

October 19, 2007

VIA OVERNIGHT MAIL

The Honorable Ronald M. George  
Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102-4797

**RE: Hughes v. Pair, 154 Cal. App. 4th 1469 (2007), No. S157197.**

To the Honorable Chief Justice and Associate Justices:

The California Women's Law Center (CWLC) submits this letter as *amicus curiae* in support of the petition for review in the case *Hughes v. Pair*, 154 Cal. App. 4th 1469 (2007), No. S157197, filed by Suzan Hughes on October 11, 2007. We urge the Court to grant the petition for review in *Hughes v. Pair* because the California Court of Appeals decision is a misstatement of the law. The Majority Opinion fails to take into account that California Civil Code § 51.9<sup>1</sup> was established to address sexual harassment in professional relationships. Instead, the court imports the sexual harassment legal standards used in employment discrimination without regard to how employment relationships differ from professional relationships.

CWLC is a private, nonprofit public interest law center specializing in the civil rights of women and girls. Established in 1989, the Law Center works in the following priority areas: Sex Discrimination, Women's Health, Violence Against Women, and Reproductive Justice. Since its inception, CWLC has worked to eradicate sex discrimination. CWLC has authored numerous amicus briefs, articles, and legal educational materials on this issue. The *Hughes v. Pair* case raises questions within the expertise and concern of CWLC. Therefore, CWLC has the requisite interest and expertise to submit an *amicus curiae* letter in the *Hughes* case.<sup>2</sup>

<sup>1</sup> All citations are to this section of the code, unless stated otherwise.

<sup>2</sup> CWLC wrote a letter in support of the 1999 amendment to Civil Code § 51.9 (AB 519) because the previous version of Civil Code § 51.9 was extremely narrow and inappropriately required victims to confront their abusers (which can be dangerous) before having a cause of action for sexual harassment in professional relationships.

Board of Directors\*

Maria Nelson  
Jones Day  
President

Martha B. Jordan  
Latham & Watkins LLP  
Vice President

Ellen Berkowitz  
Manatt, Phelps & Phillips LLP  
Secretary

Lois Thompson  
Proskauer Rose LLP  
Treasurer

Alexandra A. Bodnar  
Squire, Sanders, & Dempsey LLP

Laura K. Christa  
Christa & Jackson

Deborah Clarke  
Gibson, Dunn & Crutcher LLP

Kristina Diaz  
Winston & Strawn LLP

Daphne Gronich  
MGA Entertainment

Chris Hollinger  
O'Melveny & Myers LLP

Bruce Ishimatsu  
Loeb & Loeb LLP

Hon. Sheila James Kuehl  
California Senate

Maria Messing

Laura Petroff  
Winston & Strawn LLP

Jill Ratner  
Fox Group

Maria Rodriguez  
Kaiser Permanente

Mary Shelton Rose  
PricewaterhouseCoopers LLP

Trista Schroeder  
Wasserman Media Group LLP

Barbara Weller  
Broadthink

\*Affiliation for identification purposes only

Executive Director  
Katie Buckland

Past Presidents

Kristina Diaz  
Michelle Garber Zweig  
Laura K. Christa  
Maria Rodriguez  
Deborah K. Bothun  
E. Allison Thomas  
Wayne S. Flick  
Beatriz Olvera-Stotzer  
Janice Kamenir-Reznik  
Diana M. Bontá, DrPH, RN  
Christine A. Littleton  
Hilary Huebsch Cohen  
Susan A. Grode

We urge the Court to grant the petition for review because the Court of Appeals decision does not reflect the purpose of Civil Code § 51.9 and is a considerable step backwards in the fight to eradicate sexual harassment and prevent sex discrimination. Specifically, the Majority Opinion ignores the fact that (a) professional relationships are different from employment relationships, and (b) the context in which sexual harassment occurs affects the legal standard that should be applied.

A. Professional Relationships are Different from Employment Relationships

It is clear that sexual harassment occurs in professional relationships, although it is difficult to discern the extent of this harassment. In one survey, thirty percent of physicians reported that they had engaged in sexual contact with patients or they knew of colleagues that had sexual contact with patients.<sup>3</sup> Further, the public and media believe that a large proportion of professionals use their positions of power to sexually harass clients.<sup>4</sup> Civil Code § 51.9 recognizes this problem and establishes that sexual harassment in professional relationships is unlawful in a way that is distinct from the employment context.

