California SB 1300: What to Make of the Legislative Intent Provision

In September 2018, the California Legislature passed—and Governor Brown signed into law—SB 1300. That bill, which took effect on January 1 of this year, amended the Fair Employment and Housing Act to expand the scope of employer liability for nonemployee harassment, prohibit employers from using employment or raises to suppress legally damning information, and limit the circumstances for awarding defendants' fees and costs. This article takes a closer look at the bill's addition of section 12923, which elaborates the Legislature's intent concerning FEHA's anti-harassment provisions.

Section 12923 contains five subsections:

- Subsection (a) provides that hostile work environment claims do not require proof of a measurable decrease in employee productivity. This subsection adopts Justice Ginsburg's concurrence in *Harris v. Forklift Systems* (1993) 510 U.S. 17, which noted that "[i]t suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job."
- Subsection (b) provides that "[a] single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment," apparently rejecting the Ninth Circuit's opinion in *Brooks v. City of San Mateo* (2000) 229 F.3d 917 (discussed below).
- Subsection (c) follows the California Supreme Court's decision in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512 and makes so-called "stray remarks" potentially "relevant, circumstantial evidence" of a hostile work environment.
- Subsection (d) provides that unless it is part of an employee's job duties,

sexual harassment does not vary definitionally based on a workplace's historical tolerance of sexual behavior, rejecting *Kelley v. Conco Companies* (2011) 196 Cal.App.4th 191.
- Subsection (e) provides that, per *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, hostile work environment claims involve issues "not determinable on paper," making summary judgment on the issue only "rarely appropriate."

This new section seems rather sweeping at first blush. It appears to do several things: announce a new harassment standard; both reduce the evidentiary burden on plaintiffs *and* expand the universe of relevant evidence available to them; and even limit the availability of summary judgment on the hostile work environment question. How courts will apply the new law is uncertain. Yet two important considerations suggest that the significance of these declarations is mostly symbolic, and so they may prove to have little impact on how courts interpret FEHA.

The first consideration is the inconclusive influence of legislative policy declarations in general. Though entitled to "great weight," these statements are only persuasive, not binding.[1] Statutory construction is, after all, a judicial function.[2] Section 12923's focus on the meaning of FEHA's preexisting anti-harassment provisions further clouds its potential effect. The California Supreme Court has observed that "there is little logic and some incongruity in the notion that one Legislature may speak authoritatively on the intent of an earlier Legislature's enactment when a gulf of decades separates the two bodies."[3] Courts cannot ignore such declarations, but need only give them "due consideration."[4] For instance, courts will look to post-enactment policy statements when a statute is ambiguous[5] or if there is a question of an amendment's retrospective or prospective application.[6] Even then, "such a declaration is but a factor for a court to consider and is neither binding nor conclusive in construing the statute."[7] And none of those categories describes section 12923, which purports neither to resolve some statutory uncertainty nor to raise an issue of retroactive application. Litigants accordingly will bear the burden of convincing courts that

due consideration of section 12923 favors significant revision.

The second consideration poses an even greater challenge to any non-symbolic view of section 12923. Even if a court decided that the policy statements warranted a new interpretation of FEHA's anti-harassment provisions, the Legislature's conclusory incorporation of the above-listed cases sows confusion about the effect each case has on its respective subsection. Indeed, close readings cast considerable doubt on the legal significance of the declarations themselves.

Subsection (a)'s affirmation of Justice Ginsburg's *Harris* concurrence is mostly laudatory. Its hostile work environment definition is virtually indistinguishable from that long observed by California courts: "conduct having the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[8] Because the California Supreme Court, not the U.S. Supreme Court, is the final word on California law, it is not as if the majority opinion addressed by Justice Ginsburg's concurrence would have otherwise limited FEHA's prohibition on workplace harassment. It is difficult to discern, then, what a court should make of this declaration.

The same goes for subsection (b). As written, it suggests that the Ninth Circuit's decision in *Brooks* held that a single incident of harassing conduct was insufficient to support a hostile work environment claim. It did not. In fact, the panel specifically declined to resolve that question.[9] Its decision was much narrower. Specifically, the court found that an employer could *not* be held liable for an incident of sexual harassment by a coworker—as opposed to a supervisor, for whose actions a company is strictly liable[10]—who was immediately terminated and eventually prosecuted for his actions.[11] Because the employer promptly responded to the employee's complaint, the harasser's actions could not fairly be imputed to the employer.[12] Given the Legislature's apparent misreading of *Brooks*,

it is unclear whether the Legislature meant to state new law, clarify existing law, or distinguish California law from a nonfactual hypothetical statement of federal law.

Subsection (c)'s exclusively symbolic value is evident on its face. Here the Legislature merely reiterates the totality of the circumstances standard that already applied to harassment claims and expresses its approval of the California Supreme Court's refusal to adopt the so-called "stray remarks doctrine" in *Reid*. Importantly, *Reid* did not overturn a previous decision upholding this doctrine. Nor did it hold that stray remarks on their own would be sufficient to create a triable issue of discrimination. Rather, "when combined with other evidence of pretext, an otherwise stray remark may create an ensemble that *is* sufficient to defeat summary judgment."[13] In other words, context remains the final determinant of a remark's relevance, and nothing in subsection (c) alters that state of the law.

