

IN THE SUPREME COURT OF CALIFORNIA

AMAANI LYLE,)	
)	
Plaintiff and Appellant,)	
)	S125171
v.)	
)	Ct.App. 2/7 160528
WARNER BROTHERS TELEVISION)	
PRODUCTIONS et al.,)	
)	Los Angeles County
Defendants and Respondents.)	Super. Ct. No. BC239047
_____)	

Plaintiff was a comedy writers' assistant who worked on the production of a popular television show called *Friends*. The show revolved around a group of young, sexually active adults, featured adult-oriented sexual humor, and typically relied on sexual and anatomical language, innuendo, wordplay, and physical gestures to convey its humor. Before plaintiff was hired, she had been forewarned that the show dealt with sexual matters and that, as an assistant to the comedy writers, she would be listening to their sexual jokes and discussions about sex and transcribing the jokes and dialogue most likely to be used for scripts. After four months of employment, plaintiff was fired because of problems with her typing and transcription. She then filed this action against three of the male comedy writers and others, asserting among other things that the writers' use of sexually coarse and vulgar language and conduct, including the recounting of their own sexual experiences, constituted harassment based on sex within the meaning of the

Fair Employment and Housing Act (the FEHA) (Gov. Code, § 12900 et seq.; all further statutory references are to this code unless otherwise indicated).

The Court of Appeal reversed the trial court's order granting summary judgment on plaintiff's sexual harassment action. We granted review to address whether the use of sexually coarse and vulgar language in the workplace can constitute harassment based on sex within the meaning of the FEHA, and if so, whether the imposition of liability under the FEHA for such speech would infringe on defendants' federal and state constitutional rights of free speech.

Here, the record discloses that most of the sexually coarse and vulgar language at issue did not involve and was not aimed at plaintiff or other women in the workplace. Based on the totality of the undisputed circumstances, particularly the fact the *Friends* production was a creative workplace focused on generating scripts for an adult-oriented comedy show featuring sexual themes, we find no reasonable trier of fact could conclude such language constituted harassment directed at plaintiff because of her sex within the meaning of the FEHA. Furthermore, to the extent triable issues of fact exist as to whether certain offensive comments were made about women other than plaintiff because of their sex, we find no reasonable trier of fact could conclude these particular comments were severe enough or sufficiently pervasive to create a work environment that was hostile or abusive to plaintiff in violation of the FEHA. Accordingly, we remand the matter with directions to affirm the summary judgment order insofar as it pertains to plaintiff's sexual harassment action, without addressing the potential of infringement on defendants' constitutional rights of free speech.

FACTUAL AND PROCEDURAL BACKGROUND

After receiving a right to sue letter from the Department of Fair Employment and Housing, plaintiff Amaani Lyle filed this action against organizations and individuals involved in the production and writing of the

popular adult-oriented *Friends* television show, including Warner Bros. Television Production (WBTV), NBC Studios (NBC), Bright, Kauffman, Crane Productions (BKC), and producers-writers Adam Chase, Gregory Malins, and Andrew Reich. Her first amended complaint alleged causes of action under the FEHA for race and gender discrimination, racial and sexual harassment, and retaliation for opposing race discrimination against African-Americans in the casting of *Friends* episodes. The complaint also alleged common law causes of action for wrongful termination in violation of the public policies against race and gender discrimination and retaliation for complaining about race discrimination in violation of the FEHA.

After engaging in discovery, defendants moved for summary judgment and summary adjudication. The trial court granted the motion, ruling: (1) NBC and BKC were not plaintiff's employers and therefore were not liable on any FEHA cause of action; (2) plaintiff's FEHA harassment claims were time-barred; (3) plaintiff could not, in any event, factually establish her FEHA claims of race and gender discrimination, retaliation, or harassment as to any defendant; and (4) plaintiff could not establish her common law causes of action for wrongful termination in violation of public policy. The court entered judgment for all defendants and awarded them \$21,131 in costs. In a postjudgment order, the court awarded defendants \$415,800 in attorney fees on grounds that plaintiff's FEHA causes of action were "frivolous, unreasonable and without foundation."

