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Discrimination and retaliation cases: Recent decisions expand the scope of evidence available to employees

Employment litigation will be impacted by the breadth of scope these plaintiff-friendly decisions provide for in discovery

"Federal and California courts have acknowledged the difficulty of proving intentional discrimination: Proving intentional discrimination can be difficult because [t]here will seldom be 'eyewitness' testimony as to the employer's mental processes. ... It is rare for a plaintiff to be able to produce direct evidence or 'smoking gun' evidence of discrimination...." (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 342 [77 Cal. Rptr. 3d 654].) Because it is extremely rare to find direct evidence of discrimination, it is crucial that employees have at their disposal a full panoply of circumstantial evidence with which to demonstrate that an employer's proffered reason for an adverse employment action is false or pretextual. Recent California cases have armed employees suing for discrimination with vital additional arrows for their quivers.

In four recent cases, *Johnson v. United Cerebral Palsy/Spastic Children's Foundation of Los Angeles and Ventura Counties* (2009) 173 Cal.App.4th 740 [93 Cal. Rptr. 3d 198], *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686 [101 Cal.Rptr.3d 773], *Reid v. Google, Inc.* (2010) 50 Cal.4th 512 [113 Cal.Rptr.3d 327], and *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243 [100 Cal. Rptr. 3d 296], the California courts have greatly expanded the scope of admissible evidence, and consequently the scope of discovery, in single-plaintiff discrimination cases.

Johnson held that in a single-plaintiff case, evidence that other employees were subjected to discriminatory treatment similar to that claimed by the plaintiff is sufficient to defeat summary judgment *without any further evidence of disparate treatment.* More importantly, it held that evidence of other victims of similar discriminatory treatment is not only relevant to the employer's motive in firing the plaintiff, but *per se admissible* on that issue. Later in 2009, the Supreme Court issued its decision in *Roby*, which reiterated the relevance of such "other victims" evidence in proving the degree of reprehensibility necessary to support a large award of punitive damages. Roby also expanded the scope of evidence upon which employees may rely in proving hostile work-environment claims, holding that personnel-management actions such as negative performance evaluations, discipline and job assignments, may now be considered in determining the severity or pervasiveness of harassment purportedly creating a hostile work environment.

This past year the California Supreme Court also handed down the long awaited *Reid* case, in which it dispensed with the "stray remarks doctrine" that had been used by trial courts as an excuse to ignore all evidence of discriminatory comments directed toward employees other than the plaintiff, remarks by non-decisionmakers and discriminatory comments made in circumstances not directly connected with the adverse employment action at issue. Lastly, *Nazir* held that an inference of discrimination may be drawn from an employer's failure to use neutral, unbiased personnel, and to interview exculpatory witnesses when investigating the purported misconduct supporting an allegedly discriminatory termination.

Taken together, these cases expand the ammunition available to California employees to defeat summary judgment motions and prevail at trial. They also vastly expand the scope of permissible discovery to such an extent that employers must now decide whether it may be advantageous to settle these cases earlier than had previously been their custom. Employers also face the added danger of turning single-plaintiff discrimination cases into class actions if this expanded discovery uncovers evidence of companywide illegal policies and practices.

Johnson case and so-called "me too" evidence

Johnson v. United Cerebral Palsy/Spastic Children's Foundation of Los Angeles and Ventura Counties is a groundbreaking case for plaintiffs. It is the first published case in California to explicitly make clear that "me too" evidence – that is evidence that other similarly-situated employees were subjected to discriminatory conduct similar to that which the plaintiff was subjected – is admissible in an employment-discrimination case to prove pretext or discriminatory intent and motive.

• ***History of "me too" evidence***

Widely derided by employers as "me too" evidence, but more aptly labeled "other victims" evidence, the federal courts have frequently authorized the admission of evidence showing that similarly-situated employees inside a plaintiff's protected class have been subjected to similar discriminatory conduct. For example, the Tenth Circuit has recognized that, "[a]s a general rule, the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer's discriminatory [and retaliatory] intent." (*Spulak v. K Mart Corp.* (10th Cir.1990) 894 F.2d 1150, 1156 [quoting language]; *Curtis v. Oklahoma City Pub. Schls Bd. of Educ.* (10th Cir.1998) 147 F.3d 1200, 1217.) Numerous other federal courts have recognized the importance of using evidence of discrimination against other employees to

