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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ELIZABETH RENE RAYMOND, Plaintiff and Respondent, v. LARRY FLYNT et al., Defendants and Appellants.	B216747 (Los Angeles County Super. Ct. No. BC300130)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kenneth R. Freeman, Judge. Reversed with directions.

Horvitz & Levy, Barry R. Levy, Jeremy B. Rosen, Wesley T. Shih; Lipsitz Green Scime Cambria, Paul J. Cambria, Jr., Jonathan W. Brown; Labowe, Labowe & Hoffman and Mark S. Hoffman for Defendants and Appellants.

Mancini & Associates, Marcus A. Mancini, Christopher Barnes; Benedon & Serlin, Douglas G. Benedon and Gerald M. Serlin for Plaintiff and Respondent.

On remand from this court, the trial court confirmed an arbitrator's award of compensatory and punitive damages to Elizabeth Rene Raymond. The court concluded that the arbitrator did not commit legal error in finding Larry Flynt and his company L.F.P., Inc. (the Flynt defendants) liable for hostile work environment sexual harassment. The Flynt defendants appeal. We reverse and remand with instructions for the trial court to vacate the arbitration award.

BACKGROUND

I. Prior appeal

We incorporate substantial portions of the statement of facts from our prior unpublished decision remanding the case to the trial court for review of the arbitrator's legal conclusions. (*Raymond v. Flynt* (Oct. 23, 2008, B195242) [nonpub. opn.].)

Raymond began a job as an executive assistant for two executives at L.F.P., Inc. (LFP) in March 2000. On March 14, 2000, she signed the August 1999 Employee Handbook, in effect at the time, agreeing to the terms of her employment as outlined in the handbook. The handbook contained a mandatory arbitration provision in which Raymond agreed that any dispute, including one for "sexual . . . discrimination or harassment," would not be the subject of a lawsuit but instead "shall be submitted to arbitration before the American Arbitration Association (AAA) or any other individual or organization on which the parties agree or which a court may appoint."

The arbitration agreement also contained the following judicial review clause: "Any party may apply to a court of competent jurisdiction for entry of judgment on the arbitration award. The court shall review the arbitration award, including the ruling and findings of fact, and shall determine whether they are supported by competent evidence and by a proper application of law to the facts. If the court finds that the award is properly supported by the facts and law, then it shall enter judgment on the award; if the court finds that the award is not supported by the facts or the law, then the court may enter a different judgment (if such is compelled by the uncontradicted evidence) or may

direct the parties to return to arbitration for further proceedings consistent with the order of the court."

LFP fired Raymond on August 5, 2002 for breaching confidentiality requirements. After exhausting her administrative remedies, Raymond filed a lawsuit in superior court against the Flynt defendants on August 5, 2003, alleging sexual harassment in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). The court granted the Flynt defendants' motion to compel arbitration pursuant to the terms contained in the employee handbook.

After a three-day arbitration hearing, the arbitrator found the Flynt defendants liable under FEHA for creating and maintaining a hostile work environment, concluded that the Flynt defendants acted with malice and oppression, and awarded Raymond $175,000 in compensatory damages on November 8, 2006. After a further hearing on May 30, 2006, the arbitrator awarded Raymond punitive damages of $500,000 against Flynt and $250,000 against LFP.

The Flynt defendants then moved to vacate the arbitration award, arguing that the trial court could vacate the award if it were not supported by competent evidence or a correct application of law to facts (as provided in the arbitration agreement). At the hearing on October 2, 2006, the trial court refused to enforce the judicial review provision and denied the motion to vacate, finding it had no power to review the award for errors of fact or law. The court confirmed the arbitration award, and the Flynt defendants appealed.

During the pendency of the appeal, the California Supreme Court decided *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334 (*Cable Connection)*, holding that "parties may limit the arbitrator's authority by providing for [judicial] review of the merits in the arbitration agreement." (*Id.* at p. 1364.) Acknowledging that "arbitration awards are ordinarily final and subject to a restricted scope of review," the Supreme Court concluded that the trial court could nevertheless enforce an arbitration agreement's express and unambiguous provision for judicial review of arbitration awards for errors of

law or legal reasoning, because such an express agreement "preserves the utility of arbitration as a way to obtain expert factual determinations without delay, while allowing the parties to protect themselves from perhaps the weakest aspect of the arbitral process, its handling of disputed rules of law." (*Id.* at pp. 1364, 1363.)[1]

The LFP arbitration agreement signed by Raymond contained just such a clause providing for expanded judicial review, and as a result we remanded in light of *Cable Connection, supra*, 44 Cal.4th 1334 for the trial court to review the arbitration award for legal error. First, we explained that "in *Cable Connection,* the Supreme Court explicitly limited its holding to review for *legal* error." Second, although the LFP arbitration agreement provided for judicial review of whether the "findings of fact . . . are supported by competent evidence," we noted "the Flynt defendants do not attack the sufficiency of the evidence. Accepting the arbitrator's factual findings as correct for the purpose of this appeal, they argue that those factual findings, on their face and as a matter of law, do not constitute sexual harassment. In the event that the legal requirements for sexual harassment were met, they also argue that the punitive damages award was legally excessive. The record is adequate for review of those legal issues." On remand, therefore, we explicitly limited the trial court's review of the arbitration award to "errors of law or legal reasoning."

