



MEDIATION BOOTCAMP SERIES

PART 2: MOCK MEDIATION IN ACTION

**DATE**

16 October

**TIME**

12 PM - 1PM

**LOCATION**

Zoom Webinar

**BILL MUÑOZ**

Freeman Mathis &
Gary LLP

**PETER LINN**

ADR Services, Inc.

**COURTNEY O'BRIEN**

Oakland City
Attorney's Office

COMPLIMENTARY IN-HOUSE PROGRAM

FACT PATTERN

Kari Jones v. MerchCo

- Kari is an unmarried woman (divorced, 2 kids), 38 years old, college educated
- She was hired as account manager for sales company 4 years ago
- She Received pay raises and merit bonuses for 3 of the 4 years.
- During her 4th year of work, she was disciplined by her male supervisor, Mike, for excessive absences and placed on a performance plan. She did not receive a raise or a bonus in her 4th year.
- Mike has been with the company for 10 years, is married and also has two kids.
- Kari alleges Mike was hitting on her at work (flirting, asking her out, making sexually suggestive comments). Kari, knowing Mike was married, ignored the advances

- There are no witnesses to any of Mike’s comments or actions. Mike has one prior complaint by a female co-worker 7 years ago. The company investigated, but was unable to find any evidence supporting the claim, so no action was taken.
- Kari alleges her absences from work were approved, verbally, by Mike, but when Kari began to ignore his advances, Mike got angry and used the excessive absences as a basis for punishing her. Kari made a formal complaint with HR (in compliance with the company’s policy manual). The company hired an independent investigator who conducted a 2-week investigation. The investigator found an e-mail from Mike to Kari that stated: “Kari – are you available this Friday evening?” with a winking emoji face. There was no response to the e-mail from Kari.
- Given there were no eye witness accounts to the events, and no evidence corroborating Kari’s allegations, other than a cryptic e-mail, no action was taken and matter closed.
- 3 months later Kari quit and has now sued her former employer and Mike for:
 - Constructive termination
 - Hostile Work Environment
 - Sexual harassment
 - Retaliation

SPEAKERS

Plaintiff’s Counsel



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Mediator



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Defense Counsel



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**Plaintiff's
Mediation
Brief**

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5 *Attorneys for Plaintiff*
KARI JONES

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7 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
8 **IN AND FOR THE COUNTY OF ALAMEDA**
9

10 **KARIM JONES**
Plaintiff,
11
v.
12 **MERCHCO**, and
13 DOES 1 Through 50 inclusive,
14
Defendant.

Case No.: CV123456

PLAINTIFF'S MEDIATION BRIEF

Date: October 16, 2024
Time: 12:00 p.m.
Mediator: Peter Linn

Complaint Filed: 1/1/24

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17 **I. FACTUAL BACKGROUND**

18 **A. Overview**

19 This lawsuit arises out of Plaintiff Kari Jones' employment with MerchCo as an Account
20 Manager from 2020 until she could no longer take the continued sexual harassment and hostile
21 work environment created by her former manager Macho Mike. When the Company did
22 nothing to address her concerns and complaints about sexual harassment, she was denied a
23 bonus and ultimately quit due to the continued hostile work environment.

24 **B. Plaintiff's Performance Was Exceptional**

25 Plaintiff, a divorced mother of two children, and college educated worked for MerchCo
26 for 4 years, the first three without any issues. By all accounts, she was an exceptional employee
27 earning raises and bonuses her first three years. In her fourth year, Plaintiff had a little rough
28 patch with her children acting out due to the divorce requiring her to take more time off than she

1 would have otherwise liked. Aside from the time off, Plaintiff had no negative work
2 performance issues.

3 **C. Macho Mike Begins to Harass Plaintiff**

4 Recognizing his position of authority and the fact that Plaintiff was divorced, in
5 Plaintiff's fourth year at MerchCo, Macho Mike saw his opportunity to take advantage of
6 Plaintiff. While Mike was married and had two children of his own, he began to start flirting
7 with Plaintiff, which Plaintiff did not think much of and largely ignored. However, when the
8 flirting did not elicit the response that he wanted, Mach Mike began to get more brazen with his
9 sexual harassment and asked Plaintiff out and making sexually suggestive comments to her.

10 Knowing that Macho Mike was married, Plaintiff initially ignored these advances as
11 well. However, while she felt the comments appalling and that fact that he was married, she
12 ignored those advances only made Mike angry. While he initially approved Kari's requests for
13 time off, when she ignored his advances, he began to retaliate against her by disciplining her for
14 taking too much time off.

15 **D. Plaintiff Files a Complaint Against Macho Mike**

16 Pursuant to MerchCo's policy, Kari filed a complaint with Human Resources. While
17 there were no apparent witnesses to Mike's conduct towards Kari, the outside investigator hired
18 to conduct the investigation did discover an e-mail from Mike to Kari "Kari – are you available
19 this Friday evening?" with a winking emoji face. There was no response to the e-mail from
20 Kari.

21 Even with this e-mail, given the lack of witnesses, the investigator incredibly was not
22 able to substantiate the complaint and the matter was closed. Kari attempted to stay at MerchCo
23 for another 3 months before she could not take the further harassment and retaliation from Mike
24 and quit.

25 **II. LEGAL ANALYSIS**

26 **A. MerchCo is Liable for Sexual Harassment/Hostile Work Environment**

27 To establish a claim for sexual harassment hostile work environment, Plaintiff must
28 show: 1) she was subjected to unwelcome sexual advances; 2) the harassing conduct was based

1 on Plaintiff's sex; (3) the harassment was sufficiently severe or pervasive to alter the conditions
2 of employment; and; 4) the harassment created an abusive, hostile, intimidating, offensive, or
3 oppressive work environment. (*See Lewis v. City of Benicia*(2014) 224 Cal.App.4th 794, 800-
4 801.)

5 Here, Macho Mike's continuous flirting and asking Kari out on dates is clear sexual
6 harassment. The conduct was unwelcomed as indicated by the fact that she complained to
7 Human Resources regarding the conduct. Notwithstanding the sham investigation, Macho
8 Mike's e-mail to Kari clearly was his attempt to ask her out on a date, even though he is
9 married. The conduct was severe and pervasive as it affected Kari's ability to perform her job
10 as reflected in the time off and ultimate poor performance review despite 3 prior years of good
11 reviews and bonuses. Since Macho Mike is a supervisor, MerchCo is strictly liable for his
12 harassing conduct. (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421.)

13 **B. MerchCo Retaliated Against Plaintiff**

14 In order to establish a prima facie case of retaliation under the FEHA, a plaintiff must
15 show: 1) he or she engaged in a protected activity; 2) the employer subjected the employee to an
16 adverse employment action; and 3) a causal link existed between the protected activity and the
17 employer's action. Once an employee establishes a prima facie case, the employer is required to
18 offer a legitimate, nonretaliatory reason for the adverse employment action. If the employer
19 produces a legitimate reason for the adverse employment action, the presumption of retaliation
20 drops out of the picture and the burden shifts back to the employee to prove intentional
21 retaliation. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.)

22 Here, Macho Mike clearly retaliated against Plaintiff for ignoring his sexual advances by
23 writing her up for excessive absences after he orally agreed to the time off. In other words,
24 ignoring his sexual advances was a substantial motivating factor that contributed to the negative
25 performance review. There is no other reason for the write ups given her stellar prior
26 performance record.

1 **C. Plaintiff Was Constructively Discharged**

2 “In order to establish a constructive discharge, an employee must plead and prove, by
3 the usual preponderance of the evidence standard, that the employer either intentionally created
4 or knowingly permitted working conditions that were so intolerable or aggravated at the time of
5 the employee's resignation that a reasonable employer would realize that a reasonable person in
6 the employee’s position would be compelled to resign.” (*Turner v. Anheuser-Busch, Inc.* (1994)
7 7 Cal.4th 1238, 1251.)

8 No reasonable person would tolerate constant sexual advances, sexual comments, and
9 being asked out on a date in the workplace. It clearly affected Plaintiff’s performance, and
10 when the advances were rebuffed or ignored, she was retaliated against. Human Resources did
11 not help her. So, her choice was to continue to endure the egregious conduct or quit. She chose
12 the latter to protect herself.

13 **III. SETTLEMENT DISCUSSIONS**

14 Defendant has not yet acknowledged its wrongful conduct and there have been no
15 settlement discussions. However, in the spirit of good faith negotiations, Plaintiff will resolve
16 her claim against MerchCo for \$750,000.

17 Dated: October 15, 2024

FREEMAN MATHIS & GARY, LLP

18
19 By:



William A. Muñoz
Attorneys for Plaintiff
KARI JONES

**Defendant's
Mediation
Brief**

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3 Attorneys for
MERCHCO and MACHO MIKE
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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF ALAMEDA**
11

12 KARI JONES,

13 Plaintiff,

14 v.

15 MERCHCO, MACHO MIKE, and Does 1-20,

16 Defendants.
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Case No. 101000

ASSIGNED FOR ALL PURPOSES TO
HON. JUDGE
DEPARTMENT 1

MEDIATION BRIEF

Date: October 16, 2024
Time: 12:00 p.m.

1 COMES NOW Defendants MERCHCO and MIKE and submit this brief in advance of
2 mediation.

3 **I. INTRODUCCION**

4 This case arises from an employment action by Plaintiff KARI JONES against her
5 employer Defendant MERCHCO and her former coworker Defendant MACHO MIKE. Kari
6 Jones alleges causes of action of: (1) constructive termination, (2) hostile work environment, (3)
7 sexual harassment, and (4) retaliation.

8 **II. STATEMENT OF FACTS**

9 Plaintiff was hired by Defendant Merