

# Law Report

LEGAL NEWSLETTER

VOLUME 7, ISSUE 1

## SEXUAL HARASSMENT IN HOLLYWOOD

*California Supreme Court Rejects Claim Against Friends Television Writers*

*An Environment Hostile or Offensive to One Worker May Not Be an Unlawful Workplace Environment*

Federal and state laws protect workers from sexual harassment in the workplace. Thus, a business can be liable to an employee who establishes that the company condoned a sexually hostile or offensive work environment that has a substantial negative effect on that worker's ability to perform her or his job duties. In recently throwing out a sex harassment case brought against the *Friends* television production, the California Supreme Court has confirmed what constitutes an illegally "hostile" or "offensive" workplace environment.

While the employer in this case was not liable for allowing a work culture regularly peppered with sexually oriented language and discussion commonly considered coarse and vulgar, the business of this particular workplace was developing a television production containing such subject matter. Moreover, the complaining employee was never the target for such language, she only witnessed the subject conversations conducted by co-workers.

This decision thus arises from unique circumstances and is not a license for employees to carry on such potentially offensive conversation and conduct in any other workplace context.

***Ms. Lyle claimed she was required to attend meetings in which writers regularly discussed their preferences in women and sex in general***

● ***Employee Amaani Lyle Found the Friends Work Environment Sexually Offensive and Hostile:*** Warner Bros. Television Production (WBTV) hired Amaani Lyle in 1999 as a writers' assistant for the sixth production season of the *Friends* television production. As the California Supreme Court recounted in its April, 2006 decision, the *Friends* 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." *Amaani Lyle v. Warner Brothers Television Productions, et al.* (April 20, 2006) \_\_ California Reports 4th (Cal.4th) \_\_, 42 West's California Reporter 3d (Cal.Rptr.3d) 2, 2006 Westlaw 1028558 (Cal.).

In a pre-employment interview, two of the writers and producers told Ms. Lyle the show dealt with sexual matters and, as a result, the writers told sexual jokes and engaged in discussions about sex. Ms. Lyle told them sexual discussions and jokes did not make her uncomfortable. Ms. Lyle later sued WBTV, NBC Studios, another production company and three of the show's writers, 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 unlawful sexual harassment.

In pre-trial testimony, Ms. Lyle claimed she was required to attend writers' meetings in which writers

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## MANDATORY SEXUAL HARASSMENT TRAINING CONTINUES IN CALIFORNIA

*State Official Advises Larger Employers Who Missed the January 1, 2006 Deadline Should Promptly Arrange for the Training*

California continues among the leaders in state regulation of the workplace. Perhaps the most significant 2005 development in California's employment-related laws was the mandatory sexual harassment training required by January 1, 2006 for all supervisors in companies with 50 or more employees or independent contractors. Fair Employment and

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“regularly discussed their preferences in women and sex in general.” She also claimed she overheard such discussions in other office locations. Ms. Lyle also recounted that writers described their own sexual experiences, drew explicit cartoons, made obscene gestures and spoke coarsely of the sexual habits and histories of two actresses on the show. However, Ms. Lyle could not recall any employee ever saying anything sexually offensive about her directly to her. She also acknowledged no one on the production ever asked her out on a date, sexually propositioned her, demanded sexual favors or physically threatened her.

In their pre-trial testimony, the three writers acknowledged aspects of Ms. Lyle’s allegations, including discussion of personal sexual experiences and sexually oriented drawings and gestures. They also recounted that before and after WBTV hired Ms. Lyle, such conduct was common among the show’s writers and assistants, male and female.

● **Supreme Court Found Friends Sexually Oriented Workplace Conduct was Not Aimed at Women Specifically and Was Not Sufficiently “Severe” or “Pervasive” to Constitute Unlawful Sexual Harassment:** California’s Fair Employment and Housing Act (FEHA) makes it unlawful for an employer to sexually harass – or condone the harassment of – a worker. In its *Lyle* decision, the Supreme Court observed, “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.”