Fundamentally, the differences between sexual harassment in professional relationships and sexual harassment in the workplace stem from the diverse contexts. Women who are harassed by professionals are often more vulnerable than women in employment relationships because women as clients are often seeking help from a male professional. For example in *McDaniel v. Gile*, 230 Cal. App. 3d. 363 (1991):

“[d]efendant had a special relationship with plaintiff in that she was a client and plaintiff was her attorney representing her in a dissolution of marriage proceeding. Plaintiff was in a position of actual or apparent power over defendant. Defendant was peculiarly susceptible to emotional distress because of her pending marital dissolution. Plaintiff was aware of defendant’s circumstances. The withholding by a retained attorney of legal services when sexual favors are not granted by a client and engaging in sexual harassment of the client constitute acts of outrageous conduct under these circumstances.” *McDaniel v. Gile*, 230 Cal. App. 3d. 363, 373-74 (1991).

As *McDaniel* demonstrates, the professional relationships subject to Civil Code § 51.9 reflect an unequal balance of power and control within the relationship. These relationships tend to be more intimate relationships where honest and open communication is sought and often legally protected, e.g., in the case of attorney-client privilege or therapist-patient privilege. In a doctor-patient relationship, the patient is usually reliant on the doctor’s specialized knowledge, and the doctor is privy to intimate details about the patient. Similarly in a teacher-student relationship, a teacher wields considerable control over the student’s school environment, grades, and future success. Further, a trustee has control and discretion over the trust funds, distribution of which

---

<sup>3</sup> T. Bayer, et al. *A National Survey of Physicians’ Behaviors Regarding Sexual Contact with Patients*. 89 South Med. J. 977-82 (1996).

<sup>4</sup> J. A. Barker, *Professional-Client Sex: Is Criminal Liability an Appropriate Means of Enforcing Professional Responsibility?* 40 UCLA L. Rev. 1275, 1277 (1993).

can be conditioned on sexual harassment, as in the case before this court where Pair conditioned trustee services on sexual favors from Ms. Hughes. *Hughes*, 154 Cal. App. 4th at 1475.

Also, interactions between professionals and clients can leave clients more vulnerable to sexual harassment given the scope of the professional relationship. For example, undressing for a doctor or divulging private details of one's personal life to a therapist leave clients vulnerable to sexual harassment. These interactions are defined by the scope of professional services delivered, and what could be construed as sexual harassment in one case, may not be sexual harassment in another situation. If a doctor tells a patient that she "looks nice" while conducting a pap smear that seems to be an outrageous violation of the professional relationship. However, if an attorney tells a client that she "looks nice" before a court appearance it could arguably be seen as supportive behavior, not sexual harassment.

Importantly, in Civil Code § 51.9, the victim only has a cause of action against the harasser in the professional relationship; there is no strict liability for professionals whose agents sexually harass an individual.<sup>5</sup> This is different from sexual harassment in the employment context, where an employer can be found liable for allowing a hostile environment to exist, in addition to being liable for directly creating the hostile environment. This difference means that the severity of harassment should be interpreted in light of the circumstances. A trustee who is sexually harassing a beneficiary is aware of his conduct and is well aware of the impact of the harassment on the beneficiary, given their special professional relationship and the trustee's position of power.

Also, many professionals owe ethical duties to their clients in accordance with their professional licenses, where employers are not held to these standards. For example, trustees owe fiduciary duties to the beneficiaries of the trust, and doctors are bound by various ethical constraints in their work with patients, such as keeping confidentiality and providing a minimum standard of health care. The American Medical Association Council on Ethical and Judicial Affairs states categorically that "[s]exual conduct that occurs concurrent with the physician-patient relationship constitutes sexual misconduct" because "the relative position of the patient within the professional relationship is such that it is difficult for the patient to give meaningful consent to such behavior."<sup>6</sup>

