Department of Fair Employment and Housing V. Lyddan Law Group, Llp, 2010 WL 4901732, 1 (Cal.F.E.H.C.).

Fair Employment and Housing Commission
State of California
*1

In the Matter of the Accusation of the
DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING
v.
LYDDAN LAW GROUP, LLP and JEFFREY LYDDAN, as an Individual, Respondents.
ROBIN L. WILLIAMS, Complainant.

Case Nos. E-200607-A-1082-00-rs, E-200607-A-1082-01-rs, C 07-08-062, 10-04-P

Dated: October 19, 2010

Courtesy of

DECISION

Administrative Law Judge Caroline L. Hunt heard this matter on behalf of the Fair Employment and Housing Commission from April 21 through 23, 2009, in San Francisco, California. Megan Elsea, Staff Counsel, and Susan Saylor, then Acting Chief Counsel, represented the Department of Fair Employment and Housing. Carla Hartley, Esq., of Dillingham & Murphy, LLP, represented Lyddan Law Group, LLP and Jeffrey Lyddan. Complainant Robin Williams and Jeffrey Lyddan, Esq., attended the proceedings throughout.

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The administrative law judge issued her proposed decision on May 4, 2010. On June 2, 2010, the Commission decided not to adopt the proposed decision and notified the parties of their opportunity to file further argument (NOFA) by June 17, 2010. (Cal. Code of Regs., tit. 2, § 7434, subd. (b).) The Commission requested written argument from the parties on the following specific issue:

Whether there can be a violation of the failure to take all reasonable steps to prevent discrimination and harassment from occurring (Gov. Code, § 12940, subd. (k)) absent a finding of either unlawful discrimination or harassment under the Fair Employment and Housing Act.

Both the Department of Fair Employment and Housing, by its Staff Counsel Megan Elsea and then-Acting Chief Counsel Susan Saylor, and Lyddan Law Group, LLP, and Jeffrey Lyddan, by their counsel Carla Hartley, Esq., timely filed their post-hearing briefs in further argument (NOFA briefs).

Law

After consideration of the entire record and review of the parties' NOFA briefs, we now issue our decision, affirming the administrative law judge's proposed decision that the DFEH did not establish that respondents are liable for sexual or racial harassment under the Fair Employment and Housing Act (the Act or FEHA). (Gov. Code, § 12940, subd. (j).) We further affirm that the DFEH did not prove that respondents retaliated against complainant or violated her right to a discrimination-free work environment. (Gov. Code, § 12940, subds. (a) and (f).)

We also agree with the administrative law judge's determination that the DFEH, in the exercise of its police powers, established that respondents are liable for the unlawful employment practice of failing to take all reasonable steps to prevent discrimination or harassment (Gov. Code, § 12940, subd. (k)), as discussed more fully below. We clarify, however, that we expressly do not create a private cause of action for an independent (k) violation. Rather, we find the prosecution of an independent (k) violation to be exclusively the province of the DFEH.

Offices, A P C

Accordingly, we issue our per curiam decision, setting out the findings of fact, determination of issues and order. We designate this decision as precedential. (Gov. Code, §§ 12935, subd. (a), 12972, subd. (a); Cal. Code Regs., tit. 2, § 7435, subd. (a).)

FINDINGS OF FACT
Complaint and Accusation
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1. On May 30, 2007, Robin L. Williams (complainant or Williams) filed written, verified complaints with the Department of Fair Employment and Housing (DFEH or Department) against Lyddan Law Group, LLP, and Jeffrey Lyddan, as an individual. The complaints alleged that, in the preceding year, Jeffrey Lyddan had created a hostile work environment and discriminated against complainant on the bases of race, religion, and sex, by making race-related comments and sending derogatory emails. The complaints further alleged that Lyddan Law Group and Jeffrey Lyddan retaliated against Williams when she protested, in violation of the FEHA, Government Code section 12900, et seq.

2. The DFEH is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h). On

May 29, 2008, Phyllis W. Cheng, in her official capacity as Director of the DFEH, issued an accusation against Lyddan Law Group, LLP, and Jeffrey Lyddan, as an individual (collectively, respondents).

3. In its accusation, the DFEH alleged that respondents subjected Williams to sexual and racial harassment, creating a hostile work environment, in violation of Government Code section 12940, subdivision (j). The DFEH also charged that respondents failed to provide complainant a workplace free of discrimination, in violation of Government Code section 12940, subdivision (a), and retaliated against complainant for opposing the harassment, in violation of Government Code section 12940, subdivision (h). Finally, the DFEH alleged that respondents failed to take all reasonable steps to prevent discrimination and harassment from occurring, in violation of Government Code section 12940, subdivision (k).

4. On October 7, 2008, the DFEH filed a first amended accusation, amending various dates, adding factual allegations of the alleged retaliatory acts, amending some job titles and paragraph numbers, and otherwise realleging the allegations set forth in the original accusation.

5. On March 17, 2009, the DFEH filed a second amended accusation, in which the DFEH added factual allegations with details of specific emails and alleged retaliatory acts; deleted the charge that respondents terminated Williams' employment; added that Williams was "forced to resign" effective May 8, 2007; corrected spelling and paragraph numbering, and otherwise realleged the allegations set forth in the original accusation.