II. Trial court confirmation of the arbitration award

On remand, Raymond filed a petition to confirm the arbitration award in the trial court on March 11, 2009. The Flynt defendants filed a cross-petition to vacate the award, Raymond filed an opposition to the cross-petition, and the Flynt defendants filed a reply.

At the hearing on April 23, 2009, the court held that the Flynt defendants' conduct constituted sexual harassment, because it was based on Raymond's gender and was

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[1] When an arbitration agreement does not explicitly provide for expanded judicial review, "an arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 6.; see *Cable Connection, supra*, 44 Cal.4th at pp. 1355–1356.)

severe and pervasive. The court also held that the punitive damages award was properly based on the Flynt defendants' behavior toward Raymond, and the amount of the award did not violate due process. The trial court declined to consider additional facts submitted by Raymond. Stating, "the court has reviewed the award, the law, the findings of fact cited therein, and the arbitrator's application of fact to the law as required by the court of appeal," the court granted Raymond's motion to confirm in a judgment filed May 11, 2009. The Flynt defendants filed a timely notice of appeal.

DISCUSSION

We review de novo the trial court's order confirming the arbitration award. (*Gravillis v. Coldwell Banker Residential Brokerage Co.* (2010) 182 Cal.App.4th 503, 511.) The same de novo standard of review applies to our review of the trial court's legal conclusions. (*Rael v. Davis* (2008) 166 Cal.App.4th 1608, 1617.)

I. Review of the arbitration award is for legal error

To clarify the scope of our appellate review, we return to the language of the arbitration agreement, which states: "The Arbitrator shall render a decision which conforms to the facts, supported by competent evidence . . . and the law as it would be applied by a court sitting in the State of California. At the conclusion of the arbitration, the Arbitrator shall make written findings of fact, and state the evidentiary basis for each such finding. The Arbitrator shall also issue a ruling, and explain how the findings of fact justify his ruling." The arbitration agreement also provides that a court "shall review the arbitration award, including the ruling and findings of fact, *and shall determine whether they are supported by competent evidence* and by a proper application of law to the facts" (italics added).

First, as we explained above and in our prior opinion, *Cable Connection* approved judicial review of an arbitration award (based on language in an arbitration agreement) *for legal error only.* The arbitration agreement before the California Supreme Court provided that a court could vacate or correct an arbitration award only for an "error[] of law or legal reasoning." (*Cable Connection, supra,* 44 Cal.4th at p. 1361, fn. 20.)

Further, the Court stated that allowing judicial review for legal error did not hamper "the utility of arbitration as a way to obtain expert factual determinations without delay." (*Id.* at p. 1363.) *Cable Connection* does not open arbitration awards to judicial review of the arbitrator's findings of fact.

Second, as we stated in our prior opinion, the Flynt defendants do not argue that the evidence is insufficient to support the arbitrator's factual findings. They accept as true the arbitrator's findings of fact in their cross-petition to vacate the award and on this appeal, and argue only that those findings, as a matter of federal and California law, do not constitute sexual harassment.

Third, our prior opinion also pointed out that because the Flynt defendants did not challenge the sufficiency of the evidence to support the arbitrator's factual findings, it was therefore immaterial to the trial court's review that the record did not contain a reporter's transcript of the arbitration hearing. We point out now that the absence of a reporter's transcript (in the trial court on remand after the prior appeal, and on this appeal) is similarly immaterial to our appellate review of the trial court's confirmation of the arbitration award, as our review is limited to questions of legal error. We reject Raymond's repeated suggestion that the record is insufficient for our legal review, which we conduct using only the facts found by the arbitrator in the arbitration award. As did the trial court, we decline Raymond's invitation to infer any additional facts based on testimony, depositions, or other sources.