The Court of Appeal affirmed the judgment in part and reversed it in part. Among other things, the court found defendants entitled to summary adjudication on plaintiff's FEHA and common law causes of action for termination based on race, gender, and retaliation, but concluded triable issues of fact existed as to her FEHA causes of action for sexual and racial harassment against defendants WBTV, BKC, Chase, Malins, and Reich. Accordingly, the court reversed the

attorney fees award and vacated the award of costs for recalculation by the trial court to reflect the partial reversal of the judgment.

Both sides petitioned for review. We denied plaintiff's petition, but granted defendants' petition and ordered briefing and argument limited to the following issues: (1) Can the use of sexually coarse and vulgar language in the workplace constitute harassment based on sex within the meaning of the FEHA? and (2) Does the imposition of liability under the FEHA for sexual harassment based on such speech infringe on defendants' rights of free speech under the First Amendment to the federal Constitution or the state Constitution?

DISCUSSION

A. Sexually Coarse and Vulgar Language

There is no dispute that sexually coarse and vulgar language was used regularly in the *Friends* writers' room. But the use of sexually coarse and vulgar language in the workplace is not actionable per se. Rather, we must look to the specific facts and circumstances presented to determine whether the language at issue constituted harassment based on sex within the meaning of FEHA and whether such language was severe enough or sufficiently pervasive to create a work environment that was hostile or abusive to plaintiff because of her sex.

1. *The Facts Presented in the Summary Judgment Proceeding*

Our first task is to determine whether the facts presented in the summary judgment proceeding were sufficient to establish a prima facie case of sexual harassment under the appropriate legal standards. We begin by reviewing the rules governing the summary judgment procedure.¹

¹ In this opinion, we review the trial court's order granting summary judgment only insofar as it pertains to plaintiff's sexual harassment claims; we do not review the order with regard to her racial harassment claims. Accordingly, our

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“A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); see also *id.*, § 437c, subd. (f) [summary adjudication of issues].) The moving party bears the burden of showing the court that the plaintiff ‘has not established, and cannot reasonably expect to establish, a prima facie case’ [Citation.]” (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460 (*Miller*)). “[O]nce a moving defendant has ‘shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,’ the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff ‘may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action’ [Citations.]” (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477.)

“On appeal from the granting of a motion for summary judgment, we examine the record de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party. [Citation.]” (*Miller, supra*, 36 Cal.4th at p. 460.)

Defendants’ summary judgment motion relied on declarations from defendants Chase, Malins, Reich, and others, and other facts developed during discovery. These declarations and the deposition testimony of the parties and others disclosed that Chase, Malins, and Reich worked for defendant WBTV and

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analysis addressing whether summary judgment was proper in this case should be understood in this context.

were writers on the sixth production season of *Friends*. In June 1999, Malins and Chase, who also served as executive producers on the production, interviewed plaintiff, an African-American woman, for the position of writers' assistant for the *Friends* production. During the interview, they told plaintiff the show dealt with sexual matters and, as a result, the writers told sexual jokes and engaged in discussions about sex. Plaintiff responded that sexual discussions and jokes did not make her uncomfortable, and she subsequently was hired as a writers' assistant.

In her deposition, plaintiff testified she had no recollection of any employee on the *Friends* production ever saying anything sexually offensive about her directly to her. No one on the production ever asked her out on a date or sexually propositioned her. Likewise, no one ever demanded sexual favors of her or physically threatened her.

Plaintiff testified, however, that a number of offensive discussions and actions occurred in the writers' meetings she was required to attend. The writers regularly discussed their preferences in women and sex in general. Chase spoke of his preferences for blonde women, a certain bra cup size, "get[ting] right to sex" and not "mess[ing] around with too much foreplay." Malins had a love of young girls and cheerleaders. Some of the sex-based discussions occurred outside the writers' room, that is, in the breakroom and in the hallways.

