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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

JANET ORLANDO,
Plaintiff and Respondent,

v.

ALARM ONE, INC.,
Defendant and Appellant.

F050759 & F051470

(Super. Ct. No. 04CECG01288)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Wayne Ellison, Judge.

Gordon & Rees, Michael T. Lucey, Kelly J. Savage and Don Willenburg, Sagaser, Jones & Haesy and K. Poncho Baker for Defendant and Appellant.

Law Offices of Wagner & Jones, Nicholas Butch Wagner and Andrew B. Jones, Penner, Bradley & Buettner and Peter Sean Bradley for Plaintiff and Respondent.

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Defendant and appellant, Alarm One, Inc., appeals from a judgment and amended judgment¹ entered against it after a jury trial. The jury found in favor of plaintiff and respondent, Janet Orlando, and against appellant on causes of action for sexual harassment and sexual battery. Appellant appeals, asserting error in jury instructions, juror misconduct, and excessive damages. We grant appellant's request for judicial notice, filed February 2, 2007. We reverse the judgment.

FACTS AND PROCEEDINGS

Respondent was hired to work for Alarm One at its Fresno office on October 7, 2003. She was hired as a promotional specialist, i.e., a salesperson. After 10 days, she was promoted to field supervisor. In that position, she would choose an area, drive the team of salespersons she supervised to that area, and the team would go door-to-door selling alarm systems. When a team member found an interested homeowner, the team member would call respondent, and she would come and close the deal. Respondent earned commissions on the alarm systems her team sold.

Most of the employees in the Fresno office were 18 to 25 years old; plaintiff was 52 years old. Every morning, before the teams went out to sell, there would be a meeting of the field supervisors and a meeting of the salespersons. At the latter, a field supervisor would lead the meeting; the salespersons were given training and motivated to go out and sell alarm systems door-to-door. The meetings had a pep rally atmosphere, with yelling, chanting, and cheering. At other offices of Alarm One, the motivational techniques used at the meetings included bonuses, singing in front of the group, pies in the face, eating baby food, wearing diapers, and spanking. Some of these techniques, including spanking with an Alarm One sign or a competitor's sign, were imported to the Fresno office, which

¹ Alarm One filed a notice of appeal after the original judgment was entered. After the amended judgment was entered, it filed a second appeal. The two appeals have been consolidated.

opened in July 2003. Employees would be spanked for arriving late at a meeting or for losing a sales competition.

Respondent was spanked a few times while she worked for Alarm One. January 14, 2004, was the last date on which she was spanked; Jessica Dakin and three others were also spanked at the same meeting. Afterward, Dakin complained that she had been injured; she had sustained a cut and a bruise from the spanking. She filled out an injury report and was taken to a doctor. After Dakin's complaint, meetings were held with the supervisors and the sales staff; everyone was informed that the spankings were unacceptable. The spankings stopped.

Respondent testified she was injured by the January 14 spanking, but was denied medical care; her supervisors testified respondent did not report any such injury to them and medical care was not denied because it was never requested. Respondent ended her employment with Alarm One in mid-February, 2004.

Respondent sued appellant and its employees, Rondell Harris, vice president of sales, Dena Damanakis, market manager, Rob Harlan and Nina Correia, field supervisors, for sexual harassment, assault, battery, sexual battery, and intentional infliction of emotional distress. The verdict was in favor of respondent on the sexual harassment and sexual battery causes of action, and in favor of appellant on the other causes of action. The jury awarded respondent a total of \$500,000 in compensatory damages and imposed \$1 million in punitive damages against Alarm One. In response to appellant's motion for judgment notwithstanding the verdict, the court entered an amended judgment, reducing the award of compensatory damages by \$10,000, representing the jury's award of lost wages. Appellant appeals the original judgment and the amended judgment. Appellant also challenges the orders denying its motions for new trial and judgment notwithstanding the verdict.

DISCUSSION

A. Sexual Battery

Appellant contends the court gave an incorrect jury instruction defining sexual battery, omitting the element of lack of consent. Respondent contends any error was invited, because appellant agreed to the instruction given.

Sexual battery is defined by statute as follows:

“(a) A person commits a sexual battery who does any of the following:

“(1) Acts with the intent to cause a harmful or offensive contact with an intimate part of another, and a sexually offensive contact with that person directly or indirectly results. [¶] ... [¶]

“(3) Acts to cause an imminent apprehension of the conduct described in paragraph (1) ... and a sexually offensive contact with that person directly or indirectly results. [¶] ... [¶]

“(d) For the purposes of this section ‘intimate part’ means the ... buttocks of any person [¶] ... [¶]

“(f) For purposes of this section ‘offensive contact’ means contact that offends a reasonable sense of personal dignity.” (Civ. Code, § 1708.5.)