prove pretext. "Proof of discriminatory intent is critical in disparate treatment cases. Proffered evidence of past acts of racial discrimination may be relevant to prove the defendant's intent or motive in his actions towards the plaintiff." (See, e.g., *Hogan v. American Telephone & Telegraph Co.* (8th Cir.1987) 812 F.2d 409, 410-411; *Estes v. Dick Smith Ford, Inc.* (8th Cir.1988) 856 F.2d 1097, 1104; *Aman v. Cort Furniture Rental Corp.* (3rd Cir.1996) 85 F.3d 1074, 1086, and *Lindsey v. Prive Corp. (5th Cir.1993)* 987 F.2d 324.) Indeed, the Ninth Circuit characterizes the admissibility of testimony from other employees subjected to similar discrimination as "commonplace." (*Obrey v. Johnson* (9th Cir. 2005) 400 F.3d 691, 698.)

Despite the widespread acceptance of "other victims" evidence by federal appellate courts, trial courts continued to struggle with the question of exactly how similar to the plaintiff's experience the situations of other victims must be before their testimony should be admitted. Some courts required that other victims have worked under the same supervisor and in the same location as the plaintiff. (See, e.g., *Aramburu v. The Boeing Co.* (10th Cir. 1997) 112 F.3d 1398, 1404.) Other courts did not. (See, e.g., *Spulak v. K Mart Corp.*, *supra*, 894 F.2d 1150 (affirming admissibility of testimony of employee who held the same position as plaintiff in another store).

This particular debate was settled when the United States Supreme Court decided *Sprint/United Management Co. v. Mendelsohn* ["Mendelsohn"] (2008) 552 U.S. 379 [128 S. Ct. 1140]. In *Mendelson,* the 10th Circuit had ruled that the district court erred in holding that testimony of other employees about similar acts of discrimination perpetrated against them was *per se inadmissible* if the other employees worked under different supervisors and were therefore not "similarly situated." The Supreme Court reversed the circuit court's decision, holding that the circuit court "should not [have] assume[d] the district court adopted that 'similarly situated' analysis when it addressed a very different kind of evidence." (*Id.* at 1146.) In other words, the Supreme Court found that the 10th Circuit erred in *presuming* that the trial court had adopted such a rule of *per se inadmissibility.*

However, the Supreme Court went on to explain that if the district court *had* ruled that testimony from other victims who worked under different supervisors was *per se inadmissible,* such a ruling would constitute an abuse of discretion: "We note that, had the district court applied a *per se* rule excluding the evidence, the Court of Appeals would have been correct to conclude that it had abused its discretion. Relevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad *per se* rules. ..." (*Id.* at 1147.) The Court then explained that,

> [t]he question whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case. Applying Rule 403 to determine if evidence is prejudicial also requires a fact-intensive, context-specific inquiry.

(*Ibid.*)

• *The expansion of "me too" evidence in Johnson*

While *Mendelsohn* unequivocally held that "other victims" evidence is not per se *inadmissible* where the other victims worked under different supervisors, the California Court of Appeals went a step

further in the *Johnson* case, holding that where the other victims worked under the same supervisor, the evidence is *per se admissible.* (*Johnson, supra,* 173 Cal.App.4th 740.) At the crux of *Johnson* was a dispute over the admissibility of what the defendant had characterized as "me too" evidence. Ms. Johnson was allegedly fired from United Cerebral Palsy ("UCP") for time-card fraud on the very day she returned from a brief pregnancy disability leave and within weeks of notifying her supervisor of her pregnancy. She subsequently sued for pregnancy discrimination and other related claims. In support of her claims, Ms. Johnson obtained declarations from five coworkers who worked for the same supervisors in the same facility as plaintiff. The coworkers variously declared that 1) they too had been fired shortly after informing UCP of their pregnancies; 2) they knew of others who were fired after UCP learned of their pregnancies; 3) they had resigned because the same supervisor made their lives stressful after he learned that they were trying to get pregnant; and 4) they knew of occasions where others engaged in dishonest acts but were *not* fired.