Williams' Work History With Respondent Lyddan

Courtesy of

6. Beginning in September 1999, complainant Williams began working as a paralegal at the law firm Carroll, Burdick & McDonough, LLP, in San Francisco, California. In 2000, Jeffrey Lyddan, an attorney licensed to practice law in California, joined the firm, becoming a partner.

7. Williams is an African American female. Lyddan is a Caucasian male.

8. In April 2006, Lyddan left Carroll, Burdick & McDonough, LLP, to join Gordon & Rees, LLP, also in San Francisco. Lyddan brought staff from his former firm with him to Gordon & Rees, including Williams and two associates, David Bona, Esq., and Linda Yen, Esq.

Dowdall

9. In June 2006, after an ethical conflict arose between Lyddan's representation of a major client and Gordon & Rees, LLP, Lyddan established his own firm, Lyddan Law Group, a California limited liability partnership, practicing within the Gordon & Rees' offices at 275 Battery Street, 18th Floor, San Francisco, CA, 94111. Lyddan was managing partner of Lyddan Law Group, directly employing and supervising attorneys David Bona and Linda Yen, legal assistant Nicole Dill and, after Dill left, Penny Doering (later Mackey), part time case clerk Manisha Brown, and paralegal Williams. From June 2006 to the date of hearing, respondent Lyddan Law Group was an employer within the meaning of Government Code sections 12926, subdivision (d), and 12940, subdivisions (a), (h), (j), and (k), and Jeffrey Lyddan was a supervisor, within the meaning of Government Code sections 12926, subdivision (r), and 12940, subdivision (j).

Law

10. Williams's duties as a paralegal at Lyddan Law Group involved helping prepare cases for trial, including setting up exhibit binders, coordinating expert witnesses and their travel schedules, and preparing deposition summaries and exhibits for trial. Lyddan Law Group paid her $58,000 a year.

11. During their six years working together, Lyddan thought highly of the quality of Williams' work, and he believed they enjoyed a good working relationship.

Alleged Offensive Conduct

Offices A P C

12. During the course of Williams' employment at Lyddan Law Group from July to December 2006, Lyddan sent emails to his employees, including Williams, and made remarks and gestures as follows:

(a) In about July 2006, Lyddan questioned Williams about case clerk Manisha Brown's first name, mispronouncing "Manisha" several times, and asking, "What kind of name is that?" Williams explained that Manisha was an African American name pronounced "Maneesha." Williams thought that Lyddan was making fun of the name because it was not a "typical" American name, but African American. Lyddan asked again, "What kind of name is that?"

(b) In July 2006, in Williams' presence, Lyddan made "rapper" hand gestures, in imitation of a "Pimp My Ride" television show host and rapper, Xzibit.

(c) Also in July 2006, in Williams' presence, Lyddan, while referring to ""John Doe," [FN1] a African American, dreadlock-wearing employee of Gordon & Rees, mimicked the smoking of a marijuana cigarette. Williams was angry at Lyddan's inaccurate generalization.

(d) In July 2006, when Penny Doering interviewed for a job at Lyddan Law Group, Lyddan commented in front of Williams, while rubbing his hands together, that one of the applicants was "young," "cute" and wearing a "little cute skirt."

(e) In late July 2006, shortly after Penny Doering joined Lyddan Law Firm, Doering described to her co-workers and Lyddan a recent

incident where an individual had been fatally shot by police officers. Williams remarked that she thought that the police were "overzealous" in their actions. Lyddan told Williams that she just thought that because she was black. Williams found Lyddan's remark "slightly" offensive, unsure if Lyddan was using a racial stereotype. She told Lyddan that she held her views because she was a liberal Democrat.

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(f) On August 4, 2006, Lyddan wrote an email to Williams, Bona and Yen about a pending clergy abuse case that they were working on, involving a Hispanic child who had been chained up and sexually abused by his uncle in Santa Monica, California. Referring to the child's family, who had not visited the child in the months he lived with his uncle, Lyddan wrote, "... You know those wetbacks would want to spend some tine [sic] at the beach ...," adding in parentheses, "That was a joke." Williams was angry at Lyddan's use of the word ""wetback."

(g) Between July and September 2006, Williams heard Lyddan and the attorneys refer to Penny Doering as "bible-thumping white trash." Williams did not like them referring to Doering in this manner.

(h) In October 2006, Lyddan used the term "rice rocket" in front of Williams. When she asked what the term meant, he said that "everyone" used the expression, which referred to a modified Asian sports car or bike. Williams thought the term offensive, telling Lyddan that it was "not cool."

(i) Lyddan described to Williams an African American medical expert retained by respondents as looking "crazy;" "black [with] wild hair;" and a daughter who was "beautiful like all mulattoes are." Williams was offended by Lyddan's description of the expert and use of the word "mulatto" to describe his daughter.