Although not expressly included in the statute, Civil Code section 1708.5 has been interpreted to require that the person battered did not consent to the contact. (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1225.)

In keeping with the statute, the court gave the following jury instruction concerning sexual battery:

“A person commits a sexual battery who does any of the following: One, acts with the intent to cause a harmful or offensive contact with an intimate part of another or one, acts to cause an eminent [(sic)] apprehension provided in paragraph one; and two, a sexually offensive contact with that person directly or indirectly results. Intimate part of another person for purposes of a sexual battery includes a person’s buttocks. Offensive contact means contact that offends a reasonable sense of personal dignity.”

A party is deemed to have excepted to every jury instruction given, and may assert error in the instructions even if he did not object to them or propose an alternative. (Code Civ. Proc., § 647; *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 948, disapproved on other grounds in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4.) Instructions in the language of an applicable statute are properly given, but if the party complains the instruction, though correct in law, is too general, lacks clarity or is incomplete, that party must request an additional or qualifying instruction in order to have the error reviewed. (*Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, 520.) If the party fails to request the additional instruction, it waives the issue on appeal. (*Id.* at pp. 520-521.)

Appellant asserts that the instruction on sexual battery, which was given in the language of the statute, was incomplete in that it omitted any mention of lack of consent as an element of the tort. Appellant has not cited the court to any place in the record where it made a request for an additional or clarifying instruction to remedy that omission. Consequently, any error has been waived.

In addition, “[w]here a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal” on appeal.’ [Citation.]” (*Huffman v. Interstate Brands Corp.* (2004) 121 Cal.App.4th 679, 706, italics omitted.) In the trial court’s ruling on appellant’s motion for a new trial, it disclosed the parties’ informal discussion of the battery and sexual battery jury instructions.²

“This Court proposed to instruct the jury on the elements of sexual battery in a fashion which would parallel the elements of battery, so as to clarify for the jury that the latter tort was included within the former. All counsel, including counsel for Alarm One, objected to the court’s proposal, electing

² Apparently, there was no on-the-record discussion of these proposed jury instructions. The portions of the reporter’s transcript to which the parties cite contain discussions of the verdict form, not the jury instructions.

instead to define Battery according to the CACI pattern instruction and Sexual Battery according to its statutory definition.” (Fn. omitted.)

The ruling had a copy of the court’s proposed instructions on battery and sexual battery attached; its proposed sexual battery instruction included the element of lack of consent. Appellant rejected this proposal, demonstrating its deliberate choice of an instruction that did not expressly include lack of consent as an element of the cause of action. Appellant invited the error complained of, and it may not be asserted as grounds for reversal on appeal.

In any event, there was no prejudicial error. During deliberations, the jury asked for a clarification of consent, as it applied to the assault and battery claims. The parties prepared and the court gave an instruction in response, which indicated that the consent instruction applied to assault, battery and sexual battery.³ Consequently, although the initial instructions given did not expressly include lack of consent as an element of sexual battery, that omission was cured by the later-given clarifying instruction, which indicated lack of consent was an element of the assault, battery, and sexual battery causes of action.

B. Inconsistent Jury Findings on Battery and Sexual Battery

Appellant next contends that, if the instructions on sexual battery properly included the element of lack of consent, then the verdicts on the assault, battery, and sexual battery causes of action are fatally inconsistent. In the special verdict, the jury answered no to the questions, “Did Rob Harland, Nina Correia, or Rondel Harris commit an assault against Plaintiff?” and “Did Rob Harland, Nina Correia, or Rondel Harris,

³ The instruction read: “For purposes of the instruction on consent to an assault, battery, or sexual battery, the words duress and coercion mean the same thing. There is no consent, either express or implied, if it was obtained by duress. Consent is obtained by duress if it is given by means of a direct or implied threat of force or retribution sufficient to coerce a reasonable person to do something she would not otherwise do, or submit to something to which she otherwise would not submit. [¶] As you were previously instructed, a consent may be expressed by silence or inaction, if a reasonable person would understand that silence or inaction as being intended to indicate consent.”

commit a battery against Plaintiff?” The jury answered yes to the question, “Did Alarm One employee Rob Harlan or Nina Correia commit a sexual battery on Plaintiff?”