Johnson first observed that under *Mendelsohn, supra,* 552 U.S. 329, the trial court would have had the discretion to exclude the "me too" evidence *if the incidents had involved different supervisors in different locations.* But the Court of Appeals did not stop there. It went on to hold that because the other victims had the same supervisors and worked in the same location as the plaintiff, the evidence was *automatically* admissible:

Here we can say as a matter of law that the "me too" evidence presented by the plaintiff in the instant case is *per se admissible* under both relevance and Evidence Code section 352 standards. The evidence sets out factual scenarios related by former employees of the defendant that are sufficiently similar to the one presented by the plaintiff concerning her own discharge by defendant, and the probative value of the evidence clearly outweighs any prejudice that would be suffered by defendant by its admission. (*Id.* at 767.) Importantly, the Johnson Court held that the "me too" declarations on their own were sufficient to defeat summary judgment.

The court went on to explain that "[d]issimilarities between the facts related in the other employees' declarations and

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the facts asserted by plaintiff with regard to her own case go to the weight of the evidence, not its admissibility." (*Id.* at 767.) Lastly, *Johnson* held that the evidence of discrimination against other employees in *other* workplaces by *different* supervisors may be admissible, *"depend[ing] on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case."* (*Johnson, supra,* 173 Cal.App.4th 740, 766, quoting from *Mendelsohn, supra,* 552 U.S. 379 at 387.)

Taken together, *Mendelsohn* and *Johnson* mandate that wide latitude be given to plaintiffs seeking discovery of discrimination and harassment allegedly perpetrated against other employees. Because incidents of discrimination involving other employees under the same supervisors is *per se admissible,* and similar discrimination perpetrated by different supervisors at other locations may be admissible if the "factual scenarios" are deemed "sufficiently similar to the one presented by plaintiff", trial courts must permit extensive discovery into allegations of discrimination directed at other employees working not just at plaintiff's own location, but also at other locations supervised by other managers.

• ***Roby*/punitive damages**

"Other victims" evidence can also be used to prove the entitlement to and amount of punitive damages. This is not a new concept to federal courts, where evidence of other victims' experiences has been admitted to demonstrate that the employer's discriminatory conduct toward the plaintiff was part of a "routine" or "systematic" practice. (See, e.g., *Goldsmith v. Bagby Elevator Co.* (11th Cir.2008) 513 F.3d 1261, 1285.) Evidence of such a systematic policy or practice would then be relevant to prove "malice" and "reprehensibility" in support of punitive damages. "The dominant consideration in the evaluation of a punitive damages award is the reprehensibility of the defendant's conduct." (*Id.* at 1283.)

California courts have also recognized the importance of such "other victims" evidence in determining whether an employer's conduct is sufficiently reprehensible to support a large punitive damages award (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1162-63; *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408 [123 S.Ct. 1513]) and whether, "tortious conduct toward others

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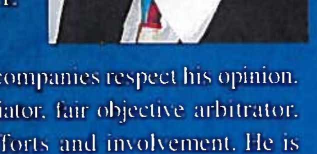

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could be relevant to the reprehensibility of an individual tort." (*Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1203.).

This principle was recently reaffirmed, yet again, by the California Supreme Court in *Roby, supra,* 47 Cal.4th 686, 715. The plaintiff in *Roby* was fired from her customer service liaison position after nearly 25 years of service with McKesson, Inc. for taking absences related to her disability. In the last few years of her employment, Ms. Roby began suffering from a panic disorder that restricted her ability to work and caused her to sweat profusely and dig her nails into her arm to the point she caused open sores. During this time, the plaintiff's supervisor made ongoing offensive and demeaning comments and gestures about the plaintiff's body odor related to her medical condition and arm sores. The evidence also included various personnel management actions taken by plaintiff's supervisor such as reprimanding the plaintiff in front of others, excluding the plaintiff from office parties by assigning her to answer phones, shunning the plaintiff at weekly staff meetings, and belittling the plaintiff's job. After finding that the plaintiff was wrongfully terminated, discriminated against and harassed because of her disability, the jury awarded the plaintiff over $19 million, including $15 million in punitive damages.

The *Roby* Court held that the "reprehensibility" factor requires evidence of *"repeated wrongdoing by [the] employer." (Id.* at 713.) The Supreme Court explained that a $15 million award was inappropriate because,

> [t]here is no evidence, for example, that [the particular managing agent's] actions toward Roby were *the product of a corporate culture that encouraged similar supervisorial conduct.* Rather, they appear to be the isolated actions of a single supervisor, combined with the one-time failure on the part of employer McKesson to take prompt responsive action when these events came to its attention.

(*Id.* at 715-716, italics added].)

