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## **California Appellate Courts Split Concerning What Qualifies as Same-Sex Sexual Harassment**

In *Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, the First District splits with the Second District's ruling in *Singleton v. United States Gypsum Co.* (2006) 140 Cal.App.4th 1547 concerning what qualifies as sexual harassment in the context of same-sex harassment suits. This split will likely require the California Supreme Court to intervene on the issue so employers can have clarity.

### **Facts of the Case**

Plaintiff/Appellant Patrick Kelley sued Defendant/Respondent The Conco Companies ("Conco") and a former male supervisor, David Seaman, alleging, among other things, sexual discrimination and sexual harassment under the California Fair Employment and Housing Act ("FEHA").

Conco had employed Kelley as an apprentice ironworker, and at a jobsite in Emeryville, Kelley was subjected to a barrage of sexually demeaning and derogatory statements, gestures, and threats by his supervisor, Seaman. That same day, Kelley complained to the Conco field safety manager, Anthony Gallegos. Gallegos berated Seaman for his conduct and insisted that the two shake hands over the situation. Also that same day, however, other co-workers made similar comments to Kelley and threatened violence against him.

Kelley requested and received transfer to different Conco jobsites, and never had any further negative encounters with Seaman. Yet, Kelley continued to experience derogatory comments from co-workers at some of the different Conco jobsites he worked at, and was sometimes confronted in an aggressive manner by co-workers and threatened with violence. Kelley communicated these incidents to Conco supervisors.

A little more than three months after the incident with Seaman, Kelley was suspended from his union apprenticeship allegedly for an unauthorized absence for which Kelley claimed he submitted an authorization request. After the suspension ended, Kelley was instructed by the union to never go back to Conco. When Kelley tried to work for other companies through the union he was consistently let go after a short period of time. When Kelley inquired to the union why this was happening, he was yelled at and told it was because of what happened at Conco.

Kelley requested and received a six-month leave of absence from the union apprenticeship program claiming he suffered from depression. The union granted Kelley's leave request, but he resigned before it expired.

## **Appellate Court's Ruling**

The trial court granted summary judgment against Kelley on all counts, including causes of action for sex discrimination and sexual harassment in violation of FEHA; retaliation; termination in violation of public policy; failure to prevent discrimination; and intentional and negligent infliction of emotional distress. Except for the claim that Conco failed to act to prevent retaliation by co-workers against Kelley, the *Kelley* appellate court affirmed on all grounds.

## **Appellate Court's Analysis**

The most significant and relevant aspect of the *Kelley* appellate court's ruling concerns the analysis of whether Seaman's conduct qualified as discrimination based on gender. In considering this issue, the court discussed in detail *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, and subsequent federal appellate decisions interpreting and applying *Oncale*. *Oncale* recall was the Supreme Court case that held Title VII's antidiscrimination protections apply to sexually harassing conduct between members of the same gender.

While the *Kelley* appellate court affirmed that FEHA encompasses sexually harassing conduct between members of the same gender, it also explained that a sexual harassment claim must be based on conduct that shows the perpetrator is acting based on actual sexual desire or intent, or that the perpetrator is motivated by the victim's actual or perceived sexual orientation. The *Kelley* appellate court concluded that, while Seaman's conduct was crude, offensive, and demeaning, there was no evidence that his comments demonstrated sexual intent or desire, or that his behavior was motivated by Kelley's actual or perceived sexual orientation. The fact that Seaman's words had sexual content or connotation, or discussed sex was not sufficient for the *Kelley* appellate court to establish sexual harassment.

In reaching its decision, the *Kelley* appellate court considered and rejected the Second District's rationale in *Singleton v. United States Gypsum Co.* (2006) 140 Cal.App.4th 1547. The *Singleton* appellate court reached a contrary decision on facts similar to those in *Kelley*; i.e., comments by males to a male co-worker about his physical appearance. The *Singleton* appellate court concluded such conduct caused disparate treatment to male workers because it targeted and attacked their heterosexual identity, thereby treating them differently from female workers. The *Kelley* appellate court argued that accepting *Singleton's* reasoning would inevitably lead to the conclusion that any hostile, offensive, or harassing comment or conduct, with or without sexual content or innuendo, made to one gender but not to the other, would constitute gender discrimination under the FEHA. The *Kelley* appellate court explained that what matters in the context of sexual harassment under FEHA is not whether or not the sexes are treated differently in the workplace, but whether one sex is treated adversely to the other based on a gender difference.

## **Impact for Employers**

Until the California Supreme Court resolves the split between *Kelley* and *Singleton*, there is no clear path for employers to follow. As a result, the best advice is to follow the more conservative ruling, *Singleton*. This means employers should employ the same preventative or remedial measures concerning same-sex sexual harassment that they currently employ with opposite-sex sexual harassment. This means employers should treat derogatory, demeaning, or offensive comments that have an express or implied sexual connotation as a form of sexual harassment even if between workers of the same gender.