The Legislature's disavowal of *Kelley* in subsection (d) is also confusing. The court in *Kelley* focused its analysis on FEHA's requirement that harassment and discrimination be "because of sex."[14] It ultimately found no evidence from which a reasonable factfinder could determine that the "offensive and demeaning" statements at issue—some of them admittedly sexual—supported an inference of discrimination because of sex.[15] The court did not suggest, however, that the alleged harassment fell short because of the workplace's historical acceptance of sexual commentary. That is not to say *Kelley* was not controversial—it was. Later court decisions have registered disagreement with *Kelley*'s very literal view of the FEHA's requirement that discrimination and harassment be attributable to sex.[16] But *Kelley* does not appear at odds with the Legislature's view that the standard for sexual harassment ought not vary by a workplace's past tolerance of sexual commentary and conduct.

Finally, like subsection (c), subsection (d)'s affirmance of *Nazir* (which remains good law) does not even pretend to change the status quo. The court's view that "many employment cases

present issues of intent, and motive, and hostile working environment, issues not determinable on paper"[17] is already well-accepted law.[18] These issues typically call for credibility determinations, a task best left to the factfinder. The Legislature's mention of *Nazir* thus appears to do little more than applaud this truism.

In sum, even if there is a reason to treat section 12923 differently from ordinary legislative declarations, the statements themselves have scant import. Certainly, the rest of SB 1300 significantly expands employer liability. Section 12923, by contrast, largely reaffirms what already was—leaving little, if anything, for interpretation. Consequently, courts are unlikely to (or at least should not) give it much significance.

Alternative approaches seem risky. Given their brevity, these statements are susceptible to divergent interpretations—an opportunity unlikely to be lost on creative attorneys. Combined with section 12923's own internal contradictions, litigants' competing interpretations would be a lose-lose for courts: conflicting and equally plausible statutory interpretations that both require disfavored results. On one hand, a pronouncement limiting this section's meaning would do little practically—or put another way, render a piece of legislation superfluous. On the other, a more expansive reading will generate systemic problems that call for further legislative intervention. Either approach risks the undesirable portrayal of the judiciary as somehow thwarting legislative intent. To avoid this dilemma, courts should treat these as ordinary policy statements. Without an existing ambiguity to correct or a retroactivity problem to resolve, "due consideration" arguably favors restraint. This interpretation best resolves these competing concerns: giving this section its due consideration as declaring existing law avoids the twin evils of rendering it a nullity or upending settled FEHA doctrine. By staying their hand, courts can allow section 12923 to stand as an explicit legislative endorsement of FEHA's already robust anti-harassment protections while avoiding a needless run-in with the Legislature.

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[1]
See Housing Authority of L.A. Cty. v. Dockweiler (1939) at 449–50 ("While such a declaration of policy by the legislative branch of the government is not necessarily binding or conclusive upon the courts, it is entitled to great weight and it is not the duty or prerogative of the courts to interfere with such legislative finding unless it clearly appears to be erroneous and without reasonable foundation.").

[2]
Western Sec. Bank v. Superior Court (1997) at 244; *see also City of Emeryville v. Cohen* (2015) at 309–10 ("[I]t is not within the Legislature's bailiwick to interpret laws previously passed.").

[3]
Western Sec. Bank, supra note 2, at 244.

[4]
Id.; accord Olmstead v. Arthur J. Gallagher & Co. (2004) at 817.

[5]
See City of Sacramento v. Pub. Emps. Retirement Sys. (1994) at 798 ("The recognition of subsequent assertions of legislative intent is derived from cases where the meaning of the earlier enactment is unclear.") (quotation omitted).

[6]
See Western Sec. Bank, supra note 2, at 244 ("Whether a statute should apply retrospectively or only prospectively is, in the first instance, a policy question for the legislative body enacting the statute.").

[7]
Cohen, supra note 2, at 309–10.

[8]
Weeks v. Baker & McKenzie (1998)
at 1146.

[9]
Brooks v. City of San Mateo(2000) at 925–26 ("We need not decide whether a single instance of sexual harassment can ever be sufficient to establish a hostile work environment.").

[10]
See Weeks, supra note 8, at 1146 ("[Under the FEHA], an employer is strictly liable for acts of sexual harassment committed by an agent or supervisor.").

[11]
See Harris v. Forklift Systems, Inc. (1993) at 924–27.

[12]
See id. at 926.

[13]
Reid v. Google, Inc.(2010) at 542 (quotations and modifications omitted).

[14]
See Kelley v. Conco Companies(2011) at 203.

[15]
Id. at 205.

[16]
See, e.g., Taylor v. Nabors Drilling USA, LP
(2014) at 1238–40 (declining to extend *Kelley*);
Pantoja v. Anton (2011) at 114 ("The plaintiff must show that the harassing conduct took place because of the

plaintiff’s sex, but need not show that the conduct was motivated by sexual desire.”).

[17]
Nazir v. United Airlines, Inc. (2009)at 286.

[18]
See, e.g.,Cornell v. Berkeley Tennis Club
(2017) at 935 (relying on *Nazir*’s view
that the inferential nature of intent questions lowers the evidentiary burden for that issue).