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The importance of evidence regarding malicious treatment of other similarly situated people was recently confirmed by the Second District Court of Appeal, which interpreted *Roby* and held that a higher ratio of punitive damages to compensatory damages was not warranted because,

> Regarding the fourth reprehensibility factor of whether the conduct involved repeated actions or was an isolated incident,... *[t]here was no evidence presented that Mercury acted similarly toward other insureds in similar circumstances.* Thus, on the evidence before us we cannot conclude that Mercury was a 'repeat offender.'

(*Amerigraphics, Inc. v. Mercury Cas. Co.* (2010) 182 Cal.App.4th 1538, 1563 [107 Cal.Rptr.3d 307] [Italics added].)

The lesson taught by the *Roby, Johnson, Mendelsohn,* and *State Farm* decisions, is the need for extensive discovery into the effect of illegal corporate policies and/or practices not just on the plaintiff but on other employees as well. The ideal discovery plan for attorneys representing employees should target evidence of other victims of similar unlawful conduct to that complained of by the plaintiff.

In particular, *Roby* opens the door to discovery into other victims working at different locations under different supervisors as such evidence would be essential to prove that the harm suffered by the plaintiff was "*the product of a corporate culture that encouraged similar supervisorial conduct.*" In other words, when you combine these cases, you now have support to seek evidence regarding how other supervisors at other locations treated their employees to show the particular supervisor's conduct at issue was evidence of a larger corporate culture encouraging and condoning such conduct. Needless to say, if discovery in an individual case supports an inference of a discriminatory "corporate culture" condoning widespread and systematic discrimination, many single-plaintiff cases may morph into class actions. (See, e.g., *Dukes v. Wal-Mart Stores, Inc.* (9th Cir. 2010) 603 F.3d 571, 612 (affirming grant of class certification based on finding evidence of "Wal-Mart's centralized firm-wide culture and policies.")

Roby/harassment claims

Roby also represents the most significant expansion of hostile work-environment harassment law in at least a generation. The

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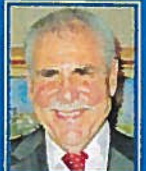
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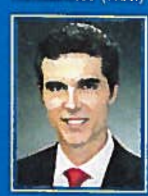
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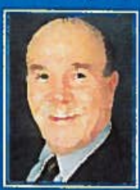
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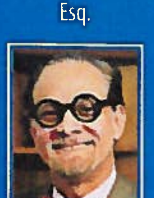
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single most difficult aspect of proving hostile work- environment claims is establishing that the offensive conduct was "severe or pervasive." California law has long recognized that "[t]here is neither a threshold 'magic number' of harassing incidents 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, Inc.* (2003) 106 Cal.App.4th 30, 36 [129 Cal.Rptr.2d 923], quoting from *Rodgers v. Western-Southern Life Insurance Co.* (7th Cir. 1993) 12 F.3d 668, 674.) However, it is equally well-settled that harassment is not actionable where the incidents of offensive conduct are "occasional, isolated, sporadic, or trivial." (*Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264, 283 [42 Cal.Rptr.3d 2].) Thus, in seeking to avoid summary adjudication, employees whose claims rely on just a few overtly discriminatory remarks or actions, have argued for years that incidents of generalized harassment should be considered even when not overtly discriminatory. Employees have also argued that biased personnel decisions must be considered in determining severity or pervasiveness because they clearly contribute to the employee's feeling of hostility in the work environment.

Roby gave proponents of these types of evidence a decisive victory, holding that, 1) overtly discriminatory comments or conduct may be used to prove that other generalized harassment was *motivated by discriminatory animus* (*Roby, supra,* 47 Cal.4th at 709); and 2) personnel management decisions, such as performance evaluations, discipline and job assignments, must be considered in determining whether a hostile work environment was created. *Roby* broadly defines harassment as not just offensive verbal, visual or physical communications, but *any* conduct which sends "abusive messages that create a hostile working environment." (*Id.* at 707.)