(j) During Williams' employment, Lyddan circulated an email to all employees depicting a photograph of a two-car garage, where one vehicle was stacked on top of the other. The written caption stated that female drivers did not know how to park. Williams considered the cartoon sexist.

(k) On November 29, 2006, Lyddan forwarded an email to Williams, David Bona, Linda Yen, Manisha Brown and Penny Doering, referring to a column by Ann Coulter, prefacing in his forwarding remarks, "Here is one of the few jokes from my high school friend that I can send around to everyone ...." The email itself, with the subject line "Irony," stated:
Ann Coulter's laugh-out-loud column notes the irony of Muslims threatening to boycott US Airways for booting six imams from a flight this week.
"Six imams removed from a US Airways flight from Minneapolis to Phoenix are calling on Muslims to boycott the airline. If only we could get Muslims to boycott all airlines, we could dispense with airport security altogether," writes Coulter. "The idea that a Muslim boycott against US Airways would hurt the airline proves that Arabs are utterly tone-deaf, continues Coulter. "This is roughly the equivalent of Cindy Sheehan taking a vow of silence.
How can we hope to deal with people with no sense of irony' The next you know, New York City cab drivers will be threatening to bathe."
Williams responded to Lyddan that the email was "So not funny at all," and went on to criticize Ann Coulter's generalization about Arabs. Lyddan responded by emailing his employees, including Williams, stating, "... [P]lease don't think that by sending this around that I was making a racist statement!" Williams responded with further critique of Ann Coulter's column, which she considered offensive and racist, although she noted to Lyddan, "I know you are not making a racist statement."

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(l) On November 30, 2006, Lyddan emailed Penny Doering the following:

A Real Business Man. The Next Mexican Millionaire.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Doering emailed a reply to Lyddan, "You are such a racist! LOL." Doering later, on February 18, 2007, forwarded a copy of the email to Williams.

(m) On December 7, 2006, Lyddan sent an email to his employees, including Williams, that depicted an elderly male and female sitting together.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE
Underneath the photograph was the following text:
A man and his ever-nagging wife went on vacation to Jerusalem. While they were there, the wife passed away. The undertaker told the husband, "You can have her shipped home for $5,000, or you can bury her here, in the Holy Land, for $150." The man thought about it and told him he would just have her shipped home.
The undertaker asked, "Why would you spend $5,000 to ship your wife home, when it would be wonderful to be buried here and you would spend only $150."

The man replied, "Long ago a man died here, was buried here, and three days later he rose from the dead. I just can't take that chance.
Williams responded to Lyddan, "nagging wife" and "Jerusalem, come on," by which she meant that the email was potentially antisemitic and, from Lyddan, predictably sexist.

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(n) On January 22, 2007, Lyddan forwarded an email to Penny Doering, prefacing it with the statement, “I thought this was funny. I'm not making a political statement.” The email, entitled “Latest California poll,” stated:
The latest telephone poll taken by the Governor of California yielded results on whether or not people who live in California think illegal immigration is a serious problem:
41% of the respondents answered: “Yes, it is a serious problem.”
59% of the respondents answered: “No es un problema serioso!”
Penny Doering forwarded Williams a copy of the email on August 9, 2007.

Year-End Bonus 2006

13. In late November 2006, Williams asked Lyddan about end-of-year bonuses. Williams and her fellow workers were used to receiving annual bonuses, Williams having received $11,200 at Carroll Burdick in 2005. Lyddan was noncommittal in his response on the bonus issue.

14. On December 11, 2006, Lyddan informed Williams that, because his largest client, an insurance firm, was slow in paying its legal bills, he did not think that he could pay end-of-year bonuses to the staff that year. Williams, Bona, and Yen were disappointed and upset at not receiving a bonus.

15. On December 13, 2006, Lyddan extended an email invitation to his staff to attend the Gordan & Rees Christmas party. Williams emailed Lyddan that she did not intend to go, because the Gordan & Rees employees would be receiving their bonuses on the day of the party. Lyddan responded, telling Williams she should apologize to him because “I am the most loyal and appreciative person you have ever worked for or with!” Williams emailed back, explaining that the issue was bonuses and appreciation, and that she “looked forward to her Christmas bonus helping me out” of “numerous financial set backs.”

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16. None of Lyddan Law Group's employees received a bonus at Lyddan Law Group in 2006.

Accusations About Gossiping

17. On about January 5, 2007, Lyddan called Williams into his office and accused her of spreading false gossip about his wife's reason for leaving her job at Carroll Burdick. A secretary at that law firm had been accused of embezzlement, and Lyddan believed that Williams had spread rumors that Lyddan's wife had been involved. Lyddan was angry at Williams, although she vehemently denied gossiping about his wife.

18. Upset by Lyddan's accusation against her, complainant stayed away from work and was placed on medical leave for stress from January 8 to February 26, 2007. She provided doctor's notes to Lyddan during her period of leave.

19. Throughout most of Williams' leave period, Lyddan and his associates were in trial in Los Angeles, and therefore not in the office.