Further, the Majority Opinion applies a workplace standard for defining severe harassment that is tantamount to a "one-free-grope" rule. "[E]ven unwelcome sexual touching is insufficient to constitute severe or pervasive harassment when the incidents are isolated and there is no violence or threat of violence." *Hughes*, 154 Cal. App. 4th at 1484, quoting *Herberg v. California Institute of the Arts*, 101 Cal. App. 4th 142, 153 (2002). This standard is inexcusable for sexual harassment in professional relationships. Professionals often see clients intermittently or many

---

<sup>5</sup> The Governor's office requested specific amendments to AB 519 because of the concern that principals would be liable for the conduct of employees when they had no notice of that sexual harassment ("in effect creating strict liability for principals for the actions of their agents when the principal has no knowledge of any bad conduct and no opportunity to take corrective measures.") Sen. Rules Committee, Third Reading, Concurrence in Sen. Amendments, Analysis, AB 519 (1999) p. 3.

<sup>6</sup> Council on Ethical and Judicial Affairs, American Medical Association, *Sexual Misconduct in the Practice of Medicine*, 266 JAMA 2741 (1991).

times over a short period of time when the professional services are needed. Client contact with professionals could always be construed as isolated as compared to employment situations because of the length between visits and lack of an analogous workplace environment.

In any case, determining whether sexual harassment occurred is a question of fact for the jury. *Id.* at 1488. The Majority Opinion creates a legal standard that makes it virtually impossible to present harassment in professional relationships to a jury, except perhaps in the case of rape. *See Id.* at 1484. A jury can determine whether sexual harassment in a professional relationship has occurred because the legislature has already expressly defined what constitutes harassment under Civil Code § 51.9: sexual harassment consists of “sexual advances, solicitations, sexual requests, demands for sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender, that were unwelcome and pervasive or severe.” Civil Code § 51.9(a)(2). A jury is able to apply common sense and real life experience to determining whether sexual harassment in a professional relationship satisfies Civil Code § 51.9, and a jury should be given that opportunity in this case.

*B. The Context in which Sexual Harassment Occurs Affects the Legal Standard*

Sexual harassment in professional relationships requires a legal standard that is adapted to consider the unique situations in which this sexual harassment occurs. As demonstrated above, professional relationships are not identical to employer/employee relationships and therefore, the legal standard used in California’s Fair Employment and Housing Act (FEHA) and Title VII of the Civil Rights Act (Title VII) employment cases does not apply to Civil Code § 51.9 cases.<sup>7</sup>

Importantly, the plain language of Civil Code § 51.9 reflects the legislature’s intent to apply a unique legal standard to sexual harassment in professional relationships by stating that “[t]he definition of sexual harassment and the standards for determining liability set forth in this section shall be limited to determining liability only with regard to a cause of action brought under this section.” Civil Code § 51.9(d). Also, Civil Code § 51.9 expressly provides for a cause of action against the individual who committed the sexual harassment. This is different from a sexual harassment cause of action under FEHA and Title VII, where the employer is generally being held liable for the actions of supervisors or other employees.

When Civil Code § 51.9 was passed into law in 1994, sexual harassment was equated solely with the employment context.<sup>8</sup> Since that time the courts have held that the context of the sexual harassment impacts the legal standard used in sexual harassment cases. For example, when analyzing school district liability for teacher-student sexual harassment, the U.S. Supreme Court applied a legal standard for damages liability that was different from Title VII and catered to the particular circumstances of sex discrimination in school districts. *Gebser v. Lago Vista Independent Sch. District*, 524 U.S. 274, 286-87 (1998). In *Gebser*, the Court held that a school official must have actual notice of the sexual harassment, in order for the district to be liable for monetary damages. *Id.* at 289. The Court expressly framed this legal standard within the

---

<sup>7</sup> See California Government Code §§ 12900, *et seq.* (2007); see 26 U.S.C. §§ 2000(e), *et seq.* (2007).

<sup>8</sup> Indeed, § 51.9 was created because legislators realized that the employer/employee relationships were not the only relationships with power imbalances that could create situations where sexual harassment was detrimental and difficult to avoid.

context of federal funding for educational systems, stating “a central purpose of requiring notice... is to avoid diverting education funding from beneficial uses where a [school district] was unaware of discrimination in its programs and is willing to institute prompt corrective measures.” *Id.* at 289. This standard differs significantly from the Title VII sexual harassment standard because student-teacher sexual harassment occurs under different circumstances and the Title IX enforcement scheme hinges on there being “an official decision by the [school district] not to remedy the violation.” *Id.* at 290. Therefore, the Court found it appropriate to give the school district an opportunity to end or limit further harassment before holding it liable for damages.