***Although the court found this employer was not liable for sexual harassment in these circumstances, the justices emphasized they were not suggesting that “the use of sexually coarse and vulgar language in the workplace can never constitute harassment because of sex”***

As Ms. Lyle did not assert that defendants subjected her to unwelcome sexual advances as a condition of employment, her case depended on whether she could show that defendants subjected her to offensive conduct because of her gender and that they created a sexually hostile or abusive work environment objectively and subjectively “severe enough or sufficiently pervasive to alter the conditions of [her] employment.” In other words, Ms. Lyle had to show if she had been a man, the defendants would not have acted in the same manner around her and, further, that the subject conduct was so bad that it unreasonably impeded her from performing her job duties.

The California Supreme Court found that “the instances of sexual antics and sexual discussions [Ms. Lyle] identified did not involve and were not aimed at [her] or any other female employee... Such ‘nondirected’ conduct was undertaken in group sessions with both male and female participants present... women writers on

the *Friends* production also discussed their own sexual experiences to generate material for the show.”

Moreover, while Ms. Lyle contended that the subject writers’ sexually oriented meanderings “wasted her time,” the Supreme Court found “no indication the conduct affected the work hours or duties of [Ms. Lyle] and her male counterparts in a disparate manner. Accordingly, while the conduct certainly was tinged with ‘sexual content’ and sexual ‘connotations,’ [Ms. Lyle cannot show] that ‘members of one sex [were] exposed to disadvantageous terms or conditions of employment to which members of the other sex [were] not exposed’... or that if [Ms. Lyle] ‘had been a man she would not have been treated in the same manner.’”

***While no workplace need be sanitized from every off-color comment, employers must carry zero tolerance for sexually-oriented offensive or hostile statements or conduct aimed at either gender and hindering the work at hand***

The court also found that although Ms. Lyle had cited instances where the writers had directed some offensive, sexually oriented comments to two actresses on the show – “raising at least an inference that certain women working on the production of *Friends* were targeted for personal insult and derogation because of their sex, while the men working there were not” – Ms. Lyle had not demonstrated that the “conduct of the three male writers was sufficiently severe or pervasive to create

a hostile work environment.” No writer made one of the subject offensive, sexually oriented comments when the particular actresses were present. Moreover, as the demeaning statements did not concern her directly, Ms. Lyle was obligated to show such comments destructively “permeated” the workplace. Yet, the court found Ms. Lyle had only been able to cite to isolated incidents of such statements.

**Conclusion:** In finding for the defendant employers and managers in this instance, the court emphasized that it was not suggesting that “the use of sexually coarse and vulgar language in the workplace can never constitute harassment because of sex.” The court observed that language similar to the *Friends*’ instances “might well establish actionable harassment depending on the circumstances.” Nor did the court “imply that employees generally should be free, without employer restriction, to engage in sexually coarse and vulgar language or conduct at the workplace.” The court simply recognized “that the FEHA is not a ‘civility code’ and [is] not designed to rid the workplace of vulgarity.... While the FEHA prohibits harassing conduct that creates a work environment that is hostile or abusive on the basis of sex, it does not outlaw sexually coarse and vulgar language or conduct that merely offends.”

Thus, this case decision underscores that while no workplace need be sanitized from every off-color comment, employers must carry zero tolerance for sexually-oriented offensive or hostile statements or conduct aimed at either gender and hindering the work at hand. Such sexually demeaning or insulting distractions are not merely unprofessional, they are unlawful. ■

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Housing Act (FEHA), California Government Code section 12950.1.

The California Department of Fair Employment and Housing (DFEH) enforces FEHA. The Department does not yet impose any particular fine or other penalty for missing the deadline. However, Janie Siess, the DFEH's Assistant Deputy Director for Program and Policy Development, observes it is unlawful for any California employer “to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.”

***The Department of Fair Employment and Housing (DFEH) warns it is unlawful for any California employer to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring***

Government Code section 12940(j), (k). Thus, Ms. Siess confirms that in the event of a future sexual harassment claim, an employer's missing the January 1, 2006 deadline for the required training could result in increased liability, including possible punitive damages, since that training is by definition a reasonable preventative step against discrimination and harassment. This is particularly true for an employer who chooses to ignore the requirement and takes no prompt action to remedy the error. It thus behooves every covered employer that missed the deadline to arrange for the required training as soon as possible.