20. In February 2007, while still out on medical leave, Williams contacted the DFEH about filing a charge against respondents. She completed a Pre-Complaint Questionnaire in which she stated that Lyddan had accused her of leaking information about the alleged embezzlement at Carroll Burdick and that he had told her, “If you don't like it here, why don't you leave?”

Williams' Resignation from Lyddan Law Group

21. After Williams returned to work on February 26, 2007, Lyddan and the associates were very busy, preparing for the damages phase of the case they had been defending in Los Angeles.

22. In April 2007, David Bona and Linda Yen had issues with William's job performance, asserting that it had declined since the denial of the 2006 bonuses.

23. In late April 2007, an issue arose about a pending production of documents, where Williams was assigned to tag confidential settlement materials. Williams, who had been taking medication for ongoing back pain, expressed concern about physically lifting boxes of documents. After a sequence of emails back and forth about the task, Lyddan ultimately wrote to Williams, ““Robin forget it ... I do not need your help.”

24. Williams forwarded to her sister Acacia Williams a copy of the April 2007 email exchange about the document production, stating that Lyddan “scared” her.

25. In early May 2007, Linda Yen emailed Williams inquiring about her progress summarizing a deposition. Williams replied, “ACTUALLY, I finished the page-line yesterday.” Yen complained to Lyddan about Williams' attitude. In an email dated May 4, 2007, Lyddan accused Williams of being “haughty and sarcastic” in her tone and use of “CAPS [capital letters]” to write to Yen.

26. On May 8, 2007, Williams replied to Lyddan by email, stating inter alia,
Your email makes it sound like this is a respectful, professional environment when it is the exact opposite. You, my boss, have circulated racist and sexist emails on more than one occasion to your employees, and continued this even when told it was unacceptable, and I was frightened by the irate email you sent me a week and a half ago. In the entire time that I have been in the professional world, I have never received anything like that from a person in authority ...

This culture of harassment which began with your accusations regarding your wife and my telling you that I had filed a claim with the Labor Department [FN2] has been accelerated unbearably with your receipt of my latest doctor's note.
Williams went on in her email to describe her ongoing "state of stress" in having to, "[e]ach day ... deal with some form of harassment which has me leaning over my desk in pain .... It's inhumane." Williams concluded with the statement that her "LAST DAY WILL BE THIS APPROACHING FRIDAY," May 11, 2007.

27. That same day, May 8, 2007, Lyddan replied to William's email, stating that he was "saddened" that Williams had decided to quit. He went on to say that he found Williams' "gossiping at [Gordon & Rees] and at [Carroll Burdick] very distasteful and hurtful and you continue to slander me in this email." He continued,
As for your vitriolic email, I take exception to your comment that our firm does not have a "respectful, professional environment." That too is not fair and simply not true! I have not "circulated racist and sexist emails." Please show me what you are talking about .... Send me one of these "racist and sexist emails that have offended you! If you make these accusations and share the falsehoods with others, then show me your proof!

28. Lyddan also told Williams that there was no need for her to come back into work, as he had accepted her resignation effective "now," and would mail her a check.

29. After leaving Lyddan Law Group, Williams diligently looked for another job. She also applied for and was granted unemployment insurance benefits. After a break in her job search in December 2007 to help look after her ailing father, Williams began work as a temporary employee at Severson and Werson in the last week of February 2008. On April 1, 2008, Severson and Werson hired her as a fulltime paralegal, earning more than she had earned at Lyddan Law Group.

30. Respondents Lyddan and Lyddan Law Group did not conduct any kind of investigation into the claims of harassment Williams made in her May 8 email.

31. Lyddan Law Group did not have an employee handbook or a written anti-harassment policy, and did not have a human resources department. Nor did Lyddan Law Group conduct trainings for its manager or employees in harassment or discrimination prevention. Lyddan had last undergone such training about three years prior, during his employment at Carroll Burdick.

32. In September 2009, Lyddan returned to work for Gordon & Rees as a partner. While retaining the business license for Lyddan Law Group, Lyddan no longer operated it as a law practice, but only for collection of accounts receivable.

DETERMINATION OF ISSUES

Liability

A. Sexual and Racial Harassment

The DFEH alleges that respondents are liable for sexually and racially harassing complainant Williams, in violation of Government Code section 12940, subdivision (j). Respondents argue that they are not liable for creating a hostile work environment, since the majority of the allegedly harassing remarks were not directed at Williams, and that the remainder were either protected by the First Amendment or were not made at all.

A violation under Government Code section 12940, subdivision (j), may be established by proving that respondent engaged in harassment based on complainant's sex or race and that the harassment created a hostile or abusive work environment. (Gov. Code, § 12940, subd. (j)(1); Miller v. Dept. of Corrections (2005) 36 Cal.4th 446, 462; Sheffield v. Los Angeles County Dept. of Social Services (2003) 109 Cal.App.4th 153, 161-162; Fisher v. San Pedro Peninsular Hospital (1989) 214 Cal.App.3d 590, 605; Beyda v. City of Los Angeles (1998) 65 Cal.App.4th 511, 516-517; Mogilefsky v. Superior Court (1993) 20 Cal.App.4th 1409, 1413-1414; Dept. Fair Empl. & Hous. v. Capital Hills Arco/AM-PM (June 12, 2006) No. 06-03-P [2006 WL 2239656, at *8 (Cal.F.E.H.C)].)