Additionally, in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), the U.S. Supreme Court found that in the context of peer-to-peer sexual harassment in schools (i.e., student-to-student) the sexual harassment must be “so severe, pervasive, *and* objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.” 526 U.S. at 650 (*emphasis added*). The Court created a more stringent standard than the standard established under Title VII because of the context of peer-to-peer harassment.<sup>9</sup> Peer-to-peer sexual harassment can easily fall under the radar of school officials, and student interactions have a different level of scrutiny than adult interactions or teacher-student interactions. *Id.* at 651-53.

The Court in *Davis*, also changed the scope and meaning of “severe” and “pervasive” in the context of peer-to-peer sexual harassment in school, stating that: “[c]ourts, moreover, must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults.” 526 U.S. at 651. Further, the Court clarified that “[d]amages are not available for simple acts of teasing and name-calling among school children . . . even where these comments target differences in gender.” *Id.* at 652. The Court changed the legal standard of sexual harassment based on the context and relationship of the harasser and victim. *Gebser* and *Davis* specifically outline legal standards that are different from the standards used in the employment context, and the California Supreme Court should do the same in this case.

Furthermore, the legal standard used in the Majority Opinion to find neither quid pro quo nor hostile work environment forms of sexual harassment in *Hughes* is steeped in circumstances particular to the employer/employee relationship. California courts define two theories of sexual harassment in the workplace:

- (1) quid pro quo harassment, where submission to sexual conduct is made a condition of *concrete employment benefits*, and (2) hostile work environment, defined as conduct having the purpose or effect of unreasonably interfering with an individual's *work performance* or creating an intimidating, hostile, or offensive *working environment*. [Citations]

---

<sup>9</sup> The harassment in the school setting for peer-to-peer sexual harassment must be “severe, pervasive, *and* objectively offensive”, whereas in the employment discrimination context the sexual harassment must be “pervasive *or* severe.” *Davis*, 526 U.S. at 650; compare *Lyle v. Warner Brothers Television Productions*, 38 Cal. 4th 264, 279 (2006).

*Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128, 1146 (1998) (*emphasis added*). Importing these standards into Civil Code § 51.9 raises many questions that remain unanswered in the Majority Opinion: What is the equivalent of “work performance” for a client in a professional relationship? What is the equivalent of “working environment” in a professional relationship? What benefits are equivalent to “employment benefits” in a professional relationship?

In particular, the quid pro quo standard used in the Majority Opinion is flawed because it borrows Title VII’s “tangible action” standard with no regard to how a tangible employment action differs from actions that change a professional relationship. *Hughes*, 154 Cal. App. 4th at 1481. Again, importing this standard with no adjustment creates confusion as to what is a tangible professional relationship action: Is the substandard delivery of professional services enough? Does the professional have to end the relationship with the client? Is there no cause of action for more subtle relationship differences, such as an attorney not returning client calls, a doctor being less sensitive to a patient, or a trustee becoming increasingly contentious with a beneficiary?

Additionally, the standards of “pervasive” and “severe” must be interpreted based on the professional relationship. “Pervasive” as used in Civil Code § 51.9 “is based upon the conditions of the *relationship*, and how the improper conduct affects those conditions.” Sen. Judiciary Committee Analysis, AB 519 (1999), p.6 (*emphasis added*). “Pervasive” must be examined within the context of a relationship because professionals may have intermittent contact with clients while employers often have daily contact with employees. Similarly, the meaning of “severe” in Civil Code § 51.9 must be based on the conditions of the relationship and the effect of sexual harassment on those conditions. What is “severe” harassment in a professional relationship necessarily relies on the professional services provided and the specific conditions of the relationship.