Also during the writers' meetings, Malins constantly spoke of his oral sex experiences and told the group that when he and his wife fought, he would "get naked" and then they would never finish the argument. Malins had a "coloring book" depicting female cheerleaders with their legs spread open; he would draw breasts and vaginas on the cheerleaders during the writers' meetings. The book was left on his desk or sometimes on writers' assistants' desks. Malins frequently used a pencil to alter portions of the name "*Friends*" on scripts so it would read

“penis.” Malins also spoke of his fantasy about an episode of the show in which the *Friends* character “Joey” enters the bathroom while the character “Rachel” is showering and has his way with her. And, during each of the four months plaintiff worked on the *Friends* production, some writers made masturbatory gestures.

In addition, plaintiff heard the writers talk about what they would like to do sexually to different female cast members on *Friends*. Malins remarked to Chase that Chase could have “fucked” one of the actresses on the show a couple of years before, and the two constantly bantered about the topic and how Chase had missed his chance to do so. Chase, Malins, and Reich spoke demeaningly about another actress on the show, making jokes about whether she was competent in sexually servicing her boyfriend. They also referred to her infertility once and joked she had “dried twigs” or “dried branches in her vagina.”

In their depositions, Chase, Malins, and Reich gave testimony that corroborated portions of plaintiff’s allegations. Chase acknowledged he had discussed, while in the writers’ room, his personal sexual experiences. Chase also confirmed that he and other writers discussed anal sex, and that he had gestured on occasion as if he were masturbating, but could not recall having done so when plaintiff was present. Malins and Reich admitted “blowjob stories” were told in the writers’ room. Reich said he had pantomimed masturbation in the writers’ room, sometimes as a way of indicating something was a waste of time. In the writers’ room and sometimes elsewhere, Reich and other writers discussed oral sex and anal sex, and writers discussed their personal sexual conduct. Reich also acknowledged he and others altered inspirational sayings on a calendar, changing, for example, the word “persistence” to “pert tits” and “happiness” to “penis.”

These writers and others also testified that, both before and after plaintiff was hired, sexually coarse and vulgar language was used in the writers’ room in group sessions with both male and female participants present, and both male and

female writers discussed their own sexual experiences to generate material for the show. Episodes of the show often featured sexual and anatomical language, innuendo, wordplay, and physical gestures to convey humor concerning sex, including oral sex, anal sex, heterosexual sex, gay sex, “talking dirty” during sex, premature ejaculation, pornography, pedophiles, and so-called “threesomes.”

In opposing defendants’ summary judgment motion, plaintiff likewise relied on the parties’ deposition testimony. She also submitted two of her own declarations, in which she reiterated and more particularly described the graphic nature of the writers’ alleged comments and conduct.² Her declarations also referred to incidents she did not mention in her deposition. Most significantly, she

² For example, plaintiff’s declarations stated: Malins, Chase, and Reich “would say that what they liked was ‘a woman with big tits who could give a blow job’ ”; the writers “would for hours on end make lewd and offensive drawings of women”; they “would also commonly sit around and bang their hands on the bottom of the desk to make it sound as though they were masturbating”; Malins would say “he gets to hang out with them [two of the actresses], get rich, dream about fucking them and yet nobody bothers him when he’s out in public”; Malins told a story “about a woman that when she had his penis down her throat had a gag reflex” and Malins thought she “was going to throw-up” on it; the writers made plaintiff sit “around waiting to go home” while they “were sitting around pretending to masturbate and continually talking about schlongs”; Reich “said that [one actress’s] pussy was full of dried up twigs and said that if her husband put his dick in her she’d break in two”; Chase told plaintiff “he could have ‘fucked’ ” one of the actresses but said it’s “ ‘not like she asked me to bang her in the ass’ ”; Chase mentioned on at least two occasions that “he would have liked to have anal sex with [the same actress]”; Chase “once rhetorically asked the group, of [one actress and her then boyfriend], ‘do you think they fuck in the dressing room’ ”; and the “blatant use of obscene language and flagrant discussions about personal sex lives occurred at least four days per week while [she] worked on ‘Friends’ and continued up until at least two days before [her] termination.”

