APPEAL NO. 15-55556

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBIN ANDERSON,

Plaintiff/Appellant,

vs.

CRST INTERNATIONAL, INC., An Iowa corporation; CRST VAN EXPEDITED, INC., an Iowa Corporation, ERIC VEGETEL, an individual, and DOES 1 through 10 inclusive

Defendants/Appellees.

On Appeal from the United States District Court for the Central District of California, Riverside, Case No. 5:14-CV-00368-DSF-MAN
The Honorable Dale S. Fischer

OPENING BRIEF FOR APPELLANT

Brian F. Van Vleck, Esq,
California Bar No. 155250
bvanvleck@vtzlaw.com
Daniel J. Turner, Esq.
California Bar No. 207654
dturner@vtzlaw.com
VAN VLECK TURNER & ZALLER LLP
6310 San Vicente Boulevard, Suite 430
Los Angeles, California 90048
Telephone: (323) 592-3505
Facsimile: (323) 592-3506

STATEMENT OF RELATED CASES

Appellant is not aware of any related cases pending in this Circuit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

I.
STATEMENT OF JURISDICTION

Plaintiff, Robin Anderson, filed this action in the United States District Court for the Central District of California pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000, et seq. ("Title VII"). The district court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1331, 1337, 1343, and 1345, and 42 U.S.C. §2000(e)-(f), which confer jurisdiction upon the district courts for actions brought under Title VII. The district court entered final judgment against Plaintiff on April 1, 2015. Plaintiff timely filed an appeal on April 13, 2015.

II.
STATEMENT OF THE ISSUES

1. Whether a reasonable finder of fact could determine that a female truck driver had been subjected to severe or pervasive harassment under Title VII where her more senior male partner repeatedly unzipped his pants, made unwanted and offensive reference to the strength of his erections and the size of penis, talked about his alleged experiences with making pornography,

and eventually took off his clothes and approached her bed when they were forced to share a hotel room by their employer.

2. Whether an employer may avoid liability for a reported instance of serious sexual harassment by one of its employees where it deliberately fails to investigate the accuracy of the accuser's allegations and refuses to even consider whether disciplinary action against the alleged harasser is warranted.

3. Whether a reasonable finder of fact could determine that an employer has retaliated or discriminated against an employee for her complaints of sexual harassment where, upon receiving her complaint, the employer immediately declines to reassign her to a new driving team apart from her harasser, fails to investigate her claims, fails to give her any work to perform, and then terminates her employment within approximately 60 days; and where the employer had previously immediately found a team member and given load assignments to her male counterpart.

4. Whether an employment relationship between a California resident and a trucking company that does business in California should be governed by California anti-discrimination law (the "FEHA"), where the employment relationship is formed in California, is based out of California, and includes substantial work within California.

III.

STATEMENT OF THE CASE

Plaintiff, Robin Anderson ("Plaintiff" or "Anderson"), was formerly employed as a truck driver by Defendant CRST International, Inc. ("CRST" or "Defendant"). On February 26, 2014, Plaintiff filed her Complaint in the federal District Court for the Central District of California, alleging four causes of action for: (1) Harassment; (2) Discrimination; (3) Retaliation; and (4) Failure to Prevent Harassment and Discrimination. All four causes of action are asserted under both Title VII of the 1964 Civil Rights Act, 42 U.S.C. Sec. 2000(e), et seq. ("Title VII"), as well as the California Fair Employment and Housing Act, Gov't Code Sec. 12940, et seq. (the "FEHA"). Also named as an individual defendant was individual Eric Vegtel ("Vegtel"), who was also employed by Defendant CRST and who is alleged to have engaged in a pattern of severe and pervasive sexual harassment against Plaintiff between approximately December 2012 and January 2013. After conducting discovery, Defendants Vegtel and CRST moved for summary judgment, which was granted by the district court of April 1, 2015.

IV.

SUMMARY OF ARGUMENT

The court erred in the first instance by determining that the evidence of harassment presented by Plaintiff was not sufficiently severe and pervasive to alter the conditions of employment of a "reasonable woman."

The evidence before the court, including the deposition and declaration testimony of Plaintiff, established that she was subjected to an unwelcome barrage of sexual comments by her co-driver, Defendant Vegtel. These included repeated statements regarding the size and strength of his erection; leaving his pants undone because and he claimed he was "too big" to zip them up; telling Plaintiff of his alleged experiences in the "Porn World" and that he repeatedly got in trouble for staring at a pornography star's breasts. The harassment culminated in early January 2013, when Vegtel took off his clothes and approached Plaintiff completely naked.

Whether this conduct was sufficiently severe and pervasive to alter the conditions of her employment should properly be decided by the trier of fact based on the "totality of the circumstances." Instead, the district court improperly found that the alleged harassment was insufficient as a matter of law to be actionable in the Ninth Circuit. The court reached this erroneous conclusion largely by misapplying

cases which have imposed a higher threshold for harassment that involves only a single, isolated incident, rather than the escalating pattern of harassment alleged here. In addition, the court failed to consider the unique circumstances presented by Plaintiff's job as a long-haul trucker teamed with a male harasser. As a result, the lower court's grant of summary judgment should be reversed as to this ground.

In addition, the court also erred in determining that Defendant CRST could not be liable for Defendant Vegtel's harassment because it had supposedly undertaken "reasonable remedial action." In fact, the record demonstrates that CRST deliberately failed to conduct any investigation and failed to even interview either the Plaintiff or the accused harasser. A long line of Ninth Circuit authority has emphatically held that such inaction will preclude an employer from avoiding liability on the basis of "remedial measures," and will instead result in an imposition of liability under a "ratification" theory.

For all of these reasons, the grant of summary judgment should be reversed.