Fourth, we base our review on the findings of fact and conclusions of law in the arbitrator's award, which we discuss below in detail. Raymond asserts that the Flynt defendants argue that the entirety of the arbitrator's award is insufficiently clear to allow judicial review, but that mischaracterizes the Flynt defendants' position. If a court vacates the arbitration award under Code of Civil Procedure 1286.2, subdivision (a)(4)[2] (finding "[t]he arbitrators exceeded their powers and the award cannot be corrected

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[2] Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

without affecting the merits of the decision upon the controversy submitted"), section 1287 states that a court may order a rehearing before new arbitrators, or before the same arbitrators "with the consent of the parties." (See *Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 456.) An indefinite or uncertain award—one which fails to determine all the questions submitted to the arbitrator and necessary to decide the controversy, as required by section 1283.4—would result in a reversal of the judgment and a remand for rehearing. (*Printing Specialties & Paper Products Union v. Litton Financial Printing Co.* (1982) 129 Cal.App.3d 100, 104.) The Flynt defendants argue that the award is unclear only with regard to its discussion of punitive damages. We do not address whether the award's discussion of punitive damages is sufficiently clear, because we conclude that the arbitrator committed legal error in ruling that the facts as enumerated in the award constituted sexual harassment.

Finally, we note that claims under FEHA and federal antidiscrimination law may be arbitrated if the arbitration (among other requirements not in issue here) includes "a written decision that will permit a limited form of judicial review." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 91, 96) (*Armendariz*).[3] Such a written decision must "reveal, however briefly, the essential findings and conclusions on which the award is based." (*Id.* at p. 107.) The arbitration award in this case satisfies that requirement. The award is also sufficiently clear and detailed to allow us to subject the arbitrator's conclusion that Raymond established sexual harassment to judicial review, as provided for in the arbitration agreement.

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[3] *Armendariz* did not involve the expanded judicial review provided for in the arbitration agreement in this case and allowed by *Cable Connection*, *supra*, 44 Cal.4th 1334. The Supreme Court expressly noted "[w]e are not faced in this case with a petition to confirm an arbitration award, and therefore have no occasion to articulate precisely what standard of judicial review is 'sufficient to ensure that arbitrators comply with the requirements of [a] statute.'" (*Armendariz*, *supra*, 24 Cal.4th at p. 107.)

II. The arbitrator's award

A. Findings of fact

The arbitrator's interim award, dated January 18, 2006, noted that Raymond's sole remaining claim was that Flynt and LFP (of which Flynt was the chief executive officer) violated the FEHA, Government Code section 12940 et seq., by creating and maintaining a hostile work environment. The arbitrator surveyed the law regarding when sexual harassment creates a hostile work environment. The arbitrator then made the following findings of fact by a preponderance of the evidence, based on the evidence presented at the arbitration:

"Claimant was employed at LFP, Inc. from March 3, 2000 through August 5, 2002 as an administrative assistant to Thomas Candy, LFP's CFO and Executive Vice-President, and David Wolinsky, Vice-President of Finance. She also filled in for the Executive Assistants to LFP's President, Jim Kohls, and CEO Larry Flynt on as 'as-needed' basis.

"It is assumed her official duties were limited to the usual range of an executive assistant, i.e., arranging meetings, business trips and appointments, clerical work, and communications within and outside the corporation.

"Following the commencement of her employment, the evidence is clear and convincing that the Claimant was informed by Larry Flynt's executive assistant that Mr. Flynt sometimes had private meetings with special female visitors, and that part of her job duties was to be watchful for Elizabeth Flynt, the wife of Mr. Flynt. Mrs. Flynt's office was located on the 10th floor of the LFP building, as were Mr. Flynt's and Ms. Raymond's. Ms. Raymond's desk was strategically located in the hallway between Mrs. Flynt's office and the elevator, so that she could see Mrs. Flynt if she was entering the area in the direction of Mr. Flynt's office.

"The testimony established that Mr. Flynt's executive assistants (and there were several in the relevant time period) informed all other executive assistants on the 10th floor when Mr. Flynt was entertaining his special guests so they could watch for Mrs.

Flynt. They were to immediately notify Mr. Flynt's assistant and then attempt to intercept Mrs. Flynt to either delay or divert her.

"It is significant that all of those who were directed to participate in this early warning system were women.

"The evidence established that Mr. Flynt's special female guests were in his office for sexual activities outside of even LFP's broad scope of adult entertainment business. Whether or not he could or could not participate in sexual intercourse with his guests is of little significance given the wide range of sexually-stimulating activities that he could participate in. Loud noises of sexual activity and gratification frequently emanated from his office during these visits. On occasion the sounds disrupted business meetings in adjoining offices to the extent that Mrs. Raymond and other female executive assistants had to re-locate or re-schedule meetings. Times, dates and locations of business meetings were arranged so as to avoid any days that were known to be frequently used by Mr. Flynt for his special meetings.

