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Creating A New Tort: Sexual Harassment and Personal Liability Under the Fair Employment and Housing Act

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Code Section Affected
Government Code § 12940 (amended).
AB 1856 (Kuehl); 2000 STAT. Ch. 1049[1]

I. INTRODUCTION

Maryann Carrisales and Dave Selkirk were coworkers at the Department of Corrections.[2] Carrisales alleged that, during the time they worked together, Selkirk repeatedly sexually harassed her.[3] Selkirk's alleged acts of sexual harassment began within two weeks of Carrisales' arrival at the Department of Corrections.[4] She accused Selkirk of hugging her, touching her on or near her breasts, inner thigh, and buttocks, and invading her personal space.[5] In addition, she claimed that he prevented her from leaving by standing in her way, or by grabbing the roll bars of her forklift.[6]

In 1999, *Carrisales v. Department of Corrections*[7] was heard by the California Supreme Court.[8] The court held that nonsupervisory employees, like Selkirk, who harass their coworkers, cannot be held personally liable under California's Fair Employment and Housing Act (FEHA).[9] This decision overruled a number of other

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1. This article was originally written on Chapter 1047. However, Chapter 1047 was subsequently incorporated into Chapter 1049. Section 7.5 of Chapter 1049 amended California Government Code section 12490; Chapter 1049 rewrote subdivision (d); inserted subdivisions (e) and (f), relating to medical and psychological conditions; redesignated former subdivisions (e) through (k) as subdivisions (g) through (m), respectively; inserted subdivision (j)(3), relating to personal liability of employees; inserted subdivision (n) relating to good faith efforts to determine reasonable accommodations; and redesignated former subdivision (l) as subdivision (o) of California Government § 12490. This article only discusses the enactment of CAL. GOV'T Code § 12940(j)(3).

2. Carrisales v. Department of Corrections, 77 Cal. Rptr. 2d 517, 518 (1998).

3. *Id.*

4. *Id.* at 519.

5. *Id.*

6. *Id.*

7. 21 Cal. 4th 1132, 988 P.2d 1083, 90 Cal. Rptr. 2d 804 (1999).

8. *Id.* at 1136, 988 P.2d at 1085-86, 90 Cal. Rptr. 2d at 806 (reviewing the grant of summary judgment by the Court of Appeal in California, Fourth Appellate District, to the defendant of the plaintiff's cause of action for sexual harassment under the California Fair Employment and Housing Act (FEHA)).

9. *See id.* at 1140, 988 P.2d at 1088, 90 Cal. Rptr. 2d at 809-10 (finding that the FEHA did not create a cause of action against a coworker for personal liability because of a lack of clear statutory language indicating that intent); *see also* CAL. GOV'T CODE § 12940(h)(1) (West Supp. 2000) (providing that, "[h]arassment of an employee

cases in which California courts had held that fellow employees could be held personally liable under the FEHA.[10]

Supporters of Chapter 1049, including the author of the bill, believe that the current tort remedies available to an employee, who is a victim of sexual harassment by a coworker, are not sufficient to deter individuals from committing sexual harassment.[11] Chapter 1049 strengthens this area of the law by specifying that a nonsupervisory employee can be held personally liable for sexual harassment under the FEHA.[12]

II. EXISTING LAW

A. *Defining Sexual Harassment Under the FEHA*

Under California law, the FEHA's standards for what constitutes sexual harassment are clearly stated.[13] According to the Fair Employment and Housing Commission (FEHC), [t]he three most common types of sexual harassment complaints filed with them involve situations in which: 1) an employee is terminated or refused a job or an employment benefit because [he or she] refused to grant sexual favors or because he or she exposed the harassment; 2) an employee resigns

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. . . shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action . . . [including] all reasonable steps to prevent harassment from occurring").

10. *See* Matthews v. Superior Court, 34 Cal. App. 4th 598, 605-06, 40 Cal. Rptr. 2d 350, 355-56 (1995), *overruled by* Carrisales v. Department of Corrections, 21 Cal. 4th 1132, 988 P.2d 1083, 90 Cal. Rptr. 2d 804 (1999) (holding that the responsibility of sexual harassment should bear on the offender, as well as the employer who tolerates it, as consistent with the Legislature's intent to provide "effective remedies which will eliminate such discriminatory practices"); *see* Department of Fair Employment & Hous. v. Lake County Dep't of Health Servs., (1998) No. 98-11 1998 (Lake County) (finding that nonsupervisory coworkers could be liable for harassment under Government Code § 12940(h)).