V.

STATEMENT OF THE FACTS

A. Anderson's Hiring and Assignment to Work with Vegtel

Plaintiff was hired to work as a driver by CRST on December 10, 2012. (ER 296; Declaration of Robin Anderson ("Anderson Decl.") at ¶ 2.)

CRST is a nation-wide trucking company which primarily staffs its "over-the-road" trucks with two-driver "teams." (ER 515; Stearns Decl. at ¶ 4.) Under this model, two drivers take turns driving in order to maximize the time that the truck is in motion. Throughout their shifts, the two drivers assigned to the truck "switch-off" between driving and sleeping in the "sleeper birth." (Id.)

When it wishes to provide work to a driver who does not currently have a co-driver CRST will find another driver to form a team. For example, when CRST's Facility Manager, Alvin Hogar, discovered that Vegtel needed a co-driver he immediately sent Plaintiff to work with him.

> Q. Okay. How did it happen? I know you that there was a table and you met her at a table, if you could just describe in more detail, how did that happen?
>
> A. Hogar came up to me and he says, "What's up?"

> "I'm looking for a co-driver."
> And he said, "Oh, I can help you with that."
> And he went into the room, the classroom and then he came back and he says, "I have" – he went in the class, he said something, I don't know what he said. And then he came back. "I helped you out." And he left. And then Robin came.
> (ER 335; Vegtel Dep. at 65:3-13.)

Immediately after completing her orientation, Plaintiff was thus assigned to drive with Vegtel on a lengthy "over the road" trip spanning several states. (ER 296; Anderson Decl. at ¶¶ 3-4; Vegtel Depo. at 64:24-65:65:25[1].) Plaintiff was told that the truck was assigned to Vegtel, not her. (ER 334-335; Anderson Decl. at ¶¶ 3-4; Vegtel Depo. at 57:21-58:18.)

Vegtel repeatedly reinforced the message that he was in charge of their day-to-day operations while driving. For example, when Plaintiff questioned Vegtel regarding the weight of the load they were carrying, he stated he would rather just drive around the weigh stations rather than reduce the load or have the customer rework the load. (ER 296; Anderson Decl. at ¶¶ 3-4.) Vegtel bluntly told

---

[1] The deposition of Eric Vegtel is attached to the Declaration of Brian Van Vleck ("Van Vleck Decl." as Exhibit A.)

Plaintiff that he was the "lead driver" and that these sorts of decisions were his to make, not hers. (ER 296; *Id.* at ¶¶ 3-4.)

B. Plaintiff Was Subjected To Repeated and Escalating Harassment by Her Lead Driver, Vegtel.

Almost from the minute she set foot in his truck, Vegtel began sexually harassing Plaintiff. For example, on their first trip together – which lasted from December 14 through December 17 – Vegtel informed Plaintiff that he had experienced a painful erection the previous night. (ER 296-297, 301-305; Anderson Decl. at ¶ 5, Exh. A.) Even though Plaintiff repeatedly pleaded with him to stop telling this inappropriate tale, Vegtel nevertheless continued to tell her that his erection was so strong that he "didn't know what to do" and it hurt so bad that he felt like he had overdosed on Viagra. (ER 296-297, 301-305; *Id.*)

It was also on this initial trip that Vegtel announced that he was "from the Porn World." (ER 297; *Id.* at ¶ 6.) Although he did not specify his role in the pornographic industry, Vegtel told Plaintiff that he frequently worked with "porn stars" who put their "large breasts in [his] face." (ER 297; *Id.*) Vegtel went on to inform Plaintiff that he had "gotten into trouble" because he could not control himself under those tempting circumstances. (ER 297; *Id.*)

Unfortunately, Vegtel's conduct was not limited to these

sexually-charged remarks and innuendos. On December 31, 2012, after their truck broke down, Plaintiff was required to share a hotel room with Vegtel in Houston, Pennsylvania. (ER 297; *Id.* at ¶¶ 7-9.) Plaintiff specifically asked CRST "can we have separate rooms or do we have to share a room," the Company informed her that they would only provide reimbursement for one room. (ER 297, 307-308; Anderson Decl. at ¶ 8, Exh. B.)

Even though Plaintiff specifically instructed Vegtel that she could only share a room with him provided none of his cloths came off (*i.e.*, the "no clothes off rule"), Plaintiff awoke in the middle of the night on January 2, 2013 to find an approximately 400-pound, naked Vegtel approaching her bed in the hotel room. (ER 298; Anderson Decl. at ¶¶ 10-11.)

Although Plaintiff was terrified that Vegtel was naked and seemed to be approaching her, she noticed that he had also removed the entirety of his sleep apnea device which would have taken several minutes and allowed him to move about the room unrestricted. (ER 298; *Id.*) It was only after Plaintiff had awoken that Vegtel sat down on the edge of his bed and put his head in his hands. After sitting on the edge of his bed – naked – for several minutes, Vegtel finally got up, put his pants on and finally got back into his own bed. (ER 298; *Id.*)

C. CRST Refused to Investigate Plaintiff's Complaints and Falsely Claims It Has Taken Remedial Action.

On paper, CRST's anti-harassment policy accurately tracks the legal obligations of Title VII. The written policy recites, for example, that "sexual harassment" may include: "discussing . . . pornographic or sexual oriented materials," "Engaging in indecent exposure;" or "creating an intimidating, hostile or offensive working environment." (ER 629-632).

CRST directs victims to "comply with this policy and report all known violations of this policy to the appropriate supervisor, fleet, manager, or Human Resource representative so that corrective action can be taken." (ER 629-632).