The objective severity of the harassment is judged from the perspective of a reasonable person in complainant's position, considering all of the circumstances, and is guided by common sense and sensitivity to social context. (Beyda v. City of Los Angeles (1998) 65 Cal.App.4th 511, 517, citing Oncale v. Sundowner Offshore Services, Inc. (1998) 523 U.S. 75, 81.) Not all workplace conduct that may be described as harassing creates liability under the FEHA. As the Supreme Court has stated, the statutory protections against harassment do not create a "general civility code." (Oncale v. Sundowner Offshore Services, Inc., supra, 523 U.S. at p. 81.) [FN3]

In this case, the DFEH asserts that Lyddan's remarks about African Americans in his statement, "You just think that because you're black;" his characterization of an African American as a marijuana smoker; his description of an expert witness as having "wild hair" and a "mulatto" daughter; and his imitation of rapper Xzibit's gestures, created a hostile work environment for Williams based on her race, African American. In addition, the DFEH asserts that Lyddan made demeaning remarks about the female sex, citing the "young, cute" job applicant wearing the "little cute skirt," and emails about "women drivers," and the "nagging wife," thereby creating a hostile work environment based on Williams' sex. Finally, the DFEH asserts that Lyddan's ethnic, religious and cultural references in his purportedly humorous emails, including the Ann Coulter column about Muslims; the cartoon of "The Next Mexican Millionaire" and use of the terms, "wetbacks," "bible-thumping white trash" and "rice rocket," further contributed to the hostile work environment for Williams.

Respondents assert that Lyddan's statements and emails did not amount to either “severe” or “pervasive” conduct that supports a finding of hostile work environment, and further, that a number of the statements which Williams attributed to Lyddan simply never happened. For example, while admitting his use of the phrases “mulatto,” “wetback,” and “rice rocket,” Lyddan denied using the word “black” to or about Williams, testifying “I never ever use the word ““black” or would use the word “black” when discussing anything with Robin [[Williams].” Lyddan also denied ever referring to a job applicant as cute or wearing a “little cute skirt,” and testified that he never said “bible-thumping white trash.” His emails, he testified, were meant as jokes, to develop “office camaraderie” and give everyone “a good laugh.”

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On the issue of credibility, Williams' recall of events is determined to be more reliable that Lyddans', whose memory was demonstrably faulty during his testimony at hearing. Nonetheless, this decision finds that Lyddan's emails about Muslims, Mexican millionaires, and women, and his mimicking marijuana smoking and a rapper's hand gestures, while demonstrating questionable judgment by Lyddan as a managing partner in a law firm, were legally insufficient, as a matter of law, to amount to the requisite objective severity or pervasiveness that give rise to a hostile work environment. The emails are, at worst, maladroit political and social commentary, and are, as argued by respondents, within the protections of the First Amendment. Similarly, the term “rice rocket,” while in dubious taste, is insufficiently offensive to be considered either severe or pervasive.

More troubling are Lyddan's remarks about William's holding her views because she was “black,” the expert's daughter being “mulatto,” the description of Penny Doering as “bible thumping white trash,” and his use of the term ““wetbacks.”

Respondents acknowledge that use of the term “wetback” is inappropriate. They argue, however, that it was only a single incident, in a context where Lyddan was angry at the Hispanic relatives of the abuse victim. But as the DFEH points out, even a single ethnic slur may support a hostile work environment claim, citing Dee v. Vintage Petroleum (2003) 106 Cal.App.4th 30, 36-37. [FN4] As the Second District Court of the Appeal notes, “there is neither a threshold “magic number' of harassing incidents that gives rise ... to liability ... nor a number of incidents below which a plaintiff fails as a matter of law to state a claim.” (Dee v. Vintage Petroleum, supra, 106 Cal.App.4th at p. 36, citing Rodgers v. Western-Southern Life Ins. Co. (7th Cir. 1993) 12 F.3d 668, 674.) In Dee, however, the court looked at the totality of the supervisor's conduct toward plaintiff, including calling her a “bitch,” an “asshole,” constantly berating her, and telling her to lie. Those circumstances are not present here.

The requisite standard involves a showing that Lyddan's conduct would have interfered with a reasonable employee's work performance, seriously affecting the psychological well-being of a reasonable employee and that Williams was actually offended.” (See Fisher v. San Pedro Peninsular Hospital, supra, 214 Cal.App.3d at p. 601.) That standard is not met here. The evidence in this case showed that Williams and Lyddan had a good working relationship, including during and after the alleged harassing comments which were made by Lyddan in the summer of 2006. It was not until mid-December that their relations soured, first on the issue of the annual bonus and then in early January, when Lyddan accused Williams of gossiping about his wife. This evidence does not support a finding that Williams' work environment was made subjectively or objectively hostile as a result of Lyddan's inadvisable and inappropriate remarks. The record showed that Lyddan exercised questionable judgment and lack of sensitivity to the ramifications of using ethnic slurs in the workplace. But, as the court stated in Aguilar v. Avis Rent A Car System, Inc. (1999) 21 Cal.4th 121, 130, “not every utterance of a racial slur in the workplace violates the FEHA or Title VII.” (Id.)