11. *See infra* Part IV.A (postulating that current tort remedies are inefficient in deterring perpetrators of sexual harassment, because the amount of workplace sexual harassment incidents have increased).

12. *See* CAL. GOV'T CODE § 12940(j)(3) (enacted by Chapter 1049) (providing that "[a]n employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action").

13. *See Fair Employment and Housing Commission Brochure, available at* http://www.dfeh.ca.gov/Posters&Brochures/DFEH-185.pdf (last visited Sept. 10, 2000) [hereinafter FEHC Brochure] (copy on file with the *McGeorge Law Review*) (defining sexual harassment as:

> unwanted sexual advances or visual, verbal or physical conduct of a sexual nature . . . [including the following acts in the definition of sexual harassment:] [u]nwanted sexual advances; [o]ffering employment benefits in exchange for sexual favors; [m]aking or threatening reprisals after a negative response to sexual advances; [v]isual conduct, e.g., leering, making sexual gestures, displaying of sexually suggestive objects or pictures, cartoons or posters; [v]erbal conduct, e.g., making or using derogatory comments, epithets, slurs and jokes; [v]erbal sexual advances or propositions; [v]erbal abuse of a sexual nature, graphic verbal commentaries about an individual's body, sexually degrading words used to describe an individual, suggestive or obscene letters, notes or invitations; [and p]hysical conduct, e.g., touching, assault, impeding or blocking movements).

because [he or she] can no longer endure an offensive work environment; and 3) an employee is subjected to an offensive work environment.[14]

In sexual harassment suits, courts have acknowledged two categories of sexual harassment: "quid pro quo sexual harassment, and hostile work environment sexual harassment."[15] "Quid pro quo" sexual harassment occurs when an employee submits to sexual conduct made by a supervisor as a condition to an exchange of employment benefits.[16] Under the FEHA, the plaintiff must prove, by a preponderance of the evidence, that "a casual connection exists between the employee's resistance to sexual harassment and an adverse action taken against the employee by his or her employer."[17] In such instances, the FEHA's policy is violated if the action was caused at least in part by a retaliatory motive.[18]

In contrast, "[h]ostile work environment" sexual harassment occurs when the harassment is so severe as to impede unreasonably with the employee's work performance or to create an offensive work environment.[19] These cases are different than quid pro quo cases, because the court examines the totality of the circumstances involved and not just the conduct of a supervisor.[20] Thus, the appropriate inquiry for a court in a sexual harassment case is to look into the entire effect of all the episodes on the working environment instead of extracting incidents of sexual conduct separately in isolation from one another.[21]

Although Chapter 1049 extends liability for workplace harassment to individual employees, it does not change the aforementioned FEHA definitions regarding what constitutes sexual harassment.[22] Moreover, Chapter 1049 does not change the existing FEHA law regarding liability of employers and supervisors for harassment.[23]

B. Conflict: Interpreting the FEHA Policy Regarding Coworker Liability

According to decisions made by the Department of Fair Employment and Housing and some California courts, a coworker could be held personally liable for

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14. *Id.*

15. Hicks v. Gates Rubber Co., 833 F.2d 1406, 1413 (1987).

16. Fisher v. San Pedro Peninsula Hosp., 214 Cal. App. 3d 590, 607, 262 Cal. Rptr. 842, 850-51 (1989).

17. 2 WILCOX, CALIFORNIA EMPLOYMENT LAW § 41.81(1)(a) 41-261 (Supp. 1998).

18. *Id.*

19. *Fisher*, 214 Cal. App. 3d at 608, 262 Cal. Rptr. at 851; ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1856, at 3 (Apr. 11, 2000).

20. *Fisher*, 214 Cal. App. 3d at 608, 262 Cal. Rptr. at 851.

21. 2 WILCOX, CALIFORNIA EMPLOYMENT LAW § 41.81(1)(b) 41-264 (Supp. 1998).

22. *See* CAL. GOV'T CODE § 12940(j)(3) (enacted by Chapter 1049) (lacking reference to the definition of sexual harassment or to changing the burden of proof required for a plaintiff to prove a prima facie case).