In return, CRST assures that it will "take the following steps in addressing complaints of harassment or discrimination in a confidential manner:"

- "Fully inform the employee of his/her avenues to report and address the harassment . . . [and] that s/he will not be disciplined or otherwise retaliated against as a result of making a complaint."
- "Immediately conduct a thorough, objective, and complete investigation of the alleged harassment in an attempt to make a determination about whether the alleged harassment has occurred."

- "Take prompt and effective remedial action commensurate with the severity of the offense of the harassment that has occurred."
- "Advise the employee of actions taken to address the complaint."

(ER 629-632) In its motion for Summary Judgment, CRST asserts as undisputed facts claims that this is, in fact, its mandatory policy which is enforced by its HR department. (ER 493-494; *See* SUMF Nos. 29-34.)

CRST's reaction to Anderson's formal complaint of harassment was the polar opposite of its own policy, however. Indeed, while Plaintiff did everything asked of her, CRST simply ignored her and shut her out from further work assignments.

Plaintiff first complained on January 4, 2013, by sending a message to Joe Stearns over the Company's QualComm system complaining that she had "some very serious issues" with Vegtel. (ER 213; *Id.* at ¶ 11, Exh. C.) When Stearns asked for details, Plaintiff immediately stated that she "woke up in the hotel to him sitting naked on the side of the bed." (ER 213; *Id.*) Nevertheless, CRST did nothing to separate Vegtel or to allow Plaintiff to return to California separately. (ER 213; *Id.* at ¶¶ 11-13.)

Upon returning to Fontana, on January 7, 2013, Plaintiff provided a 5-page handwritten statement detailing most of her allegations to the Terminal Manager, Alvin Hoggart. (ER 214, 216-

220, 717; Hoggart Decl. at ¶ 6; Anderson Decl. at ¶ 13.) Hoggart e-mailed the written complaint at 12:40 p.m. that same day to Sara Kircher in CRST's HR Department, with the transmittal message: "Enclosed is a copy of a statement from Robin Gunther regarding an incident that took place between Robin's co-driver and her. Please review and call Robin to discuss this incident 502-381-7565." (ER 717, 719; Hoggart Decl. at ¶ 6, Exh. 1.)

But Kircher never initiated contact with Anderson. Indeed, as Plaintiff testified (and CRST does not dispute), no one at CRST ever communicated with Anderson to investigate her serious harassment allegations.

> Q. Did you have any other phone conversations with anyone at CRST after this statement was prepared about sexual harassment?
> A. No. The – Sarah, Human Resources never contacted me, and she would never take my calls.

Nor did CRST bother to contact the alleged harasser, or to even inform him that a complaint had been lodged against him. When asked at deposition regarding the Company's "investigation," Vegtel testified as follows:

> Q: You're aware that Robin Anderson made some

allegations of sexual harassment against you, correct?

A: Yes.

Q: Do you know if anyone at CRST ever conducted an investigation into those allegations?

A: No.

Q: So you don't know whether they ever did an investigation?

A: I don't know.

Q: Did anyone from CRST ever interview you about those allegations?

A: I don't know.

Q: You don't know if they interviewed you?

A: No. I don't remember."

(ER 251; Vegtel Depo. at 94:05-21).

CRST thus made a conscious decision not to return Plaintiff's calls, or to actually investigate Plaintiff's allegations, or to even consider disciplinary action against Vegtel. CRST nevertheless issued a form "response letter" from Kircher on January 21, 2013, which falsely states that "I want to assure you that I have conducted an investigation." (ER 260, 513; Van Vleck Decl. at Exh. C; Stansky Decl., Exh. 2.)

This letter further states that on the basis of this fictitious investigation, "we have taken appropriate action regarding this

matter." (Id.)[2] The nature of the alleged "appropriate action" is not disclosed. In any event, as a further example of CRST's lack of communication with Plaintiff, the "response letter" was never received by Plaintiff as it was mailed to an incorrect address. (ER 214; Anderson Decl. at ¶ 15.)

CRST's conscious decision not to conduct any sort of actual fact-gathering investigation is reflected by its own internal "Investigation Form," which was generated in response to Plaintiff's January 7, 2013 complaint. (ER 254-258; (Van Vleck Decl., Exh. B.) The form contains checklists, instructions, and blanks for conducting and recording the activities of a proper investigation. The only events which are marked as completed are: "Statement[] received in writing;" and "Sent Response letter to accuser on 1/21/13." (ER 254.) The remainder of the form is entirely blank. The investigative and remedial items which CRST chose to forego include "Non-Harassment/Non-Discrimination policy reviewed with both parties;"

---

[2] The letter states in its entirety:

> This is a brief note to follow up the statement you provided on January 7, 2013 regarding the situation you have experienced during your employment with CRST. I want to assure you that I have conducted an investigation and we have taken appropriate action regarding this matter. Should you need further assistance, please do not hesitate to contact me. (ER; Van Vleck Decl. at Exh. C.)

"Qualcomm messages reviewed;" "Driver evaluations reviewed;" "Trip Inquiry obtained;" "Discipline documented in investigation file;" and "Follow up with the accuser." (Id.)

Although CRST made no effort to corroborate Plaintiff's factual allegations, it alleges that it follows an independent policy of "indefinitely prohibit[ing] the accused driver from being teamed with a driver of the opposite sex." (ER 495, 509; SUMF No. 33; Stastny Decl. at ¶ 9.) Thus, CRST internally flagged Vegtel as being ineligible to work with female drivers." (Id.) CRST's position, however, is that this is done automatically due to the mere lodging of a harassment charge and "does not necessarily indicate that CRST concluded the driver was guilty of misconduct." (ER 495, 509; Id.)