The essential elements of a cause of action for assault are: (1) defendant acted with intent to cause harmful or offensive contact, or threatened to touch plaintiff in a harmful or offensive manner; (2) plaintiff reasonably believed she was about to be touched in a harmful or offensive manner or it reasonably appeared to plaintiff that defendant was about to carry out the threat; (3) plaintiff did not consent to defendant’s conduct; (4) plaintiff was harmed; and (5) defendant’s conduct was a substantial factor in causing plaintiff’s harm. (CACI No. 1301.) The essential elements of a cause of action for battery are: (1) defendant touched plaintiff, or caused plaintiff to be touched, with the intent to harm or offend plaintiff; (2) plaintiff did not consent to the touching; (3) plaintiff was harmed or offended by defendant’s conduct; and (4) a reasonable person in plaintiff’s position would have been offended by the touching. (CACI No. 1300; accord, BAJI No. 7.50.) As relevant to this case, the essential elements of sexual battery are: (1) defendant did an act that resulted in a sexually offensive contact with plaintiff’s person; (2) defendant acted with intent to cause a harmful or offensive contact with an intimate part of plaintiff or to cause plaintiff an imminent apprehension of a harmful or offensive contact with plaintiff’s intimate part; (3) plaintiff did not consent to the contact; and (4) the harmful or offensive contact caused plaintiff to suffer injury, damage, loss, or harm. (BAJI No. 7.56.)

The substantive difference between battery and sexual battery is that battery may involve offensive or harmful touching of any part of plaintiff’s person, while sexual battery requires a sexually offensive contact with an intimate part of plaintiff’s body. The differences between assault and sexual battery are that assault may involve a threat to touch any part of plaintiff’s person and no actual contact is required, while sexual battery requires actual contact with an intimate part of plaintiff’s body. Thus, the elements of assault and battery are included within the elements of sexual battery. A sexual battery

cannot be committed without also committing an assault and a battery. Accordingly, the verdicts on the assault and battery causes of action are inconsistent with the verdict on the sexual battery cause of action.

“A special verdict presents to the jury each ultimate fact in the case, so that ‘nothing shall remain to the Court but to draw from them conclusions of law.’ [Citation.]” (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285.) “With a special verdict, [the court does not] imply findings on all issues in favor of the prevailing party, as with a general verdict. [Citation.] The verdict's correctness must be analyzed as a matter of law.” (*Ibid.*)

“‘Inconsistent verdicts are “‘against the law’” and are grounds for a new trial. [Citations.] ‘The inconsistent verdict rule is based upon the fundamental proposition that a factfinder may not make inconsistent determinations of fact based on the same evidence....’ [Citations.] An inconsistent verdict may arise from an inconsistency between or among answers within a special verdict [citation] or irreconcilable findings. [Citation.] Where there is an inconsistency between or among answers within a special verdict, both or all the questions are equally against the law. [Citation.] The appellate court is not permitted to choose between inconsistent answers. [Citations.]” (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 682.)

Where the jury’s verdict is ambiguous, the trial court must interpret the verdict from its language considered in connection with the pleadings, evidence, and instructions. (*Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456.) If the trial court interprets it incorrectly, the appellate court will interpret it if it is possible to give a correct interpretation. (*Id.* at p. 457.) “If the verdict is hopelessly ambiguous, a reversal is required.” (*Ibid.*)

In *Woodcock*, plaintiff sued defendant for personal injuries he suffered while on the job. The worker’s compensation carrier for plaintiff’s employer intervened, seeking reimbursement of amounts it paid to plaintiff as a result of his injury. The jury returned a verdict in favor of plaintiff and against defendant in the sum of \$13,000. It also made a

special finding that plaintiff's employer's negligence contributed to plaintiff's injury. Judgment was entered against defendant in the full amount, \$13,000; defendant appealed, contending the judgment against it should have been reduced by the amount of worker's compensation benefits plaintiff had received.

The court concluded the verdict, standing alone, was ambiguous in not specifying whether the \$13,000 represented the gross or net amount of damages. (*Woodcock v. Fontana Scaffolding & Equip. Co., supra*, 69 Cal.2d at p. 458.) In the instructions to the jury, however, the trial court had directed the jury to determine the full amount of plaintiff's damages, without subtracting anything for the worker's compensation claim. In light of that jury instruction, it was clear the jury's award was the gross amount of plaintiff's damages. (*Ibid.*) The instruction dispelled the ambiguity in the verdict, and required that the judgment be vacated and a new judgment be entered, reducing the damages by the amount of worker's compensation benefits previously paid. (*Id.* at p. 459.)

