

## TOP Labor & Employment Lawyers 2024 Addendum

### Critical evaluation of client cases in FEHA mediation

**Parties in employment discrimination cases often have predetermined ideas about the strengths and values of the case, but these positions are not always based on thorough evaluations under California law.**

By Anthony Khoury

When parties bring employment discrimination cases to mediation, they often have entrenched ideas about the strengths and values of those cases. In fact, counsel on one or both sides usually enter settlement negotiations with predetermined walkaway positions for their respective clients. But these positions are not always based on thorough evaluations under current California law.

Not surprisingly, when claims are brought under California's Fair Employment and Housing Act (FEHA), the starting positions of litigants are often oceans apart. And if parties have not done their homework



SHUTTERSTOCK

and cannot resolve the dispute in mediation, one or both may be in for a rude awakening when the case reaches a judge or a jury.

Frequently, a huge disconnect lies between litigants' vision of what a case is worth and the available evidence in the case. Claims with just a *prima facie* showing may not settle at mediation because plaintiffs believe that those claims are worth six figures (or more) and will accept nothing less. Despite evidence of at least some discriminatory or harassing conduct, however, there is no guarantee that such cases will even get to a jury.

Defendants may refuse to settle for more than a nominal amount in mediation, confident that they can knock down their opponents' under-

developed cases with summary judgment motions. But if they believe that simply lining up "loyal" employees as witnesses to justify the plaintiff's termination with canned remarks about business being slow or work performance being substandard, they may instead find themselves writing huge checks.

Before participating in a mediation involving one or more FEHA claims, therefore, both sides must fully understand the law and be prepared to advocate for their respective settlement positions based on a comprehensive assessment of the likely evidence available in the case.

#### FEHA CLAIMS IN GENERAL

FEHA (California Government Code Section 12900, et seq.) provides pro-

tection from harassment, discrimination, and retaliation perpetrated in the workplace because of employees' membership in certain protected classes.

Plaintiffs must first file a complaint with the California Civil Rights Department (CRD) and receive a right-to-sue letter before they can file a lawsuit. That letter is merely a legal prerequisite to filing a FEHA claim in a civil action. It does not establish that the plaintiff's case is either viable or valuable.

In order to prevail on a FEHA discrimination claim for wrongful termination, for example, the plaintiff must be able to establish that there was an adverse employment action, that the plaintiff's membership in a protected class was a sub-

stantial motivating factor in the action, and that the plaintiff suffered harm as a result of the employer's conduct. (See CACI 2500.)

To prevail on a FEHA claim for hostile work environment, the plaintiff must establish, among other things, that harassing conduct occurred because of the plaintiff's membership in a protected class, the conduct was severe or pervasive, and any reasonable person in plaintiff's circumstances would have considered the work environment to be hostile. If the conduct was not perpetrated by a supervisor, the plaintiff must show that a supervisor knew or should have known about the conduct and didn't take immediate and appropriate corrective action. (See CACI 2521A.)

For a FEHA retaliation claim, the plaintiff must establish, among other things, that he or she engaged in protected activity, there was an adverse employment action, and plaintiff's protected activity was a substantial motivating reason for that action. (See CACI 2505.)

## ESTABLISHING THE FEHA CLAIM

In the case of *Zamora v. Security Industry Specialists, Inc.* ((2021) 71 Cal.App.5th 1), an employee charged his employer with disability discrimination/wrongful termination and retaliation under FEHA. The trial court granted summary adjudication on both of those claims, but the court of appeal reversed the ruling as to the disability discrimination/wrongful termination claim.

In evaluating the trial court's ruling, the appellate court analyzed the wrongful termination claim using the *McDonnell Douglas* three-stage burden-shifting test (See *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792). Under that test, which applies in cases in which the employee is not able to present direct evidence of discrimination, discrimination may be "inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained." (*Zamora, supra* at 32.)

The plaintiff may raise a presumption of discrimination by presenting a *prima facie* case, after which the employer may dispel the presumption by articulating a legitimate, nondiscriminatory reason for the

challenged action. Finally, the plaintiff has "the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive." The fundamental issue is "whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." (*Zamora, supra* at 31-32.)