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Accordingly, the DFEH did not establish that respondents are liable for sexual or racial harassment in violation of the Act. (Gov. Code, § 12940, subd. (j).) [FN5]

B. Retaliation

The DFEH asserts that respondents retaliated against Williams for objecting to Lyddan's emails that contained racial and sexual stereotyping by assigning her menial tasks and excluding her from staff meetings, and by terminating her employment in June 2007. [FN6]

Government Code section 12940, subdivision (h), makes it unlawful for an employer “to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding” brought under the FEHA. (Gov. Code, § 12940, subd. (h); Cal. Code Regs., tit. 2, § 7287.8.) To establish retaliation under the Act, the DFEH must show that complainant engaged in protected activity, and that respondents subjected complainant to adverse employment action because of that protected activity. (Morgan v. Regents of the Univ. of California (2000) 88 Cal.App.4th 52, 69; Yanowitz v. L'Oréal USA, Inc. (2005) 36 Cal.4th 1028, 1042; Flait v. North American Watch Corp. (1992) 3 Cal.App.4th 467, 476; and Gemini v. Fair Empl. & Hous. Com. (2004) 122 Cal.App.4th 1004, 1018.)

The record does not support a finding that Lyddan was aware that Williams objected to his emails and ethnic remarks. Rather, Lyddan believed that Williams would never shy from speaking her mind if she was offended. Nor does the record establish that Williams was in fact offended, or that she ““protested” Lyddan's conduct. For example, while she indicated to Lyddan that the Ann Coulter column was “so not funny,” Williams also told Lyddan, “I know you're not being racist.”

The evidence established that the office atmosphere and working relationship between Lyddan and Williams had chilled after the denial of the 2006 bonuses and accusation by Lyddan in January 2007 that Williams had spread gossip about his wife. The evidence does not support a causal link between that change in the office atmosphere and any objection by Williams to Lyddan's emails or remarks. Nor is there a temporal link. The last documented email, the “nagging wife,” was sent on December 7, 2006, while it was not

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until May 2007, that Williams tendered her resignation.

Moreover, the record does not support the DFEH's contention that Williams' job duties were changed to “menial” non-paralegal tasks, or that she was excluded from attorney meetings, after she allegedly protested the emails. To the contrary, for much of the period in question, in those first months of 2007, Williams was out of the office on medical leave, and Lyddan and his associates were in trial in Los Angeles.

The DFEH alleges in its second amended accusation that Williams was constructively discharged from her job. To establish a constructive discharge, the DFEH must establish, by a preponderance of the evidence, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. (Turner v. Anheuser-Busch, Inc. (1994) 7 Cal.4th 1238, 1251; Dept. Fair Empl. & Hous. v. Capital Hills Arco/A.M.-P.M., supra, 2006 WL 2239656 at *8.) That standard was not met here. The evidence showed that William's attitude and work performance declined after the denial of a bonus in December 2006, and that being accused of gossiping upset Williams to the point that she took two months of medical stress leave as a result. On this record, it was these events, rather than the emails and ethnic remarks, that led to Williams' resignation. Thus, the record does not support a finding that Williams was constructively terminated.

Courtesy of

Accordingly, this decision finds that respondents are not liable for violation of Government Code section 12940, subdivision (h).

C. Failure to Take All Reasonable Steps

The DFEH asserts that respondents Lyddan Law Group and its managing partner Jeffrey Lyddan are liable for failing to take all reasonable steps to prevent sexual and racial harassment and discrimination, in violation of Government Code section 12940, subdivision (k). Respondents counter that, as a small employer, Lyddan Law Group should not be held liable for any violation of Government Code section 12940, subdivision (k).

The issue that we presented to the parties in our NOFA order (Cal. Code of Regs., tit. 2, § 7434, subd. (b)) was as follows: Whether there can be a violation of the failure to take all reasonable steps to prevent discrimination and harassment from occurring (Gov. Code, § 12940, subd. (k)) absent a finding of either unlawful discrimination or harassment under the Fair Employment and Housing Act.

Dowdall

In the NOFA brief submitted to us, the DFEH argues that the California Legislature, in enacting Government Code section 12940, subdivision (k), established its express intent to make “failure to take all reasonable steps to prevent discrimination and harassment from occurring” an independent violation of the FEHA. The DFEH cites to the legislative intent language accompanying the enactment of the 1984 amendment adding the predecessor to section 12940, subdivision (k), and the accompanying amendments. (Sen. Bill No. 2012, chaptered at Section 1 of Stats.1984, c. 1754.) The DFEH points out that, in its policy findings, the Legislature specifically “finds and declares” that “it is the existing policy of the State of California” that “employers be required to establish affirmative programs which include prompt and remedial internal procedures and monitoring so that worksites will be maintained free from prohibited harassment and discrimination ....” (Id.)