In *Curtis v. San Pedro Transp. Co.* (1935) 10 Cal.App.2d 547, the court addressed an inconsistent verdict. Plaintiff sued Christensen and his employer for assault, alleging Christensen was acting in the course of his employment at the time of the assault. The jury returned a verdict in favor of plaintiff and against the employer in the sum of \$1,000 and a verdict in favor of plaintiff and against Christensen in the sum of \$2,000. The trial court granted plaintiff's motion to enter judgment against both defendants in the sum of \$2,000.

The court concluded the trial court had the authority and the duty to make the judgment conform to the verdict, when the intention of the jury was clear from the language of the verdict, considered in connection with the pleadings and the evidence. (*Curtis v. San Pedro Transp. Co., supra*, 10 Cal.App.2d at p. 548.) "The verdict, however, must be read in the light of settled principles of law." (*Id.* at p. 549.) The doctrine of respondeat superior made the employer liable for damage caused by the

tortious conduct of the employee in the course of his employment to the same extent as the employee was liable. (*Ibid.*) Consequently, because Christensen was admittedly acting in the course of his employment at the time of plaintiff's injury, the employer's liability was the same as Christensen's, and the judgment was properly entered. (*Id.* at pp. 549-550.)

In *Cavallaro v. Michelin Tire Corp.* (1979) 96 Cal.App.3d 95, the court reversed a judgment, where plaintiff sued the distributor and the retail seller of a tire by which plaintiff was allegedly injured. Plaintiff asserted strict liability and warranty theories. The jury found in favor of the retail seller and against the distributor of the tire. The court found the verdicts fatally inconsistent. Plaintiff's theories were based on the existence of a defect in the tire. (*Id.* at p. 106.) The jury was instructed that there could be no finding in favor of plaintiff on any theory unless there was a defect in the tire which proximately caused the accident. In finding the distributor liable, the jury necessarily found both a defect and proximate cause. Those two facts would result in the retail seller's liability as a matter of law. (*Ibid.*) The court concluded the verdicts were fatally inconsistent and the distributor's motion for a new trial should have been granted. (*Id.* at p. 110.)

The facts on which the assault, battery and sexual battery causes of action against Rob Harlan and Nina Correia were based were the same. There was evidence that Harlan and Correia struck plaintiff on the buttocks with a sign. Plaintiff testified to the offensiveness of that conduct; she also testified that when she was spanked on January 14, 2004, she was injured and bled. If the jury found that Harlan or Correia committed intentional nonconsensual touchings of plaintiff's buttocks, and that she was thereby harmed or offended, then it found all the facts necessary to find that they committed battery, as well as sexual battery.

The jury was not asked to determine whether Rondell Harris committed a sexual battery against respondent. There was no evidence Harris spanked respondent. The

assault and battery causes of action against him were based on respondent's testimony that Harris grabbed her arm and dragged her into the rally room.

Respondent argues that the apparent inconsistency in the verdicts was correctly explained by the trial court. In denying appellant's motion for a new trial, the trial court stated:

“The jurors could have found that plaintiff had been sexually battered, but logically concluded that there was no assault, because the conduct of Harris, Harlan and Correia went beyond a mere ‘threat’ to touch the plaintiff. Similarly, the jurors could have found that plaintiff had been sexually battered, but logically concluded that there was no simple battery because the conduct of Harris, Harlan and Correia went beyond a simple ‘offensive touching,’ and was instead a ‘sexually offensive touching.’”

The verdict must be interpreted in light of its language, the evidence, the instructions, and the law. The law defines assault, battery and sexual battery as separate torts. Sexual battery includes the elements of assault and battery, plus additional elements. The jury was given separate instructions setting out the elements of assault, battery and sexual battery. The jury was not instructed that these were mutually exclusive torts or that the jury could find in favor of plaintiff on only one. The verdict form asked separately for the jury's conclusions about the commission of assault, battery and sexual battery. The questions about assault and battery referred to Harris, Harlan and Correia; the questions about sexual battery referred only to Harlan and Correia. The theory of liability against Harris differed from the theory advanced against Harlan and Correia, so the trial court's explanation of the inconsistency is questionable. The verdict questions required the jury to consider the elements of each tort separately and determine whether the facts as they found them established each tort.