Furthermore, even in the employment context, this Court has cautioned against applying Title VII legal standards to FEHA sexual harassment cases:

The FEHA’s provisions concerning employment discrimination by sexual harassment differ significantly from the provisions of Title VII. Indeed, Title VII does not specifically address sexual harassment at all. It is because Title VII lacks specific language on sexual harassment that the United States Supreme Court has been forced to infer not only a prohibition on sexual harassment in the workplace, but also a standard of employer liability and an affirmative defense to liability. Given this significant difference in wording, we give little weight to the federal precedents in this area.<sup>10</sup>

---

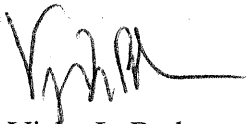
<sup>10</sup> The courts have not imported all of the legal standards developed under Title VII in their analysis of FEHA causes of action. For instances, the California Supreme Court has rejected the *Ellerth/Faragher* affirmative defense to state sexual harassment claims. The *Ellerth/Faragher* affirmative defense can be raised by an employer and consists of the following elements: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexual harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

*State Dept. of Health Services v. Superior Court*, 31 Cal. 4th 1026, 1040 (2003). The Court should similarly reject imposing Title VII legal standards to Civil Code § 51.9, a California state law that deals with sexual harassment in an entirely different context.

The Majority Opinion fails to acknowledge the reality that professional relationships exist in circumstances that differ from employment relationships, and thus discounts the impact of sexual harassment in professional relationships by applying an inappropriate legal standard. As the Dissent properly points out, “[t]he ‘constellation of surrounding circumstances’ relevant to *Civil Code section 51.9* will be such that workplace definitions of ‘severe’ will not apply.” *Hughes*, 154 Cal. App. 4th at 1488 (*Armstrong Dissenting*). As this is an issue of first impression, we urge this Court to grant review and apply a legal standard for the enforcement of Civil Code § 51.9 that takes into account the differences between sexual harassment in the workplace and sexual harassment in professional relationships. Furthermore, the jury is the appropriate body to determine whether Pair’s conduct is sexual harassment under Civil Code § 51.9 because the code section explicitly outlines a common sense definition of sexual harassment in professional relationships.

In the alternative, if a petition for review is not granted, we request that the California Supreme Court order *Hughes v. Pair* to be decertified for publication because the opinion sets an inappropriate precedent.

Respectfully submitted,



Vicky L. Barker  
*Legal Director*  
SBN 119520  
California Women’s Law Center



Emily Austin  
*Staff Attorney*  
SBN 246422  
California Women’s Law Center

Attachment: Proof of Service

---

Instead, the California Supreme Court held under FEHA that the employer is strictly liable for the acts of a supervisor. *State Dept. of Health Services v. Superior Court*, 31 Cal. 4th 1026, 1045 (2003).

## PROOF OF SERVICE

### STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a citizen of the United States and employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 6300 Wilshire Blvd., Suite 980, Los Angeles, California 90048.

On October 19, 2007, I served the foregoing document described as **Amici Curiae Letter in Support of Petition for Review in *Hughes v. Pair***, on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, and deposited in the United States mail, at Los Angeles, California. The envelopes are addressed as follows:

HILLEL CHODOS  
DEBORAH CHODOS  
1559 South Sepulveda Blvd.  
Los Angeles, CA 90025

MELANIE C. ROSS, Esq.  
Knee Ross & Silverman LLP  
2049 Century Park East,  
Suite 4250  
Los Angeles, CA 90067

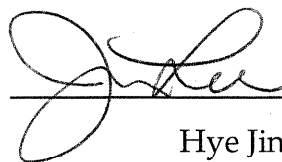
MANUEL M. MEDEIROS  
State Solicitor General  
Office of the Attorney General  
Edmund G. Brown, Jr.  
1300 I Street, P.O. Box 944255  
Sacramento, CA 94244-2550

Presiding Judge  
Los Angeles Superior Court  
For Hon. Andria K. Richey  
111 North Hill Street  
Los Angeles, CA 90012

Clerk, Court of Appeal  
Second Appellate District,  
Division Five  
300 South Spring Street, 2nd Floor  
Los Angeles, CA 90013

I caused such envelopes to be deposited in the mail at Los Angeles, California. The envelopes were mailed with postage thereon fully prepaid. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 19, 2007 at Los Angeles, California.



Hye Jin Lee