resisted. The supervisor persisted and the minor eventually agreed.

The initial date turned into a sexual relationship, with the minor and the supervisor exchanging explicit comments and text messages while at work. They engaged in sexual intercourse in the supervisor's car during their breaks from work. The supervisor told the minor not to tell anyone about the relationship. When the minor told their mother about the relationship, the minor was transferred to another Starbucks location. The minor and the supervisor continued to see each other, but at a decreased frequency. When the minor stopped working at Starbucks, they brought a lawsuit against the company.

In denying Starbucks' motion for summary judgment, the Court found that there was a triable issue of fact as to whether the minor's acts were voluntary or resulted from the supervisor's manipulation or coercion in his role as a supervisor.

What Should Employers Be Doing?

These cases make clear that the murky issue of work-relatedness can expose employers to liability under a sexual harassment claim. Employers should ensure that their sexual harassment policies are up-to-date and enforced. Likewise, employers would be well advised to ensure that employees have more than one avenue to report sexual harassment. They should also consider implementing a fraternization policy for supervisors and subordinates. Any fraternization policy should be implemented in accordance with Labor Code section 96, which prohibits adverse employment action for "lawful conduct occurring during nonworking hours away from the employer's premises."

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