"Since it was necessary to notify the other assistants, it became common knowledge among them that Mr. Flynt's executive assistant arranged for most of these encounters, especially those with [E.C.]. In all instances the arrangements were made by telephone wherein his assistant either made or received the initial call to schedule the meetings, calendars were checked, and the meetings arranged. [E.C.], the most frequent guest and the most vocal, whose sounds of sexual gratification could be heard in the hallways near Mr. Flynt's office, and by some accounts as far away as the reception area, testified that she was merely a friend of Mr. Flynt's and that the money received from him was loans.[4]

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[4] The arbitration award also concluded: "Given all the evidence received and the lack of evidence as to any loan or repayment being made, [E.C.'s] testimony regarding the nature of the payment is given no credence." The award also stated that the evidence that Flynt's "special guests" were paid was not necessary to the finding of a hostile work environment, but was to be considered as "aggravating conduct when determining if an award of punitive damages should be entered."

"Mr. Kohls, a former Vice-President of LFP, Inc., testified to hearing the herein-described sounds as late as December 2004, long after Ms. Raymond filed her claim in January 2004, giving Mr. Flynt and LFP notice of the allegations.

"Mr. Flynt also had a habit of making sexually-oriented remarks to Ms. Raymond and the other executive assistants that were well known, e.g., asking an LFP executive in Ms. Raymond's presence at a meeting if Claimant was the woman 'he was fucking,' telling the juvenile 'sticky panties' joke to Claimant in the presence of others, requesting a hug from Claimant, commenting about the attributes of his 'special guests' on several occasions to his executive assistant after the completion of their visits, or that he was 'wearing an erection.'"

The arbitrator also stated: "Pursuant to the testimony from present and former female employees, reactions to complaints regarding Mr. Flynt's conduct by LFP executives ranged from the following: . . . 'I don't want to hear about it!' . . . 'I'm sorry. what can I do?'; . . . 'He has deep pockets and can make lawsuits last a long time.'"[5]

B. Conclusions of law

The arbitration award framed the issue as "whether the totality of the conduct by Mr. Flynt and the LFP executives, including Human Resources, created a hostile work environment based on gender that was so pervasive that the conditions of Claimant's employment were altered." The arbitrator concluded that the Flynt defendants created "the hostile work environment for all the women employed as executive assistants on the 10th floor, including Ms. Raymond," and "the conduct complained of is gender based. All those involved in carrying out Mr. Flynt's directions for the procurement of women, the system for warning of Mrs. Flynt's presence and diverting her attention, and keeping

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[5] The award also stated that Raymond's eventual termination was pretextual. Raymond voluntarily withdrew a wrongful termination claim on the first day of the arbitration hearing, leaving only her claim for hostile work environment sexual harassment.

the visiting women out of sight prior to visiting with Mr. Flynt,[6] were women. The fact male employees were peripherally affected by occasionally hearing the sounds emitted from Mr. Flynt's office or had business meetings rearranged because of his conduct does not amount to equal mistreatment so as to disprove the gender basis for the hostile work environment." The hostile work environment created by Flynt was sanctioned by the inaction of the other LFP executives who dismissed complaints about Flynt's conduct.

The interim award also concluded that punitive damages were appropriate. The arbitrator awarded Raymond $175,000 in damages.

The interim award on punitive damages, dated May 30, 2006, restated the findings of fact and concluded that the evidence showed bad faith and malice by the Flynt defendants. The interim punitive damages award also distinguished *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264 (*Lyle*), on factual grounds, concluding that the conduct involved in this case "involves the abusive treatment of women employees" by requiring them to arrange for the visitors and participate in the "early warning system . . . as well as the . . . sexually explicit comments made directly to Claimant. [¶] This is not a claim of maintaining a hostile work environment based on the use of coarse and vulgar language alone, but is one based on all the circumstances of discriminatory conduct that show a concerted pattern of harassing and discriminatory behavior that were sufficiently pervasive to create a hostile work environment." The arbitrator awarded $500,000 in punitive damages against Flynt, and $250,000 in punitive damages against LFP.

The final arbitration award granted Raymond $188,000 in attorney's fees, plus costs, and incorporated by reference the compensatory and punitive damages awards.

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[6] The arbitrator did not make a factual finding regarding whether Raymond or the other executive assistants were required to hide the women before they visited Flynt, or whether Raymond was required to participate in procuring the women.