Roby also provided clear direction to trial courts, holding that "in analyzing the sufficiency of the evidence in support of a harassment claim, there is no basis for excluding evidence of biased personnel management actions *so long as that evidence is relevant to prove the communication of a hostile message.*" (*Id.* at 708, italics added.) Equally important, the Supreme Court explained that, while the FEHA treats discrimination and harassment as separate claims, there is no reason to segregate evidence relevant to both claims: "in some cases the hostile message that constitutes the harassment is conveyed through official employment actions, and therefore evidence that would otherwise be associated with a discrimination claim can form the basis of a harassment claim."(*Ibid.*)

After *Roby,* employees whose claims involve just a few overtly discriminatory remarks should find it much easier to survive summary judgment on hostile work environment claims and preserve verdicts on appeal. Now, any analysis of the severity or pervasiveness of a harassment claim must also include biased personnel decisions and generalized harassment, such as speaking to the employee in an abusive, demeaning or belittling tone. As long as evidence exists from which a jury can infer the discriminatory animus of a particular supervisor, all of that supervisor's daily negative interactions with the employee must be considered. Because biased supervisors frequently communicate hostility in the tone and content of their daily interactions with the complaining employee, it will rarely be appropriate after *Roby* to grant summary judgment on a hostile work environment claim.

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Reid v. Google – The demise of the "stray remarks" doctrine

Reid v. Google, Inc., supra, 50 Cal.4th 512, also provides new ammunition for employees seeking to prove their employers' proffered reasons for termination are pretextual. In *Reid,* the employee, Brian Reid, was hired at age 52 to be Google's Director of Operations and Director of Engineering. During his tenure, he was subjected to frequent ageist comments by superiors as well as "co-workers." For example, the V.P of Operations, Hölzle, who was 38 years old, told Reid that his opinions and ideas were "obsolete" and "too old to matter," that he was "slow," "fuzzy," "sluggish," and "lethargic," and that he did not "display a sense of urgency" and "lack[ed] energy." Other co-workers called Reid an "old man," an "old guy," and an "old fuddy-duddy," told him his knowledge was ancient, and joked that Reid's CD (compact disc) jewel case office placard should be an "LP" instead of a "CD." Less than two years after being hired, Reid was told he was not a "cultural fit" and was terminated. (*Id.* at 518-519.) In his age discrimination lawsuit, the trial court disregarded the discriminatory comments made by co-workers and superiors alike, following the federal "stray remarks doctrine." The Court of Appeals reversed and the California Supreme Court granted review.

Google asked the Supreme Court to follow federal precedent and

> adopt the judicially created stray remarks doctrine so that California courts can 'disregard discriminatory comments by co-workers and non-decisionmakers, or comments unrelated to the employment decision' to ensure that unmeritorious cases principally supported by such remarks are disposed of before trial.

(*Id.* at 538.)

In rejecting Google's request, the Supreme Court observed that "strict application of the stray remarks doctrine, as urged by Google, would result in a court's categorical exclusion of evidence even if the evidence was relevant." (*Id.* at 539.) The Court went on to explain that ageist statements made by non-decision-makers or those made by decisionmakers outside the decisionmaking process "may be relevant, circumstantial evidence of discrimination." (*Ibid.*)

The *Reid* Court's primary quarrel with the "stray remarks doctrine" was that

it had been used by trial courts to weigh plaintiff's evidence at the summary judgment stage. "It allows a court to weigh and assess the remarks in isolation, and to disregard the potentially damaging nature of discriminatory remarks simply because they are made by nondecisionmakers or [made] by decisionmakers unrelated to the decisional process." (*Id.* at 540.) Citing its earlier decision in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856 [107 Cal.Rptr.2d 841], *Reid* reaffirmed that "the court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact." The *Reid* Court then noted with disapproval that, notwithstanding its pronouncement in *Aguilar*, appellate courts have improperly weighed evidence in applying the "stray remarks doctrine." (*Reid, supra,* 50 Cal.4th at 540.)

The court also rejected the "stray remarks doctrine" as contrary to section 473c, subdivision (c), which directs that, at the summary-judgment stage, courts "shall consider all of the evidence set forth in the papers . . . and all inferences reasonably deducible from the evidence." (*Id.* at 541.) Additionally, *Reid* recognized that a single discriminatory remark by a non-decisionmaker may not suffice to defeat summary judgment, "[b]ut when combined with other evidence of pretext, an otherwise stray remark may create an ensemble [that] *is* sufficient to defeat summary judgment." (*Id.* at 542.)

Perhaps most importantly, *Reid* affirms the "cat's paw" theory, observing that discriminatory remarks by a non-decisionmaking employee *can* influence a decision maker. "If [the formal decision-maker] acted as the conduit of [an employee's] prejudice – his cat's paw – the innocence of [the decision maker] would not spare the company from liability." (*Id.* at 542.) Thus, discriminatory remarks made outside the decisionmaking process or by co-workers must be admitted if they may tend to establish that the discriminatory attitudes of co-workers or others influenced the decisionmakers involved in the termination. In short, because of the wide variety of facts and circumstances surrounding each discrimination case, *Reid* mandates that all evidence of discriminatory remarks and conduct be considered under a "totality of the circumstances" test and their probative value weighed on a case by case basis.

