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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

OMAR RODRIGUEZ; CINDY GUILLEN-GOMEZ; STEVE KARAGIOSIAN; ELFEGO RODRIGUEZ; AND JAMAL CHILDS, Plaintiffs, -vs- BURBANK POLICE DEPARTMENT; CITY OF BURBANK; AND DOES 1 THROUGH 100, INCLUSIVE. Defendants.	CASE NO.: BC 414 602 Assigned to: Hon. Joanne B. O'Donnell, Judge Dept. 37 Complaint Filed: May 28, 2009 PLAINTIFF'S SUR-REPLY IN OPPOSITION TO DEFENDANT'S MOTION *IN LIMINE* NO. 6 TO EXCLUDE EVIDENCE OR ARGUMENT RELATING TO ANY PROTECTED CLASS OF WHICH KARAGIOSIAN IS NOT A MEMBER TRIAL: DATE: February 15, 2012 TIME: 9:00 a.m. DEPT: 37
BURBANK POLICE DEPARTMENT; CITY OF BURBANK, Cross-Complainants, -vs- OMAR RODRIGUEZ, and Individual, Cross- Defendant.	

2/9

I. NEW CASE LAW CLARIFIES THAT SUCH EVIDENCE IS ADMISSIBLE TO SHOW DISCRIMINATORY OR BIASED INTENT OR MOTIVE

In its Motion in *Limine* No. 6, Defendant seeks to exclude evidence or argument relating to any protected class of which Plaintiff Steve Karagiosian ("Plaintiff" or "Karagiosian") is not a member. However, such "me too" evidence is admissible to show discriminatory or biased intent or motivation. After Plaintiff filed his oppositions to Defendant's motions *in limine*, the Court of Appeal for the Fifth Appellate District issued its opinion in *Pantoja v. Anton* (August 9, 2011) 198 Cal. App. 4th 87. In *Pantoja*, the court set forth the issue before it:

> In this employment discrimination case, we are asked to decide whether the court erred in not allowing the jury to hear "me-too" evidence, that is, evidence of the employer's alleged gender bias in the form of harassing activity against women employees other than plaintiff. Here, the me-too evidence related to harassing activity that occurred **outside plaintiff's presence and at times other than when plaintiff was employed.** At issue is whether the court properly excluded this evidence as propensity or character evidence under Evidence Code section 1101, subdivision (a), or whether it should have been admitted as evidence of a discriminatory or biased intent or motive under Evidence Code section 1101, subdivision (b).
>
> **We conclude that the evidence should have been admitted and the failure to do so was prejudicial.**

(*Pantoja*, *supra*, at p. 92, emphasis added.)

The court discussed *Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, which in turn discussed *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097 (8th Cir. Mo. 1988):

> *Johnson* discussed *Estes*, with approval, at some length: "The *Estes* court observed that a wholesale exclusion of such evidence 'can be especially damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives.' (*Estes, supra*, 856 F.2d at p. 1103.) The court then went on to quote from *Riordan v. Kempiners* (7th Cir. 1987) 831 F.2d 690, where that court observed that the law tries to protect employees from being treated

more harshly than they would be treated ' "if they were a different race, sex, religion, or national origin, but it has difficulty achieving this goal because it is so easy to concoct a plausible reason for … firing … a worker who is not superlative. A plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries." ' (*Estes, supra*, 856 F.2d at p. 1103.) . . ."

(*Id.* at p. 113.)

The *Pantoja* Court further explained:

We conclude the trial court abused its discretion when it excluded the me-too evidence, both when ruling on defendants' in limine motion and when revisiting the issue during trial. The in limine ruling was an abuse of discretion because it was based on the erroneous assumption that the me-too evidence was inadmissible no matter what it was offered to prove. The court said it understood *Johnson*; however, when Pantoja's counsel argued that the evidence could come in to prove intent, the court's response was that foundational evidence would be required first—by which it apparently meant evidence that the conduct took place in Pantoja's presence or was known by her. This response missed the point counsel was making about *Johnson*, for **the evidence was admissible to prove [defendant's] intent or motive even if the conduct did not take place in Pantoja's presence and was unknown to her.**

(Pantoja, supra, at p.115, emphasis added.)

The court further held that:

Johnson also applies by analogy to Pantoja's claim of hostile environment sexual harassment. Like her claim that gender discrimination motivated her firing, Pantoja's claim of hostile environment harassment required her to show a discriminatory intent on [the defendant's] part. . . . It follows that if the me-too evidence was probative of [the defendant's] intent in behaving as Pantoja alleged, tending to show that gender bias motivated the alleged unwanted touching, shouting, and epithets, then that evidence was admissible under section 1101, subdivision (b). It was not made inadmissible under section

1101, subdivision (a), assuming it was not substantially more prejudicial than probative under Evidence Code section 352.

(*Id.* at p.114.)

Thus, under *Pantoja*, as well as the authority cited in Plaintiff's opposition, such "me too" evidence is admissible to show discriminatory or biased intent or motive in Plaintiff's hostile environment harassment cause of action.

II. CONCLUSION

For the foregoing reasons above, and those discussed in Plaintiff's opposition, Plaintiff respectfully requests that the court deny Defendant's Motion *in Limine* No. 6 in its entirety.

DATED: February 9, 2012

LAW OFFICES OF RHEUBAN & GRESEN

By: Steven M. Cischke
Steven M. Cischke
Attorneys for Plaintiff, Steve Karagiosian

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles. I am over the age of eighteen and am not a party to the within action. My business address is 15910 Ventura Boulevard, Suite 1610, Encino, California 91436.

On February 9, 2012, I served a copy of the following documents described as: **PLAINTIFF'S SUR-REPLY IN OPPOSITION TO DEFENDANT'S MOTION *IN LIMINE* NO. 6 TO EXCLUDE EVIDENCE OR ARGUMENT RELATING TO ANY PROTECTED CLASS OF WHICH KARAGIOSIAN IS NOT A MEMBER** on the interested parties, through their respective attorneys of record in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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XX **BY OVERNIGHT DELIVERY**: I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed as above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

XX **BY E-MAIL OR ELECTRONIC TRANSMISSION**: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the person(s) at the e-mail address listed above. My electronic notification address is ag@rglawyers.com. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

XX **STATE:** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 9, 2012, at Encino, California.

Annette Goldstein