III. Hostile environment sexual harassment

It is an unlawful employment practice "[f]or an employer, because of . . . sex, . . . to harass an employee." (Gov. Code, § 12940, subd. (j)(1).) "[T]he prohibition against sexual harassment includes protection from a broad range of conduct, ranging from expressly or impliedly conditioning employment benefits on submission to or tolerance of unwelcome sexual advances, to the creation of a work environment that is hostile or abusive on the basis of sex." (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 461.) "We have agreed with the United States Supreme Court that, to 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." (*Id.* at p. 462.) For assistance in interpreting FEHA's prohibition against employer harassment because of sex, California courts frequently turn to federal authorities interpreting Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.). (*Id.* at p. 463.)

A. Because of sex

Under both federal and California law, to prevail on a claim of hostile environment sexual harassment, a plaintiff employee must "show she was subjected to sexual advances, conduct or comments that were (1) unwelcome [citation]; (2) because of sex [citation]; and (3) sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment. [Citations.]" (*Lyle, supra,* 38 Cal.4th at p. 279.) The parties do not dispute that the conduct Raymond complains of was unwelcome. They do, however, dispute whether the arbitrator's award correctly concluded that Flynt's entertainment of "special guests" in his office and the "early warning system" subjected Raymond to harassment "because of [her] sex."

"'[W]orkplace 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.]" (*Lyle*, *supra*, 38 Cal.4th at pp. 279–280.) For harassment to be based on sex, a plaintiff must be subject to *disparate treatment*: "'[I]t 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." (*Id* at p. 280, italics added). See *Singleton v. United States Gypsum Co.* (2006) 140 Cal.App.4th 1547, 1561 (*Singleton*); *Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 1002 (*Birschtein*) [harassment actionable if it "'would not occur *but for the sex* of the employee'"]; *Tomkins v. Public Serv. Elec. & Gas Co.* (9th Cir. 1977) 568 F.2d 1044, 1047, fn. 4.)

1. The early warning system

The arbitrator found that Flynt's sexual activity in his office with paid "special guests" subjected employees on the tenth floor to "loud noises of sexual activity and gratification" (both by Flynt and by his female guests) which disrupted nearby meetings and sometimes reached the reception area. That conduct was certainly distasteful, replete with sexual content, and offensive. Nevertheless, the sounds of Flynt's sexual activity did not constitute disparate treatment on the basis of sex. Male and female employees alike were subjected to and affected by the noise, which required the rescheduling and moving of business meetings. The arbitrator stated that Jim Kohls, a former vice-president of LFP, testified that he heard the sounds, and that male employees were "peripherally affected by occasionally hearing the sounds emitted from Mr. Flynt's office or had business meetings rearranged." On the facts as found by the arbitrator, Raymond

was not treated differently than a man because she had to listen to the sounds of sexual activity.

The question that remains, however, is whether the requirement that Raymond participate in the arrangements necessary to facilitate Flynt's sexual escapades and to conceal them from his wife (for ease of reference, we will call this the "early warning system"), exposed her to disadvantageous working conditions *that would not have been imposed upon a man.* Raymond was an executive assistant to LFP executives and sometimes filled in as an executive assistant to Flynt. One of Raymond's job duties was to watch out for Flynt's wife, and if Mrs. Flynt walked toward Flynt's office when he had a "special guest," Raymond was to notify Flynt's executive assistant that Mrs. Flynt was on her way, and intercept ("delay or divert") her. On occasion, Raymond rescheduled or relocated business meetings to avoid days when Flynt frequently entertained his guests. Raymond and the other executive assistants knew that Flynt's executive assistant arranged the encounters. The arbitrator concluded that all the executive assistants on the 10th floor were involved in the arrangements, and "[i]t is significant that all of those who were directed to participate in this early warning system were women." Flynt created a "hostile working environment for all the women employed as executive assistants on the tenth floor," and the conduct was "gender based" because all the executive assistants involved were women.

This analysis begs the question whether the offensive conduct (required participation in the early warning system) was directed at Raymond because of her gender. The factual findings in the arbitration award are clear that all executive assistants on the 10th floor were required to participate in the system as part of their job duties, and that all the executive assistants thus affected were women, but more is required for a conclusion that the conduct targeted women in general and Raymond in particular. The key question is: If one of the executive assistants had been male, would he have been treated in the same manner? That is, would he have been required to participate in the system to prevent Mrs. Flynt from discovering that Flynt was having a sexual encounter

in his office with a "special guest?" Nothing in the arbitrator's factual findings answers that question.