As with *Roby* and *Johnson*, *Reid* broadens the scope of evidence admissible to prove an employer's discriminatory

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motive. Evidence of widespread discriminatory comments and conduct, both in an employee's direct work environment and elsewhere in the company, will be admitted to establish the existence of a discriminatory "corporate culture" from which discriminatory motive may be inferred in an individual adverse employment decision.

Nazir

Nazir v. United Airlines, Inc., supra, 178 Cal.App.4th 243, may turn out to have the most impact of the four cases, not only for its expansion of available pretext evidence but also for its discourse on the proper summary-judgment standard and the paucity of employment discrimination cases in which summary judgment is actually appropriate.

The plaintiff Iftikhar Nazir, a dark-skinned practicing Muslim of Pakistani ancestry, was called offensive names (such as "sand nigger", "rag head", "camel jockey", and "f*cking Muslim") and subjected to other demeaning and offensive conduct (including being given sandpaper and offensive flyers depicting Saddam Hussein) on a repeated basis for many years during his long-term employment with United Airlines. (*Id.* at 257-258.) He was fired on May 9, 2005, for allegedly violating United's zero-tolerance sexual-harassment policy. Nazir's supervisor, Bernie Peterson, whom he had complained to and about repeatedly during his employment, led the investigation into the charge against Nazir. Peterson failed to interview any of the witnesses Nazir identified as persons who would support his version of events and ignored all the evidence suggesting that he and the alleged complainant were engaged in consensual arm wrestling.

After Nazir filed a lawsuit alleging various FEHA claims, including harassment, discrimination, and retaliation claims related to his religion, color, national origin and related complaints; United filed a massive motion for summary judgment/summary adjudication that the appellate court termed the "poster child for [summary judgment procedure] criticism" and possibly "the most oppressive motion ever presented to a superior court." (*Id.* at 248.) Despite the mounds of evidence the plaintiff had in support of his claims, the trial court granted the defendant's motion and, without explanation, sustained 763 of its 764 objections to the plaintiff's evidence. The appellate court reversed the trial court's decision on nearly every FEHA claim.

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Nazir is probably best known for its scathing criticism of oppressive summary judgment motions filed by employers. It provides plenty of procedural ammunition for opposing summary -judgment motions, including a holding that reply separate statements are unauthorized. (*Id.* at 252.) But it also includes a section warning trial courts that most discrimination cases are unsuited for summary adjudication.

Nazir first recognizes that the summary judgment process "has become the target of criticism" particularly "in employment litigation" where it is "abused, especially by deep pocket defendants to overwhelm less well-funded litigants" as employers ask courts to make "determinations properly reserved for the factfinder, sometimes drawing inference in the employer's favor, sometimes requiring the employees to essentially prove their case at the summary judgment stage." (*Id. at* 248.) The court went on to explain that:

> Proof of discriminatory intent often depends on inferences rather than direct evidence. (Citation). And because it does, "very little evidence of such intent is necessary to defeat summary judgment." (Citation) Put conversely, summary judgment should not be granted unless the evidence cannot support any reasonable inference for plaintiff.

(*Id.* at 283)

Next the *Nazir* court provides the kind of guidance for trial courts that employees have sought for years:

> We … observe that many employment cases present issues of intent, and motive, and hostile working environment, issues not determinable on paper. Such cases, we caution, are rarely appropriate for disposition on summary judgment, however liberalized it be… '[S]ummary judgment has spread … through the underbrush of undesirable cases, taking down some healthy trees as it goes.' (Citation) This, we cannot allow.

(*Id.* at 286.)

This section of *Nazir* should lead off every summary judgment opposition. Trial judges should understand at the outset that summary adjudication should rarely be granted in employment-discrimination cases.