Counsel for respondent emphasized in closing argument that the three causes of action were distinct. He told the jury that “the assault ... was the act of compelling the employees to get up in front of the class for a spanking which is the battery.” He later reiterated, “the battery is the spanking ... of the plaintiff by the Alarm One sign or the

Protection One sign.” He conceded there was no evidence Harris had spanked plaintiff, and argued that Harris assaulted and battered plaintiff when he grabbed her arm. Counsel urged the jury to answer the questions concerning assault and battery “yes.” He then distinguished sexual battery from battery, and urged the jury to answer the sexual battery questions “yes.”

The jury was instructed on the elements of each cause of action separately; the verdict form posed questions about each cause of action separately, requiring the jury to consider each cause of action separately. Respondent’s counsel argued for affirmative answers on each cause of action. The jury returned a verdict finding that sexual battery had been established, but neither assault nor battery had been established. These findings are fatally inconsistent, in light of the applicable law, the instructions given to the jury, and the evidence. We are not permitted to choose between the inconsistent answers. (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.*, *supra*, 126 Cal.App.4th at p. 682.) The verdict is fatally inconsistent and the judgment must be reversed.

C. Incorrect Instruction on Sexual Harassment

With certain exceptions not implicated here, the Fair Employment and Housing Act (FEHA) makes it an unlawful employment practice for an employer, “because of the ... sex ... of any person, ... to discriminate against the person in compensation or in terms, conditions, or privileges of employment.” (Gov. Code, § 12940, subd. (a).) It is also an unlawful employment practice for an employer, “because of ... sex, ... to harass an employee.” (Gov. Code, § 12940, subd. (j)(1).) Under the FEHA, “‘harassment’ because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions.” (Gov. Code, § 12940, subd. (j)(4)(C).) “[T]he prohibition against discrimination in employment because of sex is intended to guarantee that members of both sexes will enjoy equal employment benefits. [Citation.]” (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264,

278.) Employment benefits include a discrimination-free workplace, that is, a workplace free of harassment. (*Ibid.*)

There are two theories upon which sexual harassment may be alleged: quid pro quo harassment, where a term of employment is conditioned upon submission to unwelcome sexual advances, and hostile work environment, where the harassment is sufficiently pervasive so as to alter the conditions of employment and create an abusive work environment. (*Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1414.) Respondent proceeded on the latter theory. To prevail on a claim of hostile work environment sexual harassment, an employee must demonstrate that he or she was subjected to sexual advances, conduct, or comments that were (1) unwelcome; (2) because of sex; and (3) sufficiently severe or pervasive to alter the conditions of his or her employment and create an abusive work environment. (*Lyle v. Warner Brothers Television Productions, supra*, 38 Cal.4th at p. 279.)

The use of sexually coarse and vulgar language in the workplace is not actionable per se; it is actionable only when, considered in context, it was based on sex. (*Lyle v. Warner Brothers Television Productions, supra*, 38 Cal.4th at pp. 273-274.)

“Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at “discriminat[ion] ... because of ... sex.” [Citation.] Consequently, the high court stated ‘workplace harassment, even harassment between men and women, is [not] automatically discrimination because of sex merely because the words used have sexual content or connotations.’ [Citation.] Rather, “[t]he critical issue ... is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” [Citation.] This means a plaintiff in a sexual harassment suit must show ‘the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted “discrimina[tion] ... because of ... sex.”’ [Citation.]

“For FEHA claims, the discrimination requirement has been phrased similarly: ‘To plead a cause of action for [hostile work environment] sexual harassment, it is “only necessary to show that gender is a substantial factor

in the discrimination, and that if the plaintiff ‘had been a man she would not have been treated in the same manner.’” [Citation.]’ [Citations.] Accordingly, it is the disparate treatment of an employee on the basis of sex—not the mere discussion of sex or use of vulgar language—that is the essence of a sexual harassment claim.” (*Lyle v. Warner Brothers Television Productions, supra*, 38 Cal.4th at pp. 279-280, last bracketed insertion added.)

Prohibited harassment may include verbal, physical or visual harassment. (*Lyle v. Warner Brothers Television Productions, supra*, 38 Cal.4th at p. 280.) “[V]erbal harassment may include epithets, derogatory comments, or slurs *on the basis of sex*; physical harassment may include assault, impeding or blocking movement, or any physical interference with normal work or movement, when directed at an individual *on the basis of sex*; and visual harassment may include derogatory posters, cartoons, or drawings *on the basis of sex*. [Citations.]” (*Ibid*, original italics omitted; italics added.)