Law

The DFEH also argues the rules of statutory construction, citing the California Supreme Court decision in Shoemaker v Myers (1990) 52 Cal.3d 1, for the proposition that a statute cannot be rendered superfluous by interpreting it as meaningless. Moreover, the DFEH points out that the FEHA mandates ““effective remedies” that will both “prevent and deter” discrimination, and that the FEHA must be construed broadly, in recognition of its important public policy as expressly provided at Government Code sections 12920 and 12920.5. Thus, the DFEH asserts, Government Code section 12940, subdivision (k), must be given effect, as intended by the Legislature, as a separate, independent unlawful employment practice that may be prosecuted by the DFEH as part of the exercise of its police powers under the Act.

In respondents' NOFA brief, respondents assert that the instant case presents a matter of first impression. Briefly on this point, we note that we have previously found in our 1990 precedential decision entitled Dept. Fair Empl. & Hous. v. Madera County (Apr. 26, 1990) No. 90-03, FEHC Precedential Decs. 1990-91, CEB 1 [1990 WL 312871 (Cal.F.E.H.C.)] that “failure to prevent” was an independent violation of the Act, prosecutable by the DFEH. [FN7]

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In discussing the applicability of the Fourth District Court of Appeal decision in Trujillo v. North County Transit District (1998) 63 Cal.App.4th 280, respondents point out that the Trujillo case was a civil court action involving the application of tort law, rather than a prosecution by the DFEH of a statutory violation. Both parties, as do we, note that the Trujillo court stated, in dicta, “this seem[ed] to be an area where the DFEH would have jurisdiction to remedy inadequate procedures.”

Respondents' additional arguments offered in their NOFA brief include the assertions that complainant was not “an aggrieved person,” that this action is barred by the statute of limitations, and that, as a small employer, respondents Lyddan Law Group and Lyddan are entitled to special consideration under the FEHA. We do not agree. To the contrary, we find that respondent Jeffrey Lyddan, as an officer of the court and practitioner of the law, admitted before the California State Bar, is under the explicit duty to uphold the law and, as is his law firm, obligated to meet all of the FEHA obligations to prevent and deter discrimination and harassment in the workplace. In recognition of the value and appropriateness of workplace harassment prevention training, we note that respondents expressly do not object to the administrative law judge's order in her proposed decision that respondent Lyddan undergo sexual and

racial harassment prevention training.

In sum, after review of the record in this case, the parties' arguments and after due deliberations, we conclude that it is a specific unlawful employment practice prohibited by the Act, and independently prosecutable by the DFEH:
For an employer, labor organization, employment agency apprenticeship training program or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring. (Gov. Code, § 12940, subd. (k).)

Thus, we hold the DFEH may prosecute a "stand alone" failure to take all reasonable steps as an independent statutory violation of Government Code section 12940, subdivision (k), with the important limitation that we do not find that such a cause of action exists as an independent claim for private litigants. We further clarify that, while we affirm the DFEH's right, in the exercise of its police powers, to prosecute an independent violation of Government Code section 12940, subdivision (k), we expressly do not find that such a claim gives rise to an actionable tort or private cause of action in civil proceedings between private litigants.

We now turn to the determination of whether the DFEH proved that respondents violated Government Code section 12940, subdivision (k), on the record in this case.

The evidence established that Lyddan Law Group did not have a written anti-harassment policy, did not conduct trainings for its managers or employees in harassment or discrimination prevention, and did not have an employee handbook. The record further established that, when complainant Williams sent her May 8, 2007 email to respondent Lyddan, stating that, "you my boss, have circulated racist and sexist emails on more than one occasion to your employees, and continued this even when told it was unacceptable," respondents did not initiate any investigation into Williams' assertions. Williams further asserted in her May 8 email that "[t]his culture of harassment which began with your accusations regarding your wife and my telling you that I had filed a claim with the Labor Department has been accelerated unbearably with your receipt of my latest doctor's note."

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Rather than triggering an independent and fair investigation into Williams' claims, the record showed that Lyddan seized upon complainant's May 8, 2007 email to accuse her of "slander," and to precipitate the immediate termination of her employment, notwithstanding Williams' request to work to the end of the week.

We find that respondents' argument that respondent Lyddan is not responsible because he "never intended to be an employer" is without merit. This decision finds that being a managing partner of a law firm, and a supervisor and employer, imposes important responsibilities, including taking all reasonable steps to prevent sexual and racial harassment and discrimination in the workplace. Those steps include having an effective policy on the prevention of harassment, and either undertaking or ordering a fair and thorough investigation of any complaints of unlawful employment practices, such as racial and sexual harassment.