With the procedural bounty *Nazir* provides, it is easy to overlook several very

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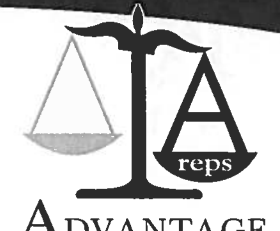

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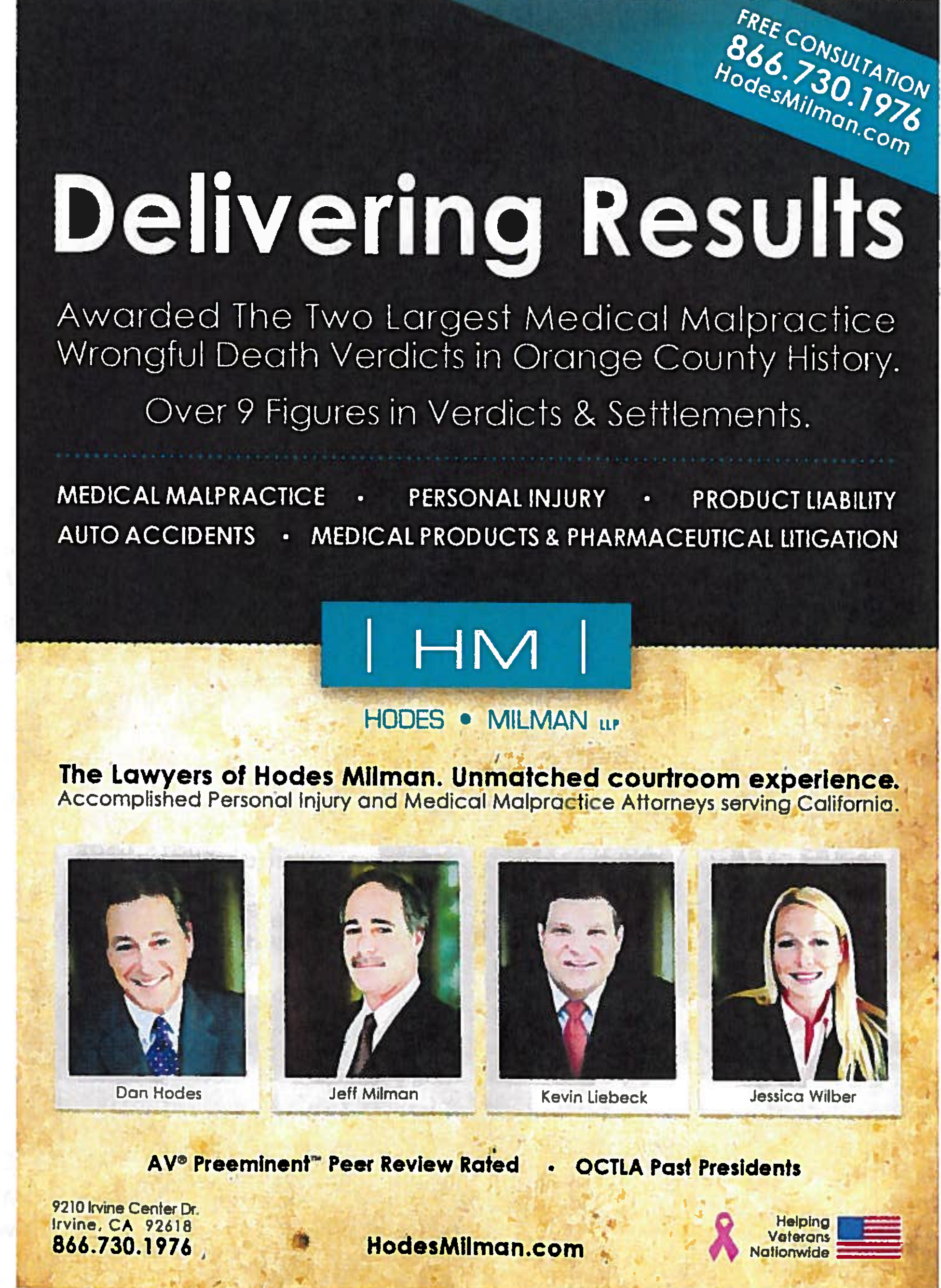
important holdings expanding the arsenal of "pretext" evidence available to employees, including a holding that the type of investigation conducted into the basis for terminating a plaintiff alleging unlawful discrimination or retaliation may itself evidence pretext. First, the court found that an investigation conducted by a supervisor with an axe to grind, or someone beholden to that supervisor, may constitute evidence of pretext because "such investigation could 'exploit [ ] a disciplinary process predisposed to confirm all charges.'" (*Id.* at 277.) The Court also addressed the role a deficient investigation may play in proving pretext, holding that, "[a]n employer's failure to interview witnesses for potentially exculpatory information [when firing an employee for alleged misconduct] evidences pretext. (*Id.* at 280.)