“[T]o prevail, an employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees *because of their sex*. [Citations.]” (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462, italics added.) The determination whether this requirement is met must be based on the totality of the circumstances. (*Ibid.*)

“[T]hat inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target.... The real social impact of workplace behavior 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. Common sense, and an appropriate sensibility to social context, will enable courts and juries to distinguish between simple teasing or roughhousing ... and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.’ [Citations.]” (*Miller v. Department of Corrections, supra*, 36 Cal.4th at p. 462.)

The jury was not instructed that the harassment had to be “based on ... sex.” It was not required to determine whether respondent was subjected to harassment “based on ... sex,” because the special verdict form did not pose that question. The jury was instructed that, to establish her claim of sexual harassment, plaintiff had to prove:

“1. That plaintiff was subjected to unwanted sexually harassing conduct.

“2. That the harassing conduct was so severe, widespread, or persistent that a reasonable woman would have considered the work environment to be hostile or abusive;

“3. That plaintiff considered the work environment to be hostile or abusive;

“4. That plaintiff was harmed; and

“5. That the conduct was a substantial factor in causing plaintiff’s harm.”

The instruction defining “sexually harassing conduct” did not cure the defect.

That instruction stated:

“Sexually harassing conduct may include the following:

“a. Verbal harassment, such as obscene language, demeaning comments, slurs or threats;

“b. Physical harassment, such as unwanted touching, assault, or physical interference with normal work or movement; or

“c. Visual harassment, such as offensive posters, objects, cartoons, or drawings; or

“d. Unwanted sexual advances.”

Nowhere in these instructions was the jury told that, in order for plaintiff to prevail, she had to prove she was exposed to a hostile work environment because she was a woman.

Appellant proposed a jury instruction like the first instruction quoted above, but it required the jury to find:

“1. That Janet Orlando was subjected to unwanted harassing conduct *because she was female....*” (Italics added.)

A standard jury instruction on hostile work environment sexual harassment includes as an element to be proven by plaintiff:

“2. That [*name of plaintiff*] was subjected to unwanted harassing conduct because [he/she] [was ...] [*protected status*]....” (CACI No. 2521.)

Under this instruction, the jury would have been required to find that plaintiff was subjected to unwanted harassing conduct because she was female - exactly the instruction appellant requested. (See also, BAJI No. 12.05, requiring the jury to find that “[protected status)] was a motivating factor for the harassment.”)

Under the instructions given, the jury could have found for plaintiff merely because offensive sexual comments were made or conduct was tinged with offensive sexual connotations, without finding plaintiff was subjected to the conduct because she was female.

Respondent asserts that “sexually harassing conduct” means the same as “harassment because of sex.” Therefore, she concludes, the instruction given was correct, and appellant was not entitled to an instruction that the harassment had to be “because she was female.” The cases are to the contrary. They indicate the harassment must be harassment because of the plaintiff’s sex — in this case, because she was female — not simply harassment tinged with sexual connotations. “[I]t is the disparate treatment of an employee on the basis of sex — not the mere discussion of sex or use of vulgar language — that is the essence of a sexual harassment claim.” (*Lyle v. Warner Brothers Television Productions, supra*, 38 Cal.4th at p. 280.) The purpose of the FEHA is to eliminate invidious discrimination, not to ban all allusions to sex in the workplace. “The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in

the workplace; it forbids only behavior so objectively offensive as to alter the ‘conditions’ of the victim's employment.” (*Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 81.) It does not forbid “ordinary socializing in the workplace — such as male-on-male horseplay or intersexual flirtation.” (*Ibid.*)

Respondent attempts to minimize the omission of the “because of ... sex” element by arguing that sexual harassment is actionable even if both men and women are harassed and that it is no defense to claim that the defendants were “equal opportunity” harassers. Her own discussion and the cases she cites, however, illustrate that “because of ... sex” remains an essential element of sexual harassment under the FEHA.

In *Steiner v. Showboat Operating Co.* (9th Cir. 1994) 25 F.3d 1459, plaintiff was a blackjack dealer at defendant casino. Her supervisor, Jack Trenkle, called her offensive names based on her gender, made sexual comments about her, and moved toward her threateningly while yelling at her. (*Id.* at p. 1461.) Plaintiff sued the casino for sexual harassment, based on Trenkle’s conduct and defendant’s response to it. (*Ibid.*)

