



WEEKLY LAW RESUME™

Issue By: Steven D. Werth

---

June 16, 2011

## Summary Adjudication Against Plaintiff on Retaliation Claim is Improper Where Triable Issues Existed as to Whether Harassment by Co-Workers was Sufficiently Severe

*Patrick C. Kelley v. The Conco Companies, et al.*  
Court of Appeal, First District (June 6, 2011)

In this case, the Appellate Court overturned the trial court's decision that the plaintiff, Patrick Kelley, had failed to raise triable issues of fact as to whether his co-workers engaged in retaliatory harassment that was severe enough to constitute an adverse employment action. However, the Appellate Court upheld the trial court's decision that Mr. Kelley had failed to produce evidence that would support a claim that he suffered discrimination in the workplace because of his gender.

The Conco Companies ("Conco"), a concrete construction company, hired Mr. Kelley as an apprentice iron worker at a job site with David Seaman as his supervisor. After he complained that Mr. Seaman subjected him to a barrage of sexually demeaning comments and gestures, he received similar comments from male co-workers. He was also subjected to physical threats by co-workers in retaliation for his complaints about Mr. Seaman.

Although Mr. Kelley's employer changed his work site, his union later suspended him, rendering him ineligible for employment. After the suspension expired, Conco did not re-hire him. Later he sued Conco and Mr. Seaman, alleging sexual harassment and retaliation under

**San Francisco Office**

505 Montgomery Street, 7th Floor | San Francisco, CA 94111 | Phone: 415-981-6630 | Fax: 415-982-1634

**Monterey Office**

2 Lower Ragsdale Drive, Suite 120 | Monterey, CA 93940 | Telephone: (831) 655-8822 | Fax: (831) 655-8881

**Web:** [www.lowball.com](http://www.lowball.com)



# Weekly Law Resume

A Newsletter published by Low, Ball & Lynch  
Edited by David Blinn and Mark Hazelwood

the California Fair Employment and Housing Act ("FEHA"). The trial court granted the defendants' motion for summary judgment on all claims.

The Appellate Court reversed in part. With regard to Mr. Kelley's claim for discrimination, the Court noted that generally, an FEHA plaintiff must show that gender is a substantial factor in the discrimination, and had plaintiff been the other gender, the plaintiff would not have been treated in the same manner. Accordingly, as the Court noted, it is the disparate treatment of an employee on the basis of sex that is the essence of a sexual harassment claim.

The Court noted that this issue is more complicated to resolve in determining when same-sex harassment amounts to discrimination because of sex. The statements made to Mr. Kelley were crude, offensive and demeaning. However, the Court found that no evidence was presented from which a reasonable trier-of-fact could conclude that they were an expression of actual sexual desire or intent by Mr. Seaman, or that they resulted from Mr. Kelley's actual or perceived sexual orientation. The Court observed that the mere fact that words may have sexual content or connotations, or discuss sex, is not sufficient to establish sexual harassment.

To establish retaliation under the FEHA, a plaintiff must show that he engaged in a protected activity, the employer subjected the employee to an adverse employment action, and a causal link existed between the protected activity and the employer's action. Here, the Court found that Mr. Kelley engaged in protected activity within the meaning of FEHA when he complained about Mr. Seaman's conduct. He also raised triable issues sufficient to defeat the motion for summary judgment as to whether his co-workers engaged in retaliatory harassment that was severe enough to constitute an adverse employment action, whether Conco knew of the improper conduct, and whether Conco properly responded to it. As such, the Appellate Court found that summary adjudication of the cause of action for retaliation under the FEHA was improper.

## COMMENT

Creation or tolerance of a hostile work environment for an employee in retaliation for the

### San Francisco Office

505 Montgomery Street, 7th Floor | San Francisco, CA 94111 | Phone: 415-981-6630 | Fax: 415-982-1634

### Monterey Office

2 Lower Ragsdale Drive, Suite 120 | Monterey, CA 93940 | Telephone: (831) 655-8822 | Fax: (831) 655-8881

Web: [www.lowball.com](http://www.lowball.com)



# Weekly Law Resume

A Newsletter published by Low, Ball & Lynch  
Edited by David Blinn and Mark Hazelwood

employee's complaining about prohibited conduct is an adverse employment action within the meaning of the FEHA. Further, an employer's alleged retaliatory responses may be considered collectively to determine whether the employee was subjected to an adverse employment action. Retaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context. The challenge for plaintiffs in same-sex harassment claims is to establish that the discrimination occurred because of the plaintiff's sex. Evidence, in and of itself, of statements that were crude or demeaning may be relevant to show discrimination, but they are not necessarily sufficient to establish actionable conduct.

For a copy of the complete decision see:

[HTTP://WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/A126865.PDF](http://www.courtinfo.ca.gov/opinions/documents/A126865.pdf)

---

This content is provided for informational purposes only. The content is not intended and should not be construed as legal advice.

Visit our [website](#) for a fully [searchable archive](#) of past editions of the Weekly Law Resume and other Low, Ball & Lynch publications.

The Weekly Law Resume TM is published fifty-two times a year, and is a complimentary publication of Low, Ball & Lynch, Attorneys at Law, a Professional Corporation, with offices in San Francisco and Monterey, California. Information regarding this and other Weekly Law Resume TM articles is available at [www.lowball.com](http://www.lowball.com).

#### San Francisco Office

505 Montgomery Street, 7th Floor | San Francisco, CA 94111 | Phone: 415-981-6630 | Fax: 415-982-1634

#### Monterey Office

2 Lower Ragsdale Drive, Suite 120 | Monterey, CA 93940 | Telephone: (831) 655-8822 | Fax: (831) 655-8881

Web: [www.lowball.com](http://www.lowball.com)