Nazir's importance in defeating summary-adjudication motions cannot be overstated. (The California Supreme Court recently cited *Nazir* with approval in *Reid v. Google* as an example of defendants overburdening the courts with unnecessary objections.) Apart from the treasure trove of quotes dictating that such motions should rarely be granted, the substantive holding that deficient investigations will support an inference of pretext will likely save many discrimination claims resting on tenuous circumstantial evidence.

The reality is that most employer investigations into the basis for firing employees are deficient in a myriad of ways. Few employers use unbiased investigators and often the "investigator" is the same individual being accused of unlawful animus. Additionally, most employer investigations do not include interviews of all key witnesses with potentially exculpatory evidence. For plaintiffs it will often be a simple matter, once helpful witnesses are uncovered in discovery, to argue that they should have been interviewed by the employer before taking the adverse employment action. Moreover, as with *Roby, Reid and Johnson*, *Nazir* expands the scope of discovery into the details of an employer's investigations.

While it may be too soon to assess the impact of *Nazir* on trial courts' willingness to throw out employment cases on summary judgment, the trend in recent appellate decisions seems to favor trial on the merits. *Nazir's* impact was, for example, evident in the court of appeals' decision in *Sandell v. Taylor-Listug, Inc.*



(2010) 188 Cal.App.4th 297 [115 Cal.Rptr.3d 453], decided a few months later. In *Nazir* the defense had argued that summary judgment was appropriate on the discrimination claims because the supervisor who terminated Nazir's employment had also participated in his promotion a few years earlier. Nazir rejected this argument, known as the "same actor defense", clarifying that while an *inference* of nondiscrimination may be drawn from such circumstances, there is no same actor *presumption* under California law. (*Nazir, supra*, 178 Cal.App.4th at 272-273.) *Nazir* further held that such same actor evidence should be looked at in context and not given any "undue importance." (*Id.* at 273.)

Sandell extended Nazir's rejection of the "same actor" defense, which was based on the fact that the same person both hired and fired the plaintiff within a period of four years. In limiting the "same actor" defense, *Sandell* noted that, even if a 'strong inference' of no discrimination exists, [it] would not be a reason to grant summary judgment in [the defendant's favor]. A strong inference is just that – an inference. The fact that a juror could reasonably draw a different inference is sufficient to preclude summary judgment. (*Id.* at 324)

As the four cases discussed make clear, the trend of recent decisions in California appellate courts has overwhelmingly favored employees, providing them with clear authority for using additional types of circumstantial evidence to prove discrimination, harassment and retaliation.

In little more than a year, the courts have made the following critical rulings:

- Ruled that evidence of other discrimination victims working in the same workplace as plaintiff is *per se admissible*,
- Authorized the use of so called "me too" evidence in other workplaces within the same company for purposes of proving the level of reprehensibility to support a claim for punitive damages,
- Held that discriminatory personnel actions may be used to prove discriminatory animus motivated other acts of harassment that are not overtly discriminatory on their face,
- Rejected the "stray remarks" doctrine

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and held that discriminatory remarks must be considered in the mix of evidence regardless of whether they were made by decisionmakers or contemporaneously with the adverse employment action,

- Ruled that evidence of discriminatory personnel management actions must be considered in analyzing whether an employee has been subjected to hostile work environment,
- Reaffirmed that discriminatory remarks by non-decisionmakers are admissible to demonstrate that input by the biased non-decisionmakers infected the decision-making process,
- Ruled that pretext may be inferred from an employer's failure to utilize neutral investigators and interview exculpatory witnesses regarding the alleged misconduct for which it claims it fired an employee,
- Held that summary adjudication is rarely appropriate in employment cases turning on issues of motive and intent, and
- Repeatedly rejected the "same actor" defense.

The breadth of these recent rulings, and the impact they will have on employment litigation going forward, cannot be overstated. The expanded scope of discovery authorized by these decisions should encourage both employers and employees to explore the possibility of early settlement, given the danger of increased attorney's fees and potential expansion of individual cases into class claims if the broader discovery necessitated by these recent rulings reveals systematic, widespread unlawful policies and practices. For those cases that don't settle early, employees and their attorneys should have a significantly easier time obtaining necessary discovery, defeating summary judgment motions and prevailing at trial.

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