23. *See id.* (establishing that an employee can be personally liable for his or her acts of workplace sexual harassment under the FEHA).

acts of harassment under the FEHA.[24] In *Matthews v. Superior Court*,[25] the language of the FEHA was interpreted to include personal liability, because the Act referred to a "person" committing unlawful employment acts.[26] Because the Act made reference to a "person" and not a supervisory employee, the Legislature's intent to include personal liability appeared clear to the court.[27] Therefore, the *Matthews* decision was consistent with the FEHC's interpretation of FEHA.[28] However, this interpretation changed in 1999 with the *Carrisales v. Department of Corrections* decision.[29]

In *Carrisales*, the California Supreme Court held that the language of the FEHA did not give rise to a cause of action of personal liability against a nonsupervisory employee.[30] The court interpreted Government Code section 12940(h)(1) and found the second sentence to be controlling.[31] According to the Court, this second sentence demonstrated that the FEHA may hold an employer liable "if it knew, or should have known, that a fellow employee was harassing another employee, and that it failed to take immediate and appropriate corrective action."[32] Furthermore, the court held that due to the FEHA's specific language regarding coworker harassment and employer liability, it does not create a cause of action for the victim against the perpetrator for personal liability if the perpetrator is a coworker.[33] Nonetheless, the

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24. *See* Matthews, 34 Cal. App. 4th at 606, 40 Cal. Rptr. 2d at 355-56, *overruled by* Carrisales v. Dep't of Corrections, 21 Cal. 4th 1132, 988 P.2d 1083, 90 Cal. Rptr. 2d 804 (1998) (holding that the responsibility of sexual harassment should bear on the offender, as well as the employer who tolerates it, and holding this reasoning consistent with the Legislature's intent to provide "effective remedies which will eliminate such discriminatory practices"); *see* Page v. Superior Court, 31 Cal. App. 4th 1206, 1217, 37 Cal. Rptr. 2d 529, 536 (1995) (finding that coworkers are "persons" within the language of the FEHA and hence may be held personally liable for acts of sexual harassment); *see also* Department of Fair Emp. and Hous. v. Lake County Dep't of Health Servs., (1998) No. 98-11, FEHC Precedential Decs. 1998-1999, CEB 1 (Lake County) (holding that finding nonsupervisory coworkers personally liable for harassment was consistent with the Legislative intent under section 12940(h) and with the policies of the FEHC); Department of Fair Emp. and Hous. v. Madera County, (1990) No. 90-03, FEHC Precedential Dec. 1990-1991, CEB 1, pp. 27-28 (Madera County).

25. 34 Cal. App. 4th 598, 40 Cal. Rptr. 2d 350 (1995), *overruled by* Carrisales v. Dep't of Corrections, 21 Cal. 4th 1132, 988 P.2d 1083, 90 Cal. Rptr. 2d 804 (1998).

26. *See id.*, at 603-06, 40 Cal. Rptr. 2d at 353-56 (1995), *overruled by* Carrisales v. Department of Corrections, 21 Cal. 4th 1132, 988 P.2d 1083, 90 Cal. Rptr. 2d 804 (1998) (questioning whether the Legislature intended for a coworker to be held personally liable for harassment acts).

27. *Id.*

28. *Id.*

29. *Carrisales*, 21 Cal. 4th at 1140, 988 P.2d at 1088, 90 Cal. Rptr. 2d at 809-10 (holding that "the FEHA . . . does not . . . impose personal liability for harassment on nonsupervisory coworkers").

30. *Id.*

31. *See* CAL. GOV'T CODE § 12940(h)(1) (West Supp. 2000) (providing that "[h]arassment of an employee or applicant by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action"); *id.* (noting that "[a]n entity shall take all reasonable steps to prevent harassment from occurring").

32. *Carrisales*, 21 Cal. 4th at 1136-37, 988 P.2d at 1085-87, 90 Cal. Rptr. 2d at 806-07.

