Pantoja v. Anton: New Ways To Introduce "Me Too" Evidence

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Plaintiffs in employment discrimination cases increasingly use "me too" evidence to bolster their cases. They offer testimony from present and former employees who claim they were also mistreated during their employment. Defense lawyers do their best to limit the admission of such "me too" evidence. However, recent case law provides plaintiffs' lawyers with new tools for introducing such evidence.

On August 9, 2011, the Court of Appeal for the Fifth Appellate District published *Pantoja v. Anton* (2011) 198 Cal.App.4th 87 [2011 Cal.App. LEXIS 1036]. In that case the Court reversed a trial court's ruling precluding "me too" evidence from former employees who also claimed to be mistreated by the employer. The three important lessons from the *Pantoja* case are:

1. "Me Too" Evidence Is Admissible Even If The "Me Too" Witnesses Did Not Work With the Plaintiff. Lorraine Pantoja worked for Thomas Anton for only eight months. She claimed that during that eight months Anton sexually harassed her. The trial court refused to allow her to introduce "me too" testimony from former employees of Anton who would testify to events occurring before and after her eight-month term of employment, sometimes years after. The Court of Appeal reversed. The Court held that the proposed evidence, which involved events of a similar nature, was relevant to prove Anton's motive and intent as it demonstrated gender-bias.

In so holding, the Court of Appeal disagreed with the case *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, a case frequently cited by defense attorneys. The *Beyda* Court excluded "me too" evidence of events occurring outside of the plaintiff's presence. *Pantoja* is the second case in two years to disagree with *Beyda* and to authorize "me too" evidence of events which the plaintiff did not perceive. (See e.g., *Johnson v. United Cerebral Palsy* (2009) 173 Cal.App.4th 740, 760 [allowing "me too" evidence from other employees who claimed to have suffered pregnancy discrimination].) Thus, a plaintiff need not have knowledge of the "me too" harassment for its admissibility.

2. "Me Too" Evidence Is Admissible to Impeach A Defendant Who Claims To Have Zero Tolerance of Harassment. The *Pantoja* Court allowed the admission of the "me too" evidence for a second reason. Specifically, the evidence was admissible to impeach Anton's testimony that he had zero tolerance for harassment.

This ruling is not surprising in a case like *Pantoja* where the alleged harasser (Anton) is also the employer. However, in many cases the employer is a large entity with various departments and multiple work locations. If such an employer has a zero tolerance policy, is every incident of harassment or discrimination admissible? Under the rationale of *Johnson v. United Cerebral Palsy, supra*, the answer should be "no." The *Johnson* Court allowed the "me too" evidence because the evidence involved the same alleged harassers and persons from the same protected classification as the plaintiff. However, *Pantoja* muddies the waters. While a company's EEO officer may testify to having a zero tolerance policy, if the proposed evidence

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shows that the EEO officer was aware of other cases of harassment and did not remedy the harassment, the "me too" evidence may be admissible under the reasoning of *Pantoja*.

This holding emphasizes the importance of properly investigating and documenting internal complaints of harassment and discrimination. The admission of such "me too" evidence often results in mini-trials of those cases. An employer must be prepared to explain through documentation why it found that no discrimination or harassment occurred in the "me too" cases.

3. "Me Too" Evidence May Be Admissible To Prove Different Forms of Discriminatory Conduct. Perhaps the most concerning language from the *Pantoja* opinion is contained in dicta associated with the eighth headnote. In that section, the Court held that "*evidence of one type of discriminatory conduct can be probative of a defendant's mental state in engaging in another type of conduct.*" (At *54-55.) By example, the Court noted that "*evidence of a male supervisor's sexually offensive remarks to and touching of other women employees is probative of the supervisor's discriminatory intent in firing a female plaintiff for refusing to have sex with him.*" (*Id.*) From this and other language, the Court suggests that it is not necessary that the plaintiff suffered the same type of discrimination as the other "me too" witnesses. This is a departure from the *Johnson* case where the "me too" evidence was admissible because the evidence involved similar types of conduct towards the same class of persons.

Defendants consistently argue that "me too" evidence is only admissible if it involves the same alleged harassers, alleged victims in the same protected classifications as the plaintiff and similar harassing conduct. This *Pantoja* language weakens the "similar conduct" prong of this argument. However, defendants should still be able to exclude "me too" evidence about misconduct by persons other than the alleged harassers or against persons in different protected classifications than the plaintiff.

The *Pantoja v. Anton* case will surely be used as a tool by plaintiffs' lawyers for years to come. *Pantoja* weakens an employer's arguments against the admission of "me too" evidence. Perhaps more importantly, *Pantoja* provides a colorable basis for conducting "me too" discovery which in turn provides plaintiffs' lawyers with a means of client-shopping.

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