## ***Periodic Required Training in Sexual Harassment Prevention and Handling:***

FEHA requires covered companies to provide a minimum two hours of such training for supervisors employed as of July 1, 2005. For any person hired as or promoted to supervisor after July 1, the employer must provide training within six months of the hire or promotion. Upon any initial training, the law requires recurring training of each supervisor every other year. As the training must include information and practical guidance on the applicable federal and state statutory laws and case decisions, it should be conducted by a qualified legal professional.

***Nature of the Required Training:*** Government Code section 12950.1 specifies the required training is “at least two hours of classroom or other effective interactive training and education regarding sexual harassment ... The training and education required by this section shall include information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment. The training and education shall also include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation.”

***Definition of “Supervisor” Under the Law:*** FEHA defines “supervisor” as any individual entrusted with authority and independent judgment:



*“O.K. – let’s review what you didn’t know and when you didn’t know it.”*

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(i) “to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees”; (ii) to direct employees or to adjust their grievances; or (iii) to effectively recommend any action in (i) or (ii) above. Government Code section 12926(r). Thus, administrative assistants, with the ability to make recommendations to their managers, must receive such training.

***An employer that missed the January 1, 2006 deadline for required harassment training is exposed to increased liability in the event of a sexual harassment claim, including possible punitive damages***

***Employers Covered by the New Law:*** For this new training requirement only, FEHA curiously defines “employer” as meaning any person “regularly employing 50 or more persons or regularly receiving the ser-

vices of 50 or more persons providing services pursuant to a contract.” Government Code section 12950.1(c). Thus, as currently written, the law directs that an employer with fewer than 50 employees but with more than 50 independent contractors providing it services (for example, a general building contractor regularly hiring 50 or more independently licensed subcontractors) would still have to provide the required harassment training for its employed supervisors.

***Consequences for Non-Compliance:*** The new law does not provide any particular penalty for non-compliance. However, if the California Fair Employment and Housing Commission finds an employer in violation, it is required to “issue an order requiring the employer to comply with these requirements.” Government Code section 12950.1(e).

FEHA makes it unlawful for any employer “to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.”

Government Code section

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12940(j), (k). However, while failure to provide the harassment training required by Government Code section 12950.1 could contribute to a finding that

***Potentially increased liability is particularly true for an employer who chooses to ignore the requirement and takes no prompt action to remedy the error***

the employer failed to take all reasonable steps necessary to prevent FEHA discrimination or harassment, such failure “shall not in and of itself result in the liability of any employer ...

[for] sexual harassment.” Government Code section 12950.1(d). On the other hand, an employer’s provision of such training does not insulate that employer from sexual harassment liability. *Id.*

Even if an employer missed the January 1, 2006 deadline, it would be foolish for the company to ignore these training requirements on the assumption there are no immediate consequences for a violation. The new law also specifies that the required training and education “is intended to establish a *minimum threshold* and should not discourage or relieve any employer from providing for longer, more frequent, or more elaborate training and education regarding workplace harassment or other forms of unlawful discrimination in order to meet its obligations

to take all reasonable steps necessary to prevent and correct harassment and discrimination.” Government Code section 12950.1(f) (emphasis supplied). Thus,

***The DFEH cautions that every covered employer that missed the January 1, 2006 deadline should arrange for the required training as soon as possible***

an employer’s program to ensure that its supervisors receive appreciably more training than this new statutory minimum is the best policy to reduce to near zero the potential for allegations the company failed to take its expected steps to prevent workplace discrimination and harassment.

***Employers That Missed the Deadline Should Promptly Arrange for the Required Training:*** As the DFEH’s Janie Siess observes, an employer that missed the January 1, 2006 deadline for this mandatory training should promptly arrange to correct this mistake. Otherwise, in event of a later sexual harassment claim, the company is in danger of a finding that it intentionally ignored a plainly stated legal requirement to take this reasonable step to prevent an abusive, unlawful environment in its workplace. This could create significant punitive damages liability.

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