33. ASSEMBLY FLOOR, ANALYSIS OF AB 1856, at 3 (June 3, 2000).

Court in *Carrisales* called on the Legislature to clarify Government Code section 12940(h)(1).[34]

III. CHAPTER 1049

Chapter 1049 was enacted to serve three main purposes: 1) to deter offenders from harassing fellow employees by making them personally liable;[35] 2) to give victims a better legal remedy to counter their harassment;[36] and 3) to clarify confusion which has developed due to the California Supreme Court's decision in *Carrisales*, which was counter to existing precedent.[37] Specifically, Chapter 1049 provided for recovery under the FEHA by victims of coworker harassment in the workplace.[38] The Legislature believes that Chapter 1049 is consistent with the intent of FEHA; to ensure that the harassment of employees is not tolerated.[39] Additionally, the Legislature acknowledges that a response to *Carrisales* is necessary in order to prevent judicial confusion that could surface in light of that decision.[40] In *Carrisales*, the California Supreme Court suggested that, if the FEHA was intended to include personal liability for coworkers in harassment cases, the Legislature would have

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34. *Carrisales*, 21 Cal. 4th at 1140, 988 P.2d at 1088, 90 Cal. Rptr. 2d at 809-10 (stating that "[i]f the Legislature believes it necessary or desirable to impose individual liability on coworkers, it can do so," and that the court believes "that had it already intended to do so, it would have used clearer language than that found in section 12940(h)(1)").

35. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1856, at 2 (Apr. 11, 2000).

36. *Id.* at 5-6.

37. *See Carrisales*, 21 Cal. 4th at 1140, 988 P.2d at 1088, 90 Cal. Rptr. 2d at 809-10 (stating that arguments regarding the best way to deter harassment should be left up to the Legislature, "which can study the various policy and factual questions and decide what rules are best for society"); *id.* (noting that "[i]f the Legislature believes it necessary or desirable to impose individual liability on coworkers, it can do so").

38. *See* CAL. GOV'T CODE § 12940(j)(3) (enacted by Chapter 1049) (providing in its entirety that:

> [a]n employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action).

39. *See* FEHC Brochure, *supra* note 13 (providing employers with the necessary information to inform its employees of California's sexual harassment laws). Specifically, this brochure explains an employer's obligations, liabilities, FEHC complaint procedures, and how the law is enforced. *Id.*

40. *Compare Carrisales*, 21 Cal. 4th at 1140, 988 P.2d at 1088, 90 Cal. Rptr. 2d at 809-10 (finding that the statutory language did not support personal liability for coworkers); *with Matthews*, 34 Cal. App. 4th at 606, 40 Cal. Rptr. 2d at 355-56, *overruled by* Carrisales v. Department of Corrections, 21 Cal. 4th 1132, 988 P.2d 1083, 90 Cal. Rptr. 2d 804 (1998) (holding that the responsibility of sexual harassment should bear on the offender, as well as the employer who tolerates it, and holding this reasoning consistent with the Legislature's intent to provide "effective remedies which will eliminate such discriminatory practices"); *see* Page, 31 Cal. App. 4th at 1217, 37 Cal. Rptr. 2d at 536 (finding that coworkers are "persons" within the language of the FEHA and hence are able to be held personally liable for acts of sexual harassment); *see also* Dep't of Fair Employment and Hous. v. Lake County Dep't of Health Servs. (1998) No. 98-11, FEHC Precedential Decs. 1998-1999, CEB 1 (Lake County) (finding that holding nonsupervisory coworkers personally liable for harassment was consistent with the Legislative intent under Section 12940(h) and with the policies of the FEHC).

made that intent clear.[41] Thus, Chapter 1049 is the Legislature's response to the comments made by the California Supreme Court in *Carrisales*.[42]

The sole intent of Chapter 1049 is to clarify the FEHA by adding language to the Government Code.[43] It does not change the FEHA's definition of harassment, nor does it lessen the employer's liability under the FEHA.[44] The purpose of Chapter 1049 is to "provide that the individual doing the harassing should be one of the parties held liable for the conduct."[45]

Specifically, the additional language establishes that if a coworker is the offender, then she is personally liable for acts of harassment, regardless of whether or not the employer is liable.[46] This additional language does nothing to affect the existing FEHA standards governing an employer's liability for "hostile work environment" sexual harassment.[47] Also Chapter 1049 does not encompass "quid pro quo" harassment, because this category requires that a supervisor be involved,[48] whereas Chapter 1049 only affects "coworkers" not supervisors.[49] Furthermore, this simple change to the FEHA sends a strong message of deterrence to coworkers in all fields of employment.[50]

Therefore, Chapter 1049 and the FEHA maintain the goal of providing effective remedies which will eliminate discriminatory employment practices.[51] Chapter 1049's remedy provides that those who sexually harass a coworker will not be able to shield themselves behind their employer.[52] This remedy deters employees from

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41. *Carrisales*, 21 Cal. 4th at 1140, 988 P.2d at 1088, 90 Cal. Rptr. 2d at 809-10.