The record in this case gave no indication that respondent Lyddan recognized that his emails and conduct could be potentially viewed as harassing or offensive. Indeed, the record showed that Lyddan denied sending any potentially racist or sexist emails, challenging Williams to "show me your proof." At hearing, Lyddan acknowledged that his use of the term "wetbacks' was potentially offensive, but attributed his use of the ethnic slur to his anger in the case he was working on. As noted above, Lyddan's response to Williams' resignation email of May 8, 2007, in which she aired her complaints about the alleged "racist and sexist emails" and the "culture of harassment," was to ""accept" her resignation immediately. This does not comport with an employer's duty to "take all reasonable steps" on receipt of a complaint of sexual or racial harassment. To permit an employer to allow the complaining employee to resign, without conducting any investigation into the alleged harassment, is to sanction future and repeated violations of the FEHA. To meet his duties as an employer, at a minimum, Lyddan should have ordered a fair and impartial investigation into Williams' charges of harassment Moreover, if Lyddan had in place an effective harassment prevention policy, and had undergone recent harassment prevention training, he should readily have recognized that any such ethnic remarks and jokes are inappropriate behavior by an employer in the workplace.

Accordingly, based on the record before us, we find that the DFEH proved that respondents are liable for violating Government Code section 12940, subdivision (k).

Remedy

This decision does not find that, on the facts of this case, an award of monetary damages is appropriate for the violation of Government Code section 12940, subdivision (k), finding that affirmative relief is the appropriate preventative remedy.

The Act authorizes the Commission to order affirmative relief, including training in sexual and racial harassment prevention, to effectuate the purposes of the Act. (Gov. Code § 12970, subd. (a)(5).) Such affirmative relief is found to be particularly appropriate for respondent Jeffrey Lyddan given that, having rejoined Gordon & Rees as a partner, he is obligated by statute to undergo, at a minimum, biennial training in the prevention of sexual harassment. (Gov. Code § 12950.1.)

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Accordingly, respondent Lyddan shall be ordered to undergo sexual and racial harassment prevention training, at his own expense, to prevent recurrence of complaints of sexual or racial harassment.

ORDER

1. Respondents Lyddan Law Group and Jeffrey Lyddan shall immediately cease and desist from failing to take all reasonable steps to prevent harassment and discrimination from occurring.

2. Within 60 days of the effective date of this decision, respondent Jeffrey Lyddan shall undergo, at his own expense, training on sexual and racial harassment prevention under the Fair Employment and Housing Act. Jeffrey Lyddan shall secure advance approval from the Department of Fair Employment and Housing of the training provider, and the form and content of the training and shall provide written certification of his completion of the training to the Department and Commission.

3. Within 100 days after the effective date of this decision, respondent Jeffrey Lyddan shall, in writing, notify the Department of Fair Employment and Housing and the Commission of the nature of his compliance with section two of this Order. Respondent Jeffrey Lyddan shall also notify the Department and Commission of any change of address and telephone number.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5 and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers should be timely served on the Department, Commission, respondents and complainant.

Fair Employment and Housing Commission
George Wolverton
Dave Carothers
Patricia Perez
Stuart Leviton

Courtesy of

FN1. While the name of the alleged Gordon & Rees employee was identified on the record, the employee is identified as “John Doe” to protect third party privacy interests.

FN2. The record was not clear what claim Williams referred to by the ““Labor Department.” As noted above, her DFEH charge was filed on May 30, 2007, three months after she had initially contacted the DFEH to file a claim.

FN3. A hostile work environment can exist without any offensive remarks or physical contact directed at complainant. (See Fisher, supra, 214 Cal.App.3d at p. 610.) However, if complainant is not personally subjected to the harassing conduct, then the DFEH must make a higher showing of a hostile or abusive work environment, by showing that the harassing conduct “permeated” the work environment. (Ibid.) Harassing conduct aimed at people other than complainant is generally considered less severe or offensive than conduct directed at complainant. (See Lyle v. Warner Bros. Television Productions (2006) 38 Cal.4th 264, 285.)

FN4. But see Herberg v. California Institute of the Arts (2002) 101 Cal.App.4th 142, 150-153, holding that liability for sexual harassment may not be imposed based on a single incident that does not involve egregious conduct akin to a physical assault or the threat thereof.

FN5. Having not found a violation of Government Code section 12940, subdivision (j), this decision finds that respondents are similarly not liable for denying complainant a discrimination-free work environment, under Government Code section 12940, subdivision (a).

Law

FN6. As respondents accurately point out, the DFEH amended the accusation to delete the charge that respondents terminated Williams' employment, replacing it with a claim of constructive discharge (discussed below). Thus, the issue of whether respondents actually terminated Williams' employment is not before the Commission.

FN7. While in our decision in Dept. Fair Empl. & Hous. v. Madera County, supra, 1990-91, CEB 1, at pp. 28-31, we held that “failure to prevent” was an independent violation of the Act prosecutable by the DFEH, in that case we also found other unlawful practices, including sexual harassment, established by the DFEH. Thus, respondents' observation is not without merit. It is our intention in this decision to uphold and clarify our earlier ruling in Dept. Fair Empl. & Hous. v. Madera County, supra, 1990-91, CEB 1, at pp. 28-31, that the DFEH may bring an independent unlawful practice of failure to prevent discrimination or harassment, but, as we emphasize in this decision, we do not extend a section 12940, subdivision (k), violation as a tort cause of action to private litigants.

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FEHC Dec. No. 10-04-P, 2010 WL 4901732 (Cal.F.E.H.C.)

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