The trial court granted summary judgment for defendant, on the ground Trenkle’s abuse was not sexual harassment because he harassed both males and females alike. (*Steiner v. Showboat Operating Co., supra*, 25 F.3d at p. 1463.) The appellate court reversed. Although Trenkle was abusive to men, his abuse of women was different, because it relied on “sexual epithets, offensive, explicit references to women's bodies and sexual conduct.” (*Ibid.*) His abuse of men was not related to their gender. (*Id.* at p. 1464.) The court added that “even if Trenkle used sexual epithets equal in intensity and in an equally degrading manner against male employees, he cannot thereby ‘cure’ his conduct toward women.” (*Ibid.*) The court must “consider what is offensive and hostile to a reasonable *woman*,” and similar treatment of men and women may mean both men and women are being sexually harassed. (*Ibid.*)

In *E.E.O.C. v. National Educ. Ass’n, Alaska* (9th Cir. 2005) 422 F.3d 840, the court found a triable issue of fact and reversed a summary judgment for defendants.

Three female employee plaintiffs presented evidence a male supervisor, Thomas Harvey, repeatedly yelled at them, loudly and publicly, used foul language, made threatening physical gestures, and, in one instance, grabbed a plaintiff by the shoulders from behind. (*Id.* at p. 843.) “Harvey’s behavior was not, on its face, sex- or gender-related.” (*Id.* at p. 844.) The court summarized the issue: “The main factual question is whether Harvey’s treatment of women differed sufficiently in quality and quantity from his treatment of men to support a claim of sex-based discrimination.” (*Ibid.*)

The court held the ““because of . . . sex”” element of the sexual harassment cause of action did not require defendant’s behavior to be either ““of a sexual nature”” or motivated by ““sexual animus.”” (*E.E.O.C. v. National Educ. Ass’n, Alaska, supra*, 422 F.3d at p. 845.) Instead, the ultimate question was whether ““members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”” [Citation.]” (*Id.* at p. 844.) There was evidence Harvey yelled at both male and female employees, but subjected female employees to more severe, more frequent, and more physically threatening abuse; the character of Harvey’s aggressiveness with male employees was different, in that it had the quality of ““bantering back and forth . . . with the boys.”” (*Id.* at p. 846.) Further, there was evidence the severity of the reaction of the female employees to Harvey’s conduct was greater than the reaction of male employees. (*Ibid.*) Consequently, plaintiffs had raised a triable issue of material fact regarding whether plaintiffs were harassed “because of . . . sex.”

Neither of these cases, which were cited by respondent, indicates that sexual harassment is actionable regardless of whether the plaintiff was harassed “because of . . . sex.” Each indicates the “because of . . . sex” element is alive and well and must be satisfied in order for plaintiff to prevail on a sexual harassment cause of action. The jury should have been instructed that it could find for plaintiff on the sexual harassment cause of action only if it found that plaintiff was subjected to the harassing conduct because she was female.

“[I]nstructional error requires reversal only “where it seems probable” that the error “prejudicially affected the verdict.” [Citation.]” (*Rutherford v. Owens-Illinois* (1997) 16 Cal.4th 953, 983.) “Generally speaking if it appears that error in giving an improper instruction was likely to mislead the jury and thus to become a factor in its verdict, it is prejudicial and ground for reversal.” (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 670.) “While there is no precise formula for measuring the effect of an erroneous instruction [citation], a number of factors are considered in measuring prejudice: (1) the degree of conflict in the evidence on critical issues [citations]; (2) whether respondent's argument to the jury may have contributed to the instruction's misleading effect [citation]; (3) whether the jury requested a rereading of the erroneous instruction [citation] or of related evidence [citation]; (4) the closeness of the jury's verdict [citation]; and (5) the effect of other instructions in remedying the error [citations].” (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 876.) “[T]he evidence must be viewed in a light most favorable to appellant[.]” (*Marich v. MGM/UA Telecommunications, Inc.* (2003) 113 Cal.App.4th 415, 427.)

As we understand it, appellant's argument is not that it spanked both males and females, so there was no actionable harassment based on sex because it harassed males and females equally. Rather, the argument is that the spanking was not based on sex, but on a misguided notion that spanking employees who performed poorly (by arriving at work late or not selling enough product) in front of their peers would motivate them (or all of the employees) to perform better. Therefore, the argument goes, there was no harassment of either sex. There was evidence to support this theory. There was testimony both men and women were spanked , both men and women administered the spankings , and the spankings were administered to men and women for the same reasons, including being late to meetings and losing at sales competitions. Because there was a far higher percentage of males in the office than females, more men than women were spanked. The morning sales meetings were intended to be motivational, to get the sales

force energized to go out and sell alarm systems door-to-door. There was a pep rally atmosphere, to raise the energy level. The spankings were just one of a number of “crazy” things the sales force did to motivate the salespersons and get them “in the mood” to sell.