42. *Id.*

43. *See* CAL. GOV'T CODE § 12940 (enacted by Chapter 1049) (providing, in its entirety, that "[a]n employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action"); *see also* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1856, at 1 (Apr. 11, 2000) (stating that the summary of Chapter 1049 is "[c]larify[ing] that all employees . . . can be held personally liable under the FEHA for unlawful harassment").

44. ASSEMBLY FLOOR, ANALYSIS OF AB 1856, at 2 (June 3, 2000).

45. *Id.*

46. CAL. GOV'T CODE § 12940(j)(3) (enacted by Chapter 1049).

47. *See* Fisher, 214 Cal. App. 3d at 608, 262 Cal. Rptr. at 851 (1989) (stating that the elements of hostile work environment sexual harassment are: "(1) [the] plaintiff belongs to a protected group; (2) [the] plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior"); *see also* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1856, at 4 (Apr. 11, 2000) (explaining that AB 1856 does not change the current law regarding the liability of employers and supervisors for harassment).

48. *See supra* Part II.A (setting forth the definition of "quid pro quo" harassment as involving a supervisor).

49. *See* CAL. GOV'T CODE § 12940(j)(3) (enacted by Chapter 1049) (stating that it is the employee who would be personally liable if that employee is an offender).

50. *See infra* Part IV.A (listing the primary goal of the FEHA as the prevention of workplace harassment); *see also* ASSEMBLY FLOOR, ANALYSIS OF AB 1856, at 3 (June 3, 2000) (stating that "[t]he deterrent effect of the statute [upon] individuals may be undermined by the ruling in [*Carrisales*], as employees get the message that they will not be held personally liable for harassing a coworker").

51. *See supra* note 50 and accompanying text.

52. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1856, at 2 (Apr. 11, 2000).

sexually harassing coworkers by forcing them to take personal responsibility for their own actions.[53]

IV. ANALYSIS OF CHAPTER 1049

The California Legislature has responded to the *Carrisales* decision by enacting Chapter 1049.[54] This law has sparked a major debate regarding whether Chapter 1049 is the best way to deter individuals from workplace harassment.[55] Imposing personal liability upon offending coworkers may be an effective way to reduce the number of sexual harassment incidents in the workplace,[56] but there is also a potential that Chapter 1049 will interfere with internal anti-harassment policies of individual companies.[57] Additionally, Chapter 1049 may increase the amount of frivolous lawsuits.[58] Finally, the possibility remains that Chapter 1049 was unnecessary to begin with, since sufficient tort remedies are available to victims of workplace sexual harassment.[59]

A. *Chapter 1049 as a Rational Deterrent*

Supporters of Chapter 1049 believe that it is the best deterrence to combat workplace sexual harassment;[60] thus, it serves to clear a major hurdle for women in the workplace.[61] The welfare-to-work movement has made many new employment prospects available, especially for women.[62] Thus, there are a number of employees

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53. *Id.*

54. *See Carrisales*, 21 Cal. 4th at 1140, 988 P.2d at 1088, 90 Cal. Rptr. 2d at 809-10 (stating that "[if] the Legislature believes it necessary or desirable to impose individual liability on coworkers, it can do so").

55. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1856, at 6-7 (Apr. 11, 2000).

56. *See infra* Part IV.A (analyzing how Chapter 1049 will deter individuals from harassing fellow employees because perpetrators will be forced to pay out of their own pockets).

57. *See infra* Part IV.B (examining whether Chapter 1049 will increase problems in the workplace and whether it is necessary to expand personal liability under the FEHA to coworker perpetrators); *see also infra* Part IV.C (examining whether Chapter 1049 will increase problems in the workplace and whether it is necessary to expand personal liability under FEHA to coworker perpetrators).

58. *Infra* Part IV.C.

59. *Id.*

60. *See* Letter from Elizabeth McGovern, Legislative Advocate, National Organization for Women, to Assemblymember Sheila Kuehl 1 (Apr. 4, 2000) [hereinafter McGovern Letter] (on file with the *McGeorge Law Review*) (urging the California Assembly to vote in support of AB 1856 and expressing the National Organization for Women's concern with the widespread problem of sexual harassment).