Lyle makes it clear that a workplace permeated with offensive sexual discussions and actions does not necessarily create a hostile work environment for the purpose of a sexual harassment claim. The female plaintiff in *Lyle* was a writers' assistant on a television series, who testified regarding sexually offensive discussions and actions in the writers' meetings she was required to attend. These discussions included preferences in women and sex in general, descriptions of sexual experiences, and fantasies about sexual experiences with the women cast members. One of the writers drew female sexual organs and breasts in a "'coloring book;'" some of the writers made "masturbatory gestures." (*Lyle*, *supra*, 38 Cal.4th at p. 275.) There was also evidence that the male writers "referred to women using gender-related epithets." (*Id.* at p. 277.) The Court recognized that verbal harassment could include epithets or derogatory comments on the basis of sex, and visual harassment could include derogatory pictures or drawings on the basis of sex. (*Id.* at p. 280.) Further, "evidence of hostile, sexist statements is relevant to show discrimination on the basis of sex." (*Id.* at p. 281.) "However, while the use of vulgar or sexually disparaging language may be relevant to such discrimination, it is not necessarily sufficient, by itself, to establish actionable conduct." (*Ibid*.) For offensive conduct to constitute sexual discrimination, it must be directed at the plaintiff or at women in general. (*Id.* at p. 282.)

The Court concluded that the record showed that the "sexual antics and sexual discussions . . . did not involve and were not aimed at plaintiff or any other female employee," and "'nondirected' conduct was undertaken in group sessions with both male and female participants present." (*Lyle*, *supra*, 38 Cal.4th at p. 287.) "[T]here was no indication the conduct affected the work hours or duties of plaintiff and her male counterparts in a disparate manner. Accordingly, while the content certainly was tinged with 'sexual content' and sexual 'connotations,' a reasonable trier of fact could not find, based on the facts presented here, that "'members of one sex [were] exposed to

disadvantageous terms or conditions of employment to which members of the other sex [were] not exposed'" [citation], or that if plaintiff "'"had been a man she would not have been treated in the same manner'"' [citation]." (*Id.* at pp. 287–288.) Nothing in the record suggested that the writers engaged in the "nondirected sexual antics and sexual talk . . . to make plaintiff uncomfortable or self-conscious, or to intimidate, ridicule, or insult her. . . ." (*Id.* at p. 288.)

Similarly, there is no factual finding in the arbitrator's award to support a conclusion that the early warning system exposed Raymond to conditions of employment to which a man would not have been exposed, or that Flynt's sexual antics and the early warning system were intended to make Raymond uncomfortable, or to intimidate or ridicule her. Flynt's behavior was indiscriminate; the sounds of his sexual activity were audible to everyone within earshot, male or female. The early warning system created to protect him from his wife was one of the job duties for executive assistants on the 10th floor. All those assistants were women, but there is no indication that the Flynt defendants never hired men as executive assistants, or that male executive assistants never worked on the 10th floor. The arbitrator's award does not demonstrate that gender was determinative rather than coincidental, that is, that the requirement that Raymond participate in the early warning system was motivated by a desire to discriminate on the basis of gender. Without some indication that men and women counterparts were treated disparately, her required participation in the early warning system cannot constitute sexual harassment to support Raymond's claim of a hostile work environment.

2. Sexual comments

Unlike the early warning system, the offensive sexual comments that Flynt made to Raymond were directed at her and constitute personal derogation of Raymond because of her sex. (See *Lyle, supra,* 38 Cal.4th at pp. 288–289.) Such remarks did target Raymond on the basis of her identity as a woman, and so it is "axiomatic" that the Flynt defendants would treat men "'differently,' i.e., not attack them for the same reason. It follows that the harassment was 'because of sex,' i.e., it employed attacks on [gender]

identity . . . as a tool of harassment." (*Singleton*, *supra*, 140 Cal.App.4th at p. 1562; see *Birschtein*, *supra*, 92 Cal.App.4th 994, 1002 [asking plaintiff for dates, making suggestive remarks, and describing sexual fantasies were "overt acts of sexual harassment"].)

a. Comments not made in Raymond's presence

The arbitrator found that Flynt commented about his special guests' "attributes" to Flynt's executive assistant on several occasions after their visits, and stated that he was "'wearing an erection.'" The arbitrator did not, however, state that Raymond witnessed these remarks, was present when Flynt made them, or even knew that the remarks were made. These remarks were not directed at Raymond, and she "must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. [Citation.] The reason for this is obvious; if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect . . . her perception of the hostility of the work environment.' [Citation.]" (*Lyle*, *supra*, 38 Cal.4th at p. 285.) Further, although "a reasonable person may be affected by knowledge that other workers are being sexually harassed in the workplace, even if he or she does not personally witness that conduct" (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519) (*Beyda*), in the absence of any factual finding that Raymond had personal knowledge of those statements, we assume that she did not personally witness them. (See *Lyle*, *supra*, 38 Cal.4th at p. 285, fn. 7.)

Raymond urges that "on this record it is presumed the comments were made to Raymond directly, or in her presence." She cites *Cable Connection*, *supra*, 44 Cal.4th at p. 1362: "Problems with the record are not reflected in the cases, but in the event they arise, there is a ready solution in the familiar rule that the decision under review is presumed correct on matters where the record is silent." As to the first comment, however, the record (the arbitrator's award) is not entirely "silent;" the arbitrator specifically stated that Flynt made the comment about his visitor's attributes to Flynt's executive assistant, not to Raymond. Further, the sole "record" in this case is the

arbitrator's award. As we stated above, we review for legal error, using only the facts as found by the arbitrator. The arbitrator's award includes no factual finding that Raymond personally witnessed the two remarks.

b. Comments made to Raymond not sufficiently severe or pervasive

Flynt asked an LFP executive, with Raymond present, if Raymond was the woman the executive "was fucking." Flynt told a "juvenile 'sticky panties' joke" to Raymond in the presence of others. Flynt also asked Raymond for a hug. These are the discriminatory remarks that are properly the basis for Raymond's claim of a hostile work environment.

"'"[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances [including] the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." [Citation.]' . . . Therefore, to establish liability in a FEHA hostile work environment sexual harassment case, a plaintiff employee must show that she was subjected to sexual advances, conduct, or comments that were *severe enough or sufficiently pervasive to alter the conditions of her employment and create a hostile or abusive work environment*. [Citations.]" (*Lyle, supra,* 38 Cal.4th at p. 283.) Harassment that is occasional, isolated, sporadic, or trivial is not enough; "the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature." (*Ibid.*) A plaintiff who, like Raymond, does not point to a loss of tangible job benefits, is required to make a higher showing that the harassing conduct pervaded and was destructive of her working environment. (*Id.* at p. 284; compare *Singleton, supra,* 140 Cal.App.4th at pp. 1560–1561 [sufficient to show harassment was severe and pervasive where conduct was hostile and abusive, plaintiff was taunted, and his work was disrupted and sabotaged].)

To evaluate whether the totality of the circumstances shows that harassment was sufficiently pervasive to create a hostile work environment, courts have examined "(1)

the nature of the unwelcome sexual acts or words . . . ; (2) the frequency of the offensive acts or encounters; (3) the total number of days over which all the offensive conduct occurred; and (4) the context in which the sexually harassing conduct occurred. [Citations.]" (*Herberg v. California Institute of the Arts* (2002) 101 Cal.App.4th 142, 150.)

Flynt's three unwelcome sexual remarks vary in their nature. The first, asking an LFP executive (in Raymond's presence) whether Raymond was the woman "he was fucking," is aggressive, demeaning, and humiliating. The second, the telling of a juvenile "sticky panties" joke to Raymond in the presence of others, is boorish, offensive, and humiliating. The third, requesting a hug from Raymond, solicits physical contact.[7]

The frequency of the remarks is low. Raymond worked at LFP for over two years, and three remarks over that period of time do not show constant harassment. There is no factual finding in the arbitration award regarding the total number of days over which the conduct occurred.

Finally, we must consider the remarks in the context in which they occurred. "'"[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' [Citation.] . . . [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

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[7] Raymond characterizes this as "physical touching," but the arbitration award does not state that Flynt hugged Raymond or that any physical touching occurred. Even if there were an act of physical touching, "even unwelcome sexual touching is insufficient to constitute severe or pervasive harassment when the incidents are isolated and there is no violence or threat of violence." (*Herberg v. California Institute of the Arts*, *supra*, 101 Cal.App.4th at p. 153.)

teasing and roughhousing . . . and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." [Citation.]'" ((*Lyle, supra,* 38 Cal.4th at p. 283; *Miller v. Department of Corrections, supra*, 36 Cal.4th at p. 462.) Raymond's workplace was LFP, described in the employee handbook as "a major publishing and internet company" which in addition to Hustler magazine includes "magazines covering lifestyle, hobbies and music" and "Web sites, including Hustler.com" which "offer[] adult and non-adult material." While we agree with the arbitrator that "[t]he fact that the business of Mr. Flynt and LFP, Inc. is different than most businesses and may make them feel isolated from the mainstream business community, does not alter their obligation to abide by the legal standards applicable to all employees with regard to treatment of employees and their working environment," those legal standards also mandate that we consider the social context of the workplace in determining whether a reasonable woman in Raymond's position—working at LFP—would find Flynt's sexual remarks sufficiently pervasive and severe to alter the conditions of her employment at LFP and result in a hostile work environment.