The appellate court noted that when summary judgment or summary adjudication is sought in an employment discrimination case, the *McDonnell Douglas* framework is altered. The employer has the initial burden of presenting evidence that one or more elements of the plaintiff's *prima facie* case is lacking or that the adverse employment action was based upon legitimate, nondiscriminatory factors. If it can satisfy this burden, it is entitled to summary judgment unless the plaintiff can produce evidence that raises a triable issue of fact material to the defendant's showing.

## SUMMARY JUDGMENT STANDARD

The court of appeal in *Zamora* explained that judgment as a matter of law depends on many factors, including the strength of the plaintiff's *prima facie* case, the probative value of the proof that the employer's explanation was false, and any other evidence supporting the employer's case. Because many employment cases raise issues of intent and motive, such cases "are rarely appropriate for disposition on summary judgment, however liberalized [summary judgment standards may] be." (*Zamora, supra* at 32-33.)

Despite the latter observation, many appellate courts have affirmed lower court rulings granting summary judgment or summary adjudication. For example, in *Hittle v. City of Stockton* (9th Cir. 2024) 101 F.4th 1000, 1015), the Ninth Circuit affirmed summary judgment in a FEHA discrimination/wrongful termination case of a plaintiff who alleged religious discrimination. The court concluded that even though the decision-makers had made statements that could be perceived as discriminatory they were "more akin to 'stray remarks that have been held

insufficient to establish discrimination.'" (Internal citation omitted.)

On July 29, 2024, however, in *Bailey v. San Francisco Dist. Attorney's Office* 2024 S.O.S. 2545, the California Supreme Court handed employees a pretty decisive FEHA victory. The plaintiff had asserted FEHA claims for racial discrimination and harassment, failure to prevent discrimination, and retaliation based on a single incident in which a coworker used the "N-word" in her presence. In reversing the court of appeal's decision, which had affirmed the trial court's grant of summary judgment for the employer (See *Bailey v. San Francisco Dist. Attorney's Office* (Sep. 16, 2020, No. A153520) \_\_\_ Cal.App.5th \_\_\_ [2020 Cal. App. Unpub. LEXIS 5993]), the state's high court found that there was a triable issue of fact whether a single use of the "N-word" by a coworker, who was not a supervisor, was "sufficiently severe so as to create a hostile work environment." The court used a "totality of the circumstances" approach in assessing when an isolated incident can create a hostile work environment, concluding that in this particular case, the coworker had a close relationship with plaintiff's supervisor and "the record could support the view that [the coworker] acted with a certain degree of impunity as a result of her relationship with [plaintiff's supervisor], and thus had a degree of influence over [plaintiff's] working conditions."

The *Bailey* court noted that its ruling was consistent with Government Code Section 12923, which the legislature passed in 2019 in an attempt to clarify FEHA's "severe or pervasive" standard. That law 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."

The court further held that, with respect to plaintiff's retaliation claim, the requisite element of an "adverse employment action" includes a supervisor's "course of conduct [which] adversely affect[s] the

terms and conditions of [plaintiff's] employment by, among other things, withdrawing [plaintiff's] right to avail herself of the human resources process available to other employees."

## CONCLUSION

What does this all mean for counsel in FEHA cases? For both sides, proper early evaluation of the facts and evidence is imperative in light of the established legal framework for FEHA claims. Instead of assuming that liability can be established based on the bare minimum *prima facie* showing, or that liability can be defeated by simply labeling a former employee subpar or disgruntled, counsel should work through the entire legal framework to see how a court might rule on a motion for summary judgment before the case even gets to trial.

Far too many FEHA cases are not settling at mediation because of unrealistic and unsupportable walkaway positions on both sides of the table. Before drawing lines in the sand, counsel for both parties should create blueprints that detail the structural framework for their positions. Doing so will not only make it easier for a mediator to bring the parties closer together in settlement negotiations but will ultimately benefit their respective clients, even if mediation does not result in a settlement.

---

**Anthony Khoury** is a neutral with Alternative Resolution Centers with more than 20 years' experience in the legal industry, most recently as a Court Commissioner in Kern County.