61. *See* Letter from Emily Katz Kishawi, Legislative Advocate, Equal Rights Advocates, to Assemblymember Sheila Kuehl 1 (Apr. 4, 2000) [hereinafter Katz Letter] (on file with the *McGeorge Law Review*) (compelling the California Legislature to vote for AB 1856, because the Equal Rights Advocates believe that it is dedicated to achieving equal opportunity for women by reducing sexual harassment in the workplace).

62. *See* Letter from Marc Brown, Legislative Advocate, California Rural Legal Assistance Foundation, to Assemblymember Sheila Kuehl 1 (Apr. 4, 2000) [hereinafter Brown Letter] (on file with the *McGeorge Law Review*) (informing the Assembly Judiciary Committee of its support for AB 1856 because welfare-to-work requires its workers to be responsible for their own actions, and the same standard should apply to all employees).

in California who are vulnerable to harassment, for a multitude of reasons.[63] For example, an employee may be inexperienced in the workplace and may not know his rights.[64] "In 1997, 25% of the employment discrimination claims lodged with the California Department of Fair Employment and Housing were sexual harassment complaints."[65] This illustrates the widespread problem of sexual harassment in the workplace.[66]

Under California law, employers have "certain obligations regarding sexual harassment."[67] The law requires that employers be involved in the prevention of sexual harassment.[68] One of these requirements is the posting of California sexual harassment laws in the workplace.[69] This is an important requirement, because, for Chapter 1049 to be effective as a deterrent, employees must be aware of the new imposition of personal liability.[70] Chapter 1049 does not impose a new requirement on employers,[71] nor does it change the standard of review under which a court when ruling in a sexual harassment case.[72] Consequently, employers do not have to modify their internal anti-harassment grievance procedures with the addition of Chapter 1049. Instead, employers must only amend discrimination posters to include notice of coworker personal liability.[73]

Furthermore, Chapter 1049 does not add liability to employers because a coworker can be held liable regardless of whether the employer knew or should have known of the harassment.[74] Therefore, Chapter 1049 maintains the current

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63. *Id.*

64. *Id.*

65. McGovern Letter, *supra* note 60, at 1.

66. *Id.*

67. *See* FEHC Brochure, *supra* note 13 (noting that employers have an obligation: to "[t]ake all reasonable steps to prevent discrimination and harassment from occurring," to "[d]evelop and implement a sexual harassment prevention policy," to "[p]ost in the workplace a poster made available by the Department of Fair Employment and Housing," and to "[d]istribute to all employees an information sheet on sexual harassment"); *see also* CAL. GOV'T CODE § 12950(a) (West Supp. 2001) (establishing that all employers have certain responsibilities which include: amending the "current poster on discrimination in employment to include information relating to the illegality of sexual harassment").

68. FEHC Brochure, *supra* note 13, at 2.

69. *Id.*

70. *See* ASSEMBLY COMMITTEE ON JUDICIARY, ASSEMBLY ANALYSIS OF AB 1856, at 7 (Apr. 11, 2000) (establishing that "[i]ndividual liability should provide an additional deterrent, enhancing the deterrent effect of employer and supervisor liability under existing law").

71. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1856, at 4 (Apr. 11, 2000) (explaining that AB 1856 does not change the current law regarding the liability of employers and supervisors for harassment).

72. *See* ASSEMBLY COMMITTEE OF JUDICIARY, COMMITTEE ANALYSIS OF AB 1856, at 5 (Apr. 11, 2000) (noting that "[c]ourts should be able to apply existing legal standards to determine when personal liability for individual coworkers should apply"); *see also Fisher*, 214 Cal. App. 3d at 608, 262 Cal. Rptr. at 851 (setting forth the elements required to establish a hostile work environment sexual harassment case).

73. FEHC Brochure, *supra* note 13, at 2.

74. *See id.* (stating that "[a] program to eliminate sexual harassment from the workplace . . . is the most practical way to avoid or limit liability").

requirements of the law to prevent sexual harassment, while not interfering in an employer's internal anti-harassment grievance procedures.