We conclude that the remarks were not severe enough, or pervasive enough, to create a hostile or abusive work environment. Flynt's remarks to Raymond were few in number (three) over more than two years of Raymond's employment. The remarks varied in the degree of their sexual offensiveness, but none constituted an extreme incident sufficient to overcome the infrequency of their occurrence. In *Hughes v. Pair* (2009) 46 Cal.4th 1035, the Supreme Court concluded that the trustee defendant's statement that if plaintiff was "nice" to him, he could approve money from plaintiff's husband's trust fund, and his statement that night in front of other people at a private museum showing that "'I'll get you on your knees eventually. I'm going to fuck you one way or another'" were not "so egregious as to alter the conditions of the underlying professional relationship" and would not support a finding of hostile work environment sexual harassment. (*Id.* at pp. 1048–1050.) "[A]n employee seeking to prove sexual harassment based on no more than a few isolated incidents of harassing conduct must

show that the conduct was 'severe in the extreme.'" (*Id.* at p. 1043.) A reasonable person in Raymond's position would not find Flynt's conduct severe in the extreme, especially considering the social context of the LFP workplace.

The Flynt defendants argue that the arbitrator's statement that Flynt "had a *habit* of making sexually-oriented remarks to Ms. Raymond and the other executive assistants" (italics added), and the arbitrator's use of the abbreviation "e.g"[8] before listing Flynt's remarks, require us to presume that there were many other sexually harassing statements to support the arbitrator's finding of a hostile work environment. First, we note that the arbitrator stated that Flynt's "habit" targeted the other executive assistants as well as Raymond. There is no factual finding regarding how many (if any) additional remarks were directed at Raymond, or how many additional remarks she witnessed. As we have explained, remarks made to others outside of Raymond's presence of which Raymond had no knowledge cannot affect her perception of the hostile nature of the work environment, and we assume that she did not know of the remarks in the absence of a finding to the contrary. (*Beyda*, *supra*, 65 Cal.App.4th at p. 519; see *Lyle*, *supra*, 38 Cal.4th at p. 285, fn. 7.) Although the arbitration award also states that Flynt's habit was "well known," there is no indication to whom, or whether his "habit" was known to Raymond. The arbitration award made no factual finding that Raymond was the target of, witnessed, or knew of, other harassing remarks beyond the three remarks described above.

After applying California sexual harassment law to the factual findings as stated in the arbitration award, we are left with only three incidents of harassing conduct over a more than two-year period. These few incidents are not sufficient to show that a reasonable person in Raymond's position would find the harassment severe or pervasive. In *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, the Fourth Appellate District found three instances of harassment over five weeks to be insufficient for a hostile work

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[8] "E.g. An abbreviation of exempli gratia. For the sake of an example." (Black's Law Dict. (6th ed. 1990) p. 515, col. 2.)

environment claim, even though the conduct was more severe and involved two incidents of physical touching, including of the employee's breast. Nevertheless, the "rude, inappropriate, and offensive behavior" was not enough to show that the workplace was permeated with discriminatory "'intimidation, ridicule or insult'" sufficiently severe to constitute a hostile work environment. (*Id.* at p. 145; see *Haberman v. Cengage Learning, Inc.* (2009) 180 Cal.App.4th 365, 381–382, 386 [listing cases finding multiple harassing behaviors insufficient for hostile work environment, and concluding that plaintiff's allegations of multiple inappropriate remarks did not establish severe or pervasive conduct].)

Raymond also argues that the Flynt defendants' failure to investigate complaints about Flynt's behavior[9] constituted an act of harassment. Unless the behavior constituted discriminatory harassment, however, a failure to investigate the behavior does not independently establish a hostile work environment. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 283-284, 289 [Gov. Code § 12940, subd. (i) [now redesignated as subd. (k)] does not establish an independent statutory tort; plaintiff must prove underlying harassment].)

We do not condone Flynt's improper behavior. Under the parties' explicit agreement, however, we review the arbitration award for legal error only. (*Cable Connection, supra*, 44 Cal.4th at p. 1363; see *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 676, fn. 2.) We simply hold that, given the totality of the circumstances, the facts as set forth in the arbitration award do not establish a claim for hostile work environment sexual harassment.[10] We therefore conclude that the trial court

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[9] The arbitration award does not state that Raymond herself complained about Flynt, stating only that "present and former female employees" testified that in response to "complaints," LFP executives refused to do anything about Flynt's behavior.

[10] Because we conclude that the arbitrator committed legal error in finding sexual harassment, we do not address the Flynt defendants' arguments regarding the punitive damages award.

erred in confirming the arbitration award, and remand to the trial court with directions to vacate the arbitration award.

DISPOSITION

The judgment confirming the arbitration award is reversed. The trial court is directed to vacate the award. Appellants shall recover their costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.