Witnesses testified no one complained about the spankings until Dakin was injured. There was evidence respondent voluntarily participated in the spankings and other “pep rally” events. There was also testimony that plaintiff spanked one of the male employees, although plaintiff testified she was forced to spank him and she merely touched him with the sign.

Respondent contends the spankings were “based on ... sex” because the men in the audience shouted comments that were derogatory to women while the women were spanked, but no derogatory comments were made when the men were spanked. Respondent testified she could not remember any derogatory or sexual comments being made while she was being spanked, just laughing, clapping, yelling and encouraging the spanker to hit the employee harder. Dakin testified that “[w]hen a guy was spanked they’d be just, like, get up there. Get it over with, you know. And when a girl was spanked – bend over, let me see that ass. Spank that bitch. Slap that ho. Things of that nature.” She testified she was spanked on three occasions, the last time on January 14, 2004, and similar comments were made on the first two occasions. Crystal Melendez and Kristy Moren testified that, when they were spanked on January 14, 2004, they heard similar comments. Thus, the testimony concerning spankings accompanied by derogatory or gender-specific comments focused on three occasions. The evidence about how often spankings occurred was conflicting.

Respondent also contended she was subjected to derogatory name-calling in the workplace in general, some of which was gender-specific. Others denied calling her, or hearing her called, such names. Witnesses testified that profanity was commonly used in the workplace on a daily basis, and it was used by respondent herself.

Thus, there was conflict in the evidence regarding whether plaintiff was subjected to harassment because she was female. The jury was not instructed that one of the elements of sexual harassment was that the harassment was because plaintiff was female; consequently, the jury's consideration was not focused on conduct that respondent was subjected to because she was female. In reaching its verdict, the jury may have considered all offensive conduct, including exposure to profanity or sexual comments that were not gender-related. If the jury had considered only conduct that occurred because respondent was female, it might have concluded that conduct was not "sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment." (*Lyle v. Warner Brothers Television Productions, supra*, 38 Cal.4th at p. 279.)

Respondent's argument to the jury reinforced the misleading jury instruction. It reiterated that, if respondent was "subjected to sexually harassing conduct," the jury should answer the first question in the special verdict form in the affirmative. It did not mention the requirement that respondent be harassed "because of ... sex." Another party's counsel mentioned in closing argument that plaintiff's expert "explained that you can still have sexual harassment even if men are receiving it." Plaintiff's human resources expert, Mark Keppler, was asked about the assertion that both men and women were spanked. He stated that, from the deposition testimony, "it was clear that there was a sexual connotation in this situation." He mentioned the vulgar comments that were made to women while they were being spanked, and testimony that the same comments were not made when men were spanked. He concluded "there clearly was a sexual connotation here with the conduct." He then stated that it was not acceptable to allow sexual harassment to occur in the workplace if there was harassment of both genders. The overall effect of the testimony was to suggest that gender was irrelevant; it suggested that, if the conduct or language had a sexual connotation and was directed at either men

or women, or both, it constituted sexual harassment. This testimony and the closing arguments, may have contributed to the misleading effect of the instruction.

The jury did not request a rereading of the sexual harassment instructions or of any related evidence. The jury verdict on the sexual harassment cause of action was close. On the question whether plaintiff was subjected to sexually harassing conduct, the vote was 10 to 2. On the question whether the sexually harassing conduct was a substantial factor in causing harm to plaintiff, the vote was 9 to 3.

There were no other instructions that remedied the omission. In fact, the instruction defining sexually harassing conduct, which followed the instruction setting out the elements of sexual harassment, may have compounded the problem, by suggesting that obscene language and demeaning comments constitute sexually harassing conduct, without regard to whether they are gender-related.

Based on these factors, it is reasonably probable the jury was misled and the error prejudicially affected the verdict. Properly instructed, the jury might not have found that plaintiff was harassed because she was female.

Because we find that error in the jury instructions and inconsistency in the verdict require reversal, we need not consider the issues of jury misconduct and excessive damages.

DISPOSITION

The judgment is reversed and the matter is remanded for a new trial on the assault, battery, sexual battery, and sexual harassment causes of action. The final judgment after retrial shall reflect the special verdict in favor of Alarm One already rendered on the intentional infliction of emotional distress cause of action. Appellant shall recover its costs on appeal.

HILL, J.

WE CONCUR:

HARRIS, Acting P.J.

KANE, J.