Arguably, if a perpetrator were to be held personally liable, that person tend to be more mindful of their conduct.[75] In other words, the perpetrator will not be able to leave the payment of the judgment to his or her employer but rather will feel the sting of paying for his actions himself.[76]

B. Challenges for Chapter 1049's Implementation

Potential fallouts from Chapter 1049 are substantial.[77] First, there is the concern that Chapter 1049 will open the door to frivolous lawsuits.[78] A "hostile work environment" sexual harassment by definition, is a collection of sexual harassment incidents which occur over a period of time.[79] So, "whenever a plaintiff sues a company for harassment, it is an easy matter to name every individual employee at the company who ever said a bad word to the plaintiff."[80] This paves the way for frivolous lawsuits because a plaintiff may name an infinite number of coworker defendants.[81] A coworker with limited involvement or no involvement in a suit may be named as a defendant. This circumstance would not have been possible prior to the enactment of Chapter 1049.[82]

However, Chapter 1049 refutes this concern because the current law under the FEHA regarding what constitutes unlawful harassment is still applicable.[83] Plaintiffs will still have to meet the elements of a prima facie case for sexual harassment in the workplace.[84] Therefore, courts will be able to weed through frivolous lawsuits and

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75. Brown Letter, *supra* note 62, at 1.

76. *Id.*

77. *See* Letter from Prem Hunji Turner, Legislative Counsel, California Employment Law Council, to Assemblymember Sheila Kuehl 1 (Mar. 16, 2000) [hereinafter Turner Letter] (on file with the *McGeorge Law Review*) (urging the California Assembly to oppose AB 1856 because it will not reduce workplace harassment but, instead, will cause more problems for California's employers and employees).

78. *See* Letter from Tom Rankin, President, California Labor Federation, to Assemblymember Robert Hertzberg 1 (Apr. 20, 2000) [hereinafter Rankin Letter] (on file with the *McGeorge Law Review*) (expressing the concern of the California Labor Commission surrounding Chapter 1049 and asking the California Legislative not to enact AB 1856, because the law should hold the employer liable for the acts of employees and not impose injustice on employees).

79. *Supra* Part II.A.

80. Turner Letter, *supra* note 77, at 1.

81. Rankin Letter, *supra* note 78, at 1.

82. *Id.*

83. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1856, at 2 (Apr. 11, 2000) (recounting a statement made by the author that "AB 1856 does not change existing law as to what constitutes harassment").

84. *See Fisher*, 214 Cal. App. 3d at 608, 262 Cal. Rptr. at 851 (stating that the elements of hostile work environment sexual harassment are: "(1) [the] plaintiff belongs to a protected group; (2) [the] plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior"); *see also* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1856, at 4 (Apr. 11, 2000) (explaining that AB 1856 does not change the current law regarding the liability

prevent abuse of this law, because the plaintiff must assert a claim for which relief may be granted.[85]

Second, this law could interfere with a company's in-house anti-harassment policies.[86] Often, an effective employer anti-harassment policy is the most practical and non-litigious way to avoid or limit harassment incidents and employer liability.[87] Furthermore, Chapter 1049 allows a victim to go directly to the courts, bypassing a company's internal grievance procedures.[88] This remedy does not allow employers an opportunity to respond to or take action against aimed at workplace harassment before it reaches this level.[89] By interfering with internal policies, Chapter 1049 works against reducing workplace harassment.[90]

On the other hand, an employee facing personal liability would welcome the opportunity to completely cooperate with internal grievance procedures in order to prevent the situation from going to court.[91] Also, the victim would most likely work with an employer's grievance procedure because a lawsuit is an expensive and trying experience. In addition, Chapter 1049 works with the already established employer requirements while limiting employer liability.[92] Thus, Chapter 1049 operates in conjunction with a company's internal grievance procedures to eliminate sexual harassment in the workplace.

C. Is Chapter 1049 Really Necessary?

Another consideration surrounding the enactment of Chapter 1049 is whether this law is necessary. A victim of workplace harassment already has the ability to sue his or her perpetrator for assault, battery, or intentional infliction of emotional distress, depending on the perpetrator's conduct.[93] However, recovery under each of these potential claims presents difficulties for the victim, even though the perpetrator's conduct is undoubtedly unlawful under the FEHA.[94]

Under California law, an assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."[95] For an assault to be

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of employers and supervisors for harassment).