This exclusion from working with females is therefore not a form of reprimand or discipline. Indeed, CRST never even informed Vegtel of this internal change in his status. Vegtel only learned of his special "no female co-worker" status by happenstance when he was blocked from working with a female in April 2014 – well over a year after the alleged harassment, the conclusion of CRST's putative investigation, and the termination of Plaintiff's employment. (ER 252; Vegtel Depo. at 95:07-24.)

D. Whether CRST Legitimately Terminated Plaintiff for "Job Abandonment" Is a Disputed Material Issue.

Even after Plaintiff lodged her initial complaints of harassment via Qualcomm CRST made no arrangement to allow her to work separately from Vegtel. CRST did not, for example, assign her a new driving partner or reassign Vegtel to a new truck.

Instead, Plaintiff was forced to resort to "self-help" by simply getting out of Vegtel's truck and refusing to get back on after she returned back to her home base in Fontana. (ER 616; Anderson Dep. at 247 ("when I got back to the yard, I wasn't getting back on the truck with him.")

The negative consequences for Plaintiff, however, were that CRST would no longer assign her any loads and she could earn no compensation due to CRST's mileage-based compensation system. (ER 634).

Indeed, after lodging her internal complaint on January 7, 2013, CRST never paired her with a new co-driver and never gave her any work assignments. ***In other words, CRST "abandoned" Anderson after she complained, not the other way around***.

> Q. Who do you think made the decision to terminate your employment?

A. I have no idea.

Q. Do you think it was Joe Sterns?

A. I don't know. No one ever called me. No one called me on the phone and said you are terminated. Just I never got any more loads, they didn't assign me another truck, they sent me home, and they knew I wanted a female co-driver before they sent me home. They never sent me any information or any ways about getting a female driver.

Q. Did you ever receive any communication from CRST about your complaint of sexual harassment?

A. No, never.

Q. Did you receive a letter from Sarah Kircher?

A. No, I did not.

(ER 619; Anderson Dep. at 255:8-23.)

CRST offered the declaration statement of its Fleet Manager, Joe Stearns to contradict Plaintiff's deposition testimony. Stearns asserts that, in fact, he "attempted to team Anderson with another driver and give her a list of possible female co-drivers to contact" by

sending her a January 7, 2013 e-mail "listing possible co-drivers." (ER 517; Stearns Decl. at ¶ 15.)

However, the alleged "e-mail" is not in the format of a CRST e-mail, such as the one sent the same day by Alvin Hoggard to Sarah Kircher transmitting Plaintiff's complaint. (*Compare* ER 527-529; Stearns Decl. Exh. 2 with to ER 719; Hoggart Decl. Exh. 1.) Rather, the document appears to be some sort of screen shot from an internal CRST database. Indeed, the purported "e-mail" contains no valid e-mail address for Plaintiff. It merely lists a code of "nurserlg," which contains no valid e-mail extension and is thus a facially invalid e-mail address format.

It is conceivable that Hoggard tried to transmit the January 7, 2013 information to Plaintiff via CRST's on-board Qualcomm messaging system. If so, CRST knew or should have known that Plaintiff would never receive the message as the whole point of the message is premised on a recognition that she is no longer assigned to any truck. In any event, these facial defects in Hoggard's purported "e-mail" merely lend credence to Plaintiff's testimony that "[t]hey never sent me any information or any ways about getting a female driver." (ER 619; Anderson Dep. at 255:8-23.)

Furthermore, even if Plaintiff had received the January 7, 2013 "e-mail," it contains no explanation as to what the enclosed screen shot is supposed to mean, or how Plaintiff is expected to respond.

Nothing in the documents identifies the list as being female drivers. Nor does it offer Plaintiff the opportunity to work with any of them, or request that Plaintiff take any particular action.

The alleged purpose of the January 7, 2013 "e-mail" – i.e., to transmit a list of female co-drivers -- is also contradicted by CRST's own claim that that "Anderson never requested names of female co-drivers." (ER 505; SUMF No. 99.)

CRST also submitted no evidence of a consistent policy or practice of requiring drivers to take particular actions to be assigned to a team or to receive loads, or that Anderson violated these policies. Indeed, the evidence that Hoggard took the initiative to immediately find a co-driver for Vegtel belies any claim that the onus was on Plaintiff to obtain further assignments from CRST.

Approximately 60 days after lodging her complaint, CRST formally terminated Plaintiff's employment on March 5, 2013. The stated ground was that Plaintiff had supposedly "abandoned" her employment by "failing to report" for work. [ER 517, 527-529; Stearns Decl. at ¶ 15, Exh. 2.] CRST offered no evidence, however, that it had offered Plaintiff the opportunity to work upon "reporting." Nor did it offer any evidence that termination under these circumstances is required by CRST policy, or that any drivers who have not lodged protected complaints had been denied assignments or been terminated in similar circumstances.

VI.

STANDARD OF REVIEW

This Court reviews the grant of summary judgment de novo, applying the same legal standard as the district court is required to apply.[3] Summary judgment is only appropriate if, on the record as a whole, no rational trier of fact could find for the plaintiff, and, in making such a determination, "the court must draw all reasonable inferences in favor of the [plaintiff], and it may not make credibility determinations or weigh the evidence."[4] While the court should review the record as a whole, "it must disregard all evidence favorable to the moving party that the jury is not required to believe."[5] By contrast, it must "give credence to the evidence favoring the nonmovant."[6] As applied to a discrimination case, the applicable standard "requires the non-moving party to produce 'very little evidence' to overcome a motion for summary judgment" as "the

[3] *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1021 (9th Cir. 2001).

[4] *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

[5] *Id.* at 150-51.

[6] *Id.* at 150-51.

ultimate question is one that can only be resolved through a searching inquiry-one that is most appropriately conducted by a factfinder, upon a full record."[7]

VII.
ARGUMENT

A. THE ALLEGED CONDUCT OF CO-DRIVER VEGTEL IS ACTIONABLE HARASSMENT UNDER TITLE VII.

Title VII prohibits discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex."[8] "Sexual harassment is a form of discriminatory treatment, and applies in any

[7] *Lindsay v. SLT Los Angeles, LLC*, 432 F.3d 954, 958 (9th Cir. 2005) (quoting *Chuang v. Univ. of Cal. Davis Bd. of Trs.*, 225 F.3d 1115, 1124 (9th Cir. 2000); *accord Video Software Dealers Assn. v. Schwarzenegger*, 556 F.3d 950, 956 (9th Cir. 2009) ("viewing the evidence in the light most favorable to the nonmoving party," to determine "whether there are any genuine issues of material fact and whether the district court correctly applied substantive law.").

[8] 42 U.S.C. § 2000e–2(a)(1).

situation where there is discrimination 'because of' sex."[9]

"A hostile environment exists when an employee can show (1) that he or she was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, (2) that this conduct was unwelcome, and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[10] All three elements are met here.

The sexual harassment analysis includes both an objective and a subjective component. The objective standard is based on the perspective of "a reasonable person in the plaintiff's situation,"[11] which the Ninth Circuit has long held to be a "reasonable woman" in the case of a male-on-female harassment.[12] Moreover, "in most claims of hostile work environment harassment, the discriminatory acts [are] not always of a nature that could be identified individually as significant events." Rather, "day-to-day harassment [is] primarily

---

[9] *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1094 (9th Cir. 2008), (quoting *Oncale v. Sundowner Offshore Servs*., 523 U.S. 75, 81 (1998).

[10] *Ellison v. Brady*, 924 F.2d 872, 875-876 (9th Cir. 1991).

[11] *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998).

[12] *See, e.g., Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991).

significant, both as a legal and as a practical matter, in its cumulative effect."[13]

In weighing the severity of a particular course of harassment the fact-finder must evaluate the "***totality of the circumstances***."[14] Indeed, analyzing the severity of harassment against a particular individual in a particular workplace requires "careful consideration of the social context in which particular behavior occurs and is experienced by its target ... [and] often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."[15] Thus, where the severity or pervasiveness of harassment is at issue, "it is more appropriate to leave the assessment to the fact-finder than for the court to decide the case on summary judgment."[16]

In this case, for example, the relevant circumstances include the fact that Plaintiff was required to co-habit a truck with her alleged harasser while traveling thousands of miles away from her home. Compared to other workplaces, it is impractical for a long-haul

---

[13] *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1108 (1998).

[14] *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

[15] *Draper v. Coeur Rochester, Inc*., 147 F.3d 1104, 1108 (1998).

[16] *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1096 (9th Cir. 2008).

trucker to simply leave HER "workplace" in order to avoid a harasser, or to summon help in the event of a physical attack. These realities necessarily heighten the abusive nature of harassment occurring within the confines of this environment.[17]

Indeed, while Vegtel had Plaintiff confined as his "captive audience," he engaged in a persistent variety of sexually offensive and threatening behavior that could only have been directed at Plaintiff based on her sex. As noted previously, Vegtel:

- Repeatedly made unwanted vulgar comments regarding the size and strength of his erection;
- Made clear he could not "zip up" his pants because and he was "too big" and, therefore, had to work with his pants halfway down his body;
- Informed Plaintiff that he was from the "Porn World" and he repeatedly got in trouble for staring at a pornography star's breasts; and
- Approached Plaintiff in early January 2013 in their hotel room completely naked, despite Plaintiff's clear directive that he not take off any of his clothing while they were forced to share a room.

Moreover, Vegtel harassment was compounded by the uncaring, unresponsive and, at times, dishonest response by CRST.

[17] *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1108 (1998).

This included CRST's failure to even interview or speak to Plaintiff about her allegations, or to take any affirmative remedial measures such as reassigning Plaintiff to a new team or reprimanding Vegtel. (The deficiencies of CRST's response are discussed more fully in Sections (C) and (D), below.)

These facts, considered together, are similar to, or more egregious than, those in which the Ninth Circuit has previously found

to be actionable sexual harassment.[18]

The lower court reached a contrary determination primarily by its over-reliance on this court's 2000 decision in *Brooks v. City of San Mateo*.[19] *Brooks* involved a "single incident" of sexual assault, which resulted in swift and decisive investigation and remedial action by the employer. In *Brooks*, the harasser had reached his hand under the

---

[18] *See, e.g., Ellison v. Brady*, 924 F.2d 872, 876 (9th Cir. 1991) (three notes or letters in which a coworker professed his love for the plaintiff was sufficient to create a triable issue of fact as to sexual harassment); *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989), (overruled on other grounds by *Burrell v. Star Nursery, Inc.*, 170 F.3d 951 (9th Cir. 1999) (hostile working environment found to exist where "hotel's male chief of engineering frequently made sexual comments and sexual advances to the maids, and where a female supervisor called her female employees 'dog[s]' and 'whore[s].'"); *Vance v. Southern Bell Tel and Tel. Co.*, 863 F.2d 1503 (11th Cir. 1989) (two displays of a noose in employee's work space create a triable issue of fact as to racial harassment); *see also Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994) (male supervisor's calling female employee "dumb fucking broad," "cunt," and "fucking cunt," making off-color comments, and staring and glaring creates a triable issue of fact as to harassment); and *Burrell v. Star Nursery, Inc.*, 170 F.3d 951 (9th Cir. 1999) (comments containing sexual references, expressing the desire to take a trip together, and comments concerning plaintiffs body and one instance of grabbing plaintiffs breasts are sufficient to create a genuine issue of fact as to sexual harassment).

[19] *Brooks v. City of San Mateo*, 229 F.3d 917 (2000).

plaintiff's shirt and bra and fondled her breast. However, this "was an entirely isolated incident," with no acts of harassment occurring either before or after.[20]

As the *Brooks* court noted, however, "the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct."[21] Thus, "If a single incident can ever suffice to support a hostile work environment claim, the incident must be extremely severe."[22] Moreover, the severity of the incident that occurred in *Brooks* was greatly mitigated by the employer's prompt and decisive remedial measures, which sent an unequivocal message of condemnation. The perpetrator was investigated, forced to resign, and served jail time for the incident.[23]

The lower court misapplied *Brooks*, however, by simply comparing the sexual assault in that case with Vegtel's conduct. It then determined that Vegtel's conduct should be deemed non-actionable because "unlike the male co-worker in Brooks, Vegtel never touched Anderson or verbally requested sexual favors from her."

---

[20] Id. at 927

[21] Id. at 926.

[22] Id.

[23] Id. at 927.

A "single incident" case, such as *Brooks* is necessary subject to a heightened requirement of severity. *Brooks* itself recognized this by explaining that the four incidents at issue in *Ellison v. Brady* – an unwanted request for a date followed by a "note" and two subsequent "love letters" – properly constituted a course of actionable harassment.[24] *Brooks* found it significant that this scenario involved multiple incidents becoming "more intense over time."[25]

Thus, "single incident" cases such as *Brooks* are not a useful or proper yardstick by which to judge the repeated and escalating harassment by Vegtel, especially when it was compounded by a subsequent failure to take remedial measures amounting to ratification by CRST.

B. DEFENDANT CRST'S FAILURE TO TAKE REASONABLE REMEDIAL ACTION AFTER LEARNING OF VEGTEL'S HARASSMENT SUBJECTS IT TO LIABILITY UNDER TITLE VII.

The second analytical error by the court below was its assumption that an employer may not be liable for co-worker harassment unless it had advance knowledge of the conduct and failed to prevent it from recurring. This is incorrect.

[24] Id.

[25] Id. at 928.

Under well-established Ninth Circuit precedent an employer's duty under Title VII is not limited merely to preventing future harassment. Rather, the remedial obligation includes an affirmative duty to investigate and take action against past harassment. As this court explained in *Ellison v. Brady*, "Employers send the wrong message to potential harassers when they do not discipline employees for sexual harassment."[26]

The court further reinforced this principle in *Fuller v. City of Oakland*.[27] In that case, the harassment had ceased before the employer ever learned of it. The employer argued (exactly as CRST does here) that "because the harassment stopped, its response was *ipso facto* reasonable."[28] The Court disagreed.

> Once an employer knows or should know of harassment, a remedial obligation kicks in. That obligation will not be discharged until action—prompt, effective action—has been taken. Effectiveness will be measured by the twin purposes of ending the current harassment and deterring future harassment—by the same offender or others. ***If 1) no remedy is undertaken, or 2) the remedy attempted is ineffectual, liability will attach***. Our prior cases stand for the proposition that an employer's actions will not necessarily shield it from liability if harassment

[26] *Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir. 1991).

[27] *Fuller v. City of Oakland*, 47 F.3d 1522, 1528-29 (9th Cir. 1995).

[28] Id. *at* 1528.

> continues. It does not follow that the employer's failure to act will be acceptable if harassment stops.
>
> Putting it another way, even if inaction through some Orwellian twist is described as a "remedy," it will fail the deterrence prong of the *Ellison* test whether or not the individual harasser has voluntarily ceased harassment. Nor can inaction fairly be said to qualify as a remedy "reasonably calculated to end the harassment." ***Title VII does not permit employers to stand idly by once they learn that sexual harassment has occurred. To do so amounts to a ratification of the prior harassment.*** We refuse to make liability for ratification of past harassment turn on the fortuity of whether the harasser, as he did here, voluntarily elects to cease his activities, for the damage done by the employer's ratification will be the same regardless.[29]

In *Fuller*, the City-employer had responded to the plaintiff's complaints by conducting an investigation which the court found to have been badly flawed and "inadequate." As a result, the *Fuller* Court concluded that: "Because Oakland failed to take *any* appropriate remedial steps once it learned of the harassment, it cannot be shielded from liability."[30] As a result, "the district court should have entered judgment in favor of Fuller on her Title VII claim."[31]

---

[29] *Fuller v. City of Oakland*, 47 F.3d 1522, 1528-29 (9th Cir. 1995) (emphasis added) (internal punctuation and citations omitted).

[30] *Fuller, supra*, 47 F.3d at 1529; *accord Cherry v. Shaw Coastal, Inc.*, 668 F.3d 182 (9th Cir. 2012) ("The human resource staff's

Here, CRST's response to harassment allegations was even more inadequate than the employer in *Fuller*. The City in that case at least conducted an investigation. CRST deliberately violated its own stated policy by deliberately electing not to interview the accuser or accused, or to otherwise conduct any actual fact-finding. CRST's HR department then attempted to mislead Plaintiff into believing that an investigation had been completed and remedial action undertaken.

Vegtel was likewise never informed of the charges against him and was never investigated, reprimanded, or disciplined. Instead, he was merely secretly coded as ineligible to work with females. This status change was not the result of any investigation, and CRST insists that it carries no stigma of potential guilt. Thus, under *Fuller* and *Ellison* CRST may take no credit for the mere "fortuity" that no further harassment occurred.

The message sent to potential harassers is that CRST will inevitably shield them from discipline regardless of the severity or credibility of the allegations. As a matter of law, this fails the requirement that any remedial action to be effective must meet the goal of "deterring future harassment." "The most significant

---

decision not to act because of "insufficient evidence" could reasonably be interpreted as a failure to take prompt remedial action.")