claimed for the first time that Chase, Malins, and Reich referred to women using gender-related epithets.³

In this court, defendants argue the facts shown in the summary judgment proceeding do not establish actionable harassment under the FEHA because: (1) use of sexual speech, standing alone, does not violate the FEHA's prohibition against harassment because of sex; and (2) the conduct did not amount to severe or pervasive conduct that altered the terms or conditions of plaintiff's employment.

2. The FEHA and its Prohibitions

We now turn to a review of the FEHA and its prohibitions.

With certain exceptions not implicated here, the FEHA makes it an unlawful employment practice for an employer, "because of the . . . sex . . . of any person, . . . to discriminate against the person in compensation or in terms, conditions, or privileges of employment." (§ 12940, subd. (a).) Likewise, it is an unlawful employment practice for an employer, "because of . . . sex, . . . to harass an employee." (§ 12940, subd. (j)(1).) Under the statutory scheme, " 'harassment' because of sex" includes sexual harassment and gender harassment.

³ In their reply brief on the merits, defendants urge us to disregard these particular "facts" because, among other things, plaintiff did not mention them in her deposition but first raised them in a declaration, dated December 20, 2001, that she filed in opposition to defendants' summary judgment motion. But defendants provide no information or record citations indicating what objections, if any, they made to that declaration or what evidentiary rulings the trial court made. Although defendants claim both the trial court and the Court of Appeal "properly disregarded" plaintiff's December 20, 2001 declaration, they do so without reference to the record and without addressing the existence or significance of a second declaration plaintiff filed, dated March 19, 2002, in which she refers to the same "facts," as well as others. Because defendants' evidentiary contentions in this court lack adequate argument and support, we shall not disregard the evidence concerning the reported use of gender-related epithets.

(§ 12940, subd. (j)(4)(C).) These prohibitions represent a fundamental public policy decision regarding “the need to protect and safeguard the right and opportunity of all persons to seek and hold employment free from discrimination.” (*Brown v. Superior Court* (1984) 37 Cal.3d 477, 485; see also *Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1414.)

As we recently explained, “the prohibition against sexual harassment includes protection from a broad range of conduct, ranging from expressly or impliedly conditioning employment benefits on submission to or tolerance of unwelcome sexual advances, to the creation of a work environment that is hostile or abusive on the basis of sex.” (*Miller, supra*, 36 Cal.4th at p. 461.) Here, plaintiff does not contend defendants subjected her to unwelcome sexual advances as a condition of employment; rather, she alleges defendants created a hostile or abusive work environment. For this type of claim, plaintiff need not show evidence of unwanted sexual advances. (*Id.* at pp. 461-462.)

According to regulations interpreting and implementing the FEHA, the prohibition against discrimination in employment because of sex is intended to guarantee that members of both sexes will enjoy equal employment benefits. (Cal. Code Regs., tit. 2, § 7290.6, subd. (b).) For purposes of the FEHA, an “employment benefit” specifically includes “provision of a discrimination-free workplace” (*id.*, § 7286.5, subd. (f)), which in turn is defined as “provision of a workplace free of harassment” (*id.*, § 7286.5, subd. (f)(3).)

Like the FEHA, title VII of the federal Civil Rights Act of 1964 (Title VII) (42 U.S.C. § 2000e et seq.) prohibits sexual harassment, making it an unlawful employment practice for an employer, among other things, “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex[.]” (42 U.S.C. § 2000e-2(a)(1).) Because the workplace environment is one of the terms,