85. FED. R. CIV. P. 12(b)(6).

86. *See* Rankin Letter, *supra* note 78, at 1 (stating that "it is imperative that we [society] hold the employer responsible for providing a just and safe workplace").

87. *Id.*

88. *Id.*

89. *Id.*

90. *See* Letter from Brian Hatch, Director of Governmental Affairs, California Professional Firefighters, to Assemblymember Sheila Kuehl 1 (Apr. 26, 2000) (on file with the *McGeorge Law Review*) (stating that AB 1856 will compromise employer liability for workplace sexual harassment and urging the California Assembly to oppose AB 1856).

91. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1856, at 5 (Apr. 11, 2000).

92. *Supra* Part IV.A.

93. BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 317 (1992).

94. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1856, at 6 (Apr. 11, 2000).

95. CAL. PENAL CODE § 240 (West 1999).

brought, there must be a violent injury on the person.[96] Thus, assault does not cover words, jokes, or offensive posted materials, which constitute the bulk of sexual harassment suits.[97] Therefore, an assault claim for many victims of workplace harassment is completely inadequate and does not serve as a deterrent.

Under California law, a successful battery claim is also untenable for many victims.[98] In California, a battery is defined as "any willful and unlawful use of force or violence upon the person of another."[99] For a claimant to succeed on a battery claim, the plaintiff must show that the defendant's acts intentionally caused harmful or offensive contact with the victim's person.[100] Hence, for a battery suit to be brought, there must be some element of physical contact.[101] However, insults or offensive materials posted in the workplace could not be dealt with under a battery cause of action.[102]

The other option for victims of workplace sexual harassment is a claim for intentional infliction of emotional distress.[103] A cause of action for intentional infliction of emotional distress is established if a plaintiff's severe emotional distress resulted from the outrageous conduct of the defendant.[104] In most cases this tort would not extend to circumstances involving sexual harassment because the language used to harass does not meet the higher standard of "outrageous conduct."[105] For example, isolated propositions, attempts at seduction, and racial slurs are not situations where courts have imposed liability under intentional infliction of emotional distress.[106] However, these examples could constitute a claim under the FEHA.[107]

Therefore, the remedies currently provided by common law are insufficient to deter workplace sexual harassment, as the growing number of incidents of workplace sexual harassment have risen.[108] Chapter 1049 deters sexual harassment in the workplace by holding perpetrators responsible for their own actions.[109] Also, current remedies does not seem to be enough to reduce workplace harassment because the number of discrimination claims reported to the California Department

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96. *Id.*

97. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1856, at 6 (Apr. 11, 2000).

98. *Infra* Part IV.C (explaining that current tort remedies are ineffective remedies for many victims of workplace sexual harassment).

99. CAL. PENAL CODE § 242 (West 1999).

100. *Id.*

101. *Id.*

102. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1856, at 6 (Apr. 11, 2000).

103. *Id.*

104. Kiseskey v. Carpenters' Trust for S. California, 144 Cal. App. 3d 222, 231, 192 Cal. Rptr. 492, 497 (1983).

105. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1856, at 6 (Apr. 11, 2000).

106. *Id.*

107. *Id.*

108. *See* McGovern Letter, *supra* note 60, at 1 (addressing the concern surrounding the increase in the number of sexual harassment claims filed with the FEHC).

109. CAL. GOV'T CODE § 12940(j)(3) (enacted by Chapter 1049).

of Fair Employment and Housing are increasing.[110] By holding perpetrators accountable through their pocket books, Chapter 1049 will serve to deter offenders from engaging in harassing behavior in the workplace.

V. CONCLUSION

The California Legislature has enacted Chapter 1049, establishing a cause of action under the FEHA against coworkers for workplace sexual harassment.[111] This new remedy will deter perpetrators, create cohesion in the courts, and hopefully protect many individuals from the humiliating experience of being a victim of harassment.[112] With the enactment of Chapter 1049, California has provided a more viable remedy for women like Maryann Carrisales, who got her day in court only to experience injustice.

110. *See* McGovern Letter, *supra* note 60, at 1 (stating that, "[i]n 1997, 25% of the employment discrimination claims lodged with the California Department of Fair Employment and Housing were sexual harassment complaints").

111. *See supra* Part III (discussing the necessity of Chapter 1049).

112. *See supra* Part III (discussing the nature of Chapter 1049 and what the Legislature sought to accomplish by its enaction).