[31] Id.

immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified."

By failing to take effective remedial action in response to allegations of past harassment, CRST must therefore "be deemed to have adopted the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy."[32]

Thus, the lower court thus undeniably erred by granting summary judgment to CRST on the ground that it has shielded itself from liability by engaging in "reasonable remedial measures."

C. A REASONABLE TRIER OF FACT COULD FIND THAT CRST'S TERMINATION OF PLAINTIFF ANDERSON WAS MOTIVATED BY HER COMPLAINTS OF HARASSMENT

Plaintiff's third cause of action for retaliation is analyzed under the *McDonnell Douglas* burden-shifting framework. "To make out a prima facie case she must establish that she acted to protect her Title

---

[32] *Swenson v. Potter*, 271 F.3d 1184, 1193 (9th Cir. 2001) ("An investigation is a warning, not by words but by action. We have held, however, that the "fact of investigation alone" is not enough. An investigation that is rigged to reach a pre-determined conclusion or otherwise conducted in bad faith will not satisfy the employer's remedial obligation.")

VII rights, that an adverse employment action was thereafter taken against her, and that a causal link exists between these two events."[33]

Plaintiff's internal complaints of harassment, including her January 7, 2013 written complaint, clearly constitute protected conduct.[34] CRST's failure to provide her with job assignments beginning on January 7, 2013, and the termination of her employment on March 5, 2013, likewise constitute adverse employment actions.[35]

Moreover, the final prima facie element of "causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity."[36] For example, this court has "found a prima facie case of causation when termination occurred fifty-nine days after EEOC hearings," "when adverse actions were taken more than two months after the employee filed an administrative complaint," and "more than a month and a half after

---

[33] *Steiner v. Showboat Operating Co*., 25 F.3d 1459, 1464 (9th Cir. 1994).

[34] *Crawford v. Metropolitan Gov. of Nashville*, 555 U.S. 271, 276 (2009).

[35] *Yanowitz v. L'Oreal USA, Inc.*, 36 C4th 1028, 1052, 1054 (2005); *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68-70 (2006)

[36] *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1094 (9th Cir. 2008).

the employer's investigation ended."[37] Plaintiff has therefore made out a *prima facie* claim based solely on the timing of her protected conduct and CRST's adverse employment actions.[38]

The burden therefore shifts to CRST to produce evidence that the adverse employment actions were motivated by "legitimate, non-retaliatory reasons," and to negate any inference from the evidence that such stated reasons may be pre-textual. CRST's proffered motive here is that Plaintiff supposedly "failed to report" for work and thereby abandoned her job, warranting termination.

The evidence offered in support of this motive consists entirely of the Stearns declaration statement claiming that Plaintiff received a January 7, 2013 "e-mail" that should be interpreted as offering to team Plaintiff with a list of potential female drivers. The lower court erroneously credited this evidence as dispositive of the motivation issue. This was error, as a reasonable trier of fact could easily reject this evidence and credit Plaintiff's contrary evidence instead.

---

[37] *Davis, supra*, 520 F3d at 1094, citing *Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 505 (9th Cir. 1989), and *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987); *Passatino v. Johnson & Johnson Consumer Products, Inc.*, 212 F3d 493, 507 (9th Cir. 2000). ("Specifically, when adverse employment decisions are taken within a reasonable period of time after complaints of discrimination have been made, retaliatory intent may be inferred.").

[38] *Davis, supra*, 520 F.3d at 1094.

In a discrimination or retaliation action under Title VII, the applicable standard "requires the non-moving party to produce 'very little evidence' to overcome a motion for summary judgment" as "the ultimate question is one that can only be resolved through a searching inquiry-one that is most appropriately conducted by a factfinder, upon a full record."[39]

- CRST failed to affirmatively assign Plaintiff to a new position (away from Vegtel), after she complained of sexual harassment.[40]
- Plaintiff specifically testified in her deposition that after she left the Fontana yard Stearns never contacted her about obtaining a new co-driver or driving assignment.

---

[39] *Lindsay v. SLT Los Angeles, LLC*, 432 F.3d 954, 958 (9th Cir. 2005) (quoting *Chuang v. Univ. of Cal. Davis Bd. of Trs.*, 225 F.3d 1115, 1124 (9th Cir. 2000); *accord Video Software Dealers Assn. v. Schwarzenegger*, 556 F.3d 950, 956 (9th Cir. 2009) ("viewing the evidence in the light most favorable to the nonmoving party," to determine "whether there are any genuine issues of material fact and whether the district court correctly applied substantive law.").

[40] See e.g., *Swenson v. Potter*, 271 F.3d 1184, 1193 (9th Cir. 2001) ("We have held that an employer does not satisfy its remedial obligation by transferring the victim to "a less desirable location."), citing *Ellison v. Brady, supra*.)

- The alleged January 7, 2013 "e-mail" from Stearns is not actually an e-mail addressed to Plaintiff at all, but rather a screen shot of some sort, which is not addressed to any valid e-mail address.
- The January 7, 2013 document, even if it had been received by Plaintiff, contains no transmittal message from Stearns, it does not advise Plaintiff as to what it means, that she may return to work, or that she needs to take any particular action to receive a new assignment.
- Other than the January 7, 2013, "e-mail," Stearn's declaration does not actually address any specific alleged communication to Plaintiff offering to allow her to return to work.
- CRST violated its own policy by failing to investigate Plaintiff's harassment complaint, and then misrepresenting the facts in Kircher's (misaddressed) January 21, 2013, letter which falsely claimed that an investigation had been completed and remedial action taken.
- CRST cites no evidence that Plaintiff violated any policy or practice of CRST, or that CRST has declined to assign co-drivers or to provide work assignments to non-complaining males who have had to leave their driving teams.

- CRST had no difficulty in affirmatively providing Vegtel with a co-driver (i.e. Plaintiff), when he needed one in order to receive assignments.[41]

For purposes of the present appeal, of course, the court must evaluate these facts by "draw[ing] all reasonable inferences in favor of [Plaintiff]."[42] In applying this liberal standard, a trier of fact could find that CRST failed to give Plaintiff an equal opportunity to return to work because they viewed her as a "troublemaker" or "complainer" based on these and other facts which were before the court below.

D. THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT ("FEHA") GOVERNS THE TERMS AND CONDITIONS OF CALIFORNIA EMPLOYEES LIKE PLAINTIFF

Plaintiff is a California resident who was hired in California, worked in California, experienced discrimination and harassment by other

---

[41] *See Hawn v. Executive Jet Mgmt., Inc*., 615 F3d 1151, 1157–1158 (9th Cir. 2010) (discrimination may be inferred from evidence that similarly situated employees were treated more favorably than members of a protected group to which plaintiff belongs)

[42] *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

California-based employees, including incidents in California, made her complaints of harassment in California, and was ultimately terminated in California. The terms and conditions of Plaintiff's employment by CRST are therefore properly governed by the California Fair Employment and Housing Act (the "FEHA").

The FEHA, like most state laws, is not specifically intended to apply "extraterritorially" – i.e., to individuals or transactions exclusively involving foreign jurisdictions. By contrast, however, where a California legal relationship is affected by transactions between the parties that occur in multiple jurisdictions, the court must necessarily invoke California's own "choice of law" analysis to determine which body of law should apply.

"For over four decades, California courts have resolved such conflicts by applying governmental interest analysis."[43] In *Sullivan v. Oracle,* the California Supreme Court explained the elements of the test as follows:

> We typically summarize governmental interest analysis as involving three steps: First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different. Second, if there is a difference, the court examines each jurisdiction's interest in the

[43] *Sullivan v. Oracle Corporation,* 51 Cal.41h 1191, 1202 (2011).

> application of its own law under the circumstances of the particular case to determine whether a true conflict exists. Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state, and then ultimately applies the law of the state whose interest would be the more impaired if its law were not applied.[44]

In their summary judgment motions below, the Defendants failed to address the "governmental interest test" required by *Sullivan v. Oracle.* Indeed, Defendants also failed to even articulate what state law they believed should apply to Plaintiff's harassment claims or employment generally. Their position seems to be that either no state has jurisdiction, or that Plaintiff's employment should be fragmented among the 50 states she potentially traversed in the course of her employment based on her location on a day-by-day basis.

The absurdity of such an outcome is illustrated by considering a hypothetical in which a California employee who lives and works in that state is summoned to a meeting in Nevada at which her employment is terminated. According to Defendants' interpretation of "extraterritoriality," the mere coincidence of her location at the time of the adverse employment

---

[44] *Sullivan*, *supra*, 51 Cal.4th at 1202 (internal citations and punctuation omitted).

action would supposedly require that any wrongful termination action be brought exclusively under Nevada law.

Defendants' jurisdictional theory is equally illogical as applied to claims for sexual harassment. Indeed, even more so, as "in most claims of hostile work environment harassment, the discriminatory acts [are] not always of a nature that [can] be identified individually as significant events; instead, the day-to-day harassment [is] primarily significant, both as a legal and as a practical matter, in its cumulative effect."[45] In other words, each incident of harassment is not subject to a different claim. Rather, it is the employee's entire "work environment" – irrespective of geographic location -- which is being safeguarded against discrimination.

Courts have never sought to fractionate the employment relationship based on transitory business travel in the manner advocated by Defendants. Rather, they have employed traditional choice of law principles to determine the appropriate body of law applicable to the relationship as a whole. For example, in *Maez v. Chevron Texaco Corp.,* it was undisputed that an employee lived and worked in Arizona.[46] Yet, the district court denied summary judgment as to his California wage claims on the ground that it was a question of fact as to whether his overall "employment" should be deemed to have "occurred" in California. As the court explained, it was a potentially sufficient basis

---

[45] Draper v. Coeur Rochester, Inc., 147 F.3d 1104, 1108 (1998).

[46] *Maez v. Chevron Texaco Corp.,* 2005 WL 1656908 (N.D. Cal. 2005).

for applying California law "that Plaintiff visited California a couple of times every month for business and that his entire customer base was in California."[47]

The lower court granted summary judgment as to all of Plaintiff's claims under the FEHA based solely on its conclusion that the statute does not apply "extraterritorially." In doing so, it failed to conduct the requisite choice of law analysis required by *Sullivan v. Oracle.* Had it done so, it would necessarily have to conclude that the balance of the "governmental interests" favors application of the FEHA to Plaintiff's employment. As a result, the grant of summary judgment as to Plaintiff's FEHA claims must be reversed.

VIII.
CONCLUSION

For the foregoing reasons lower courts grant summary judgment should be reversed.

[47] *Maez, supra,* 2005 WL at * 3

IX.

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

The undersigned attorney hereby certifies that the present brief is in compliance with the type-volume limitations of FRAP, Rule 32(a)(7). Pursuant to the word count function of the Word program used to create the present brief it contains a total of 8,474 words.

Dated: December 21, 2015 VAN VLECK TURNER & ZALLER, LLP

s/ Brian F. Van Vleck
Brian F. Van Vleck
Attorney for Plaintiff and Appellant
Robin Anderson

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2015, a copy of the foregoing **OPENING BRIEF FOR APPELLANT** was filed electronically. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Brian F. Van Vleck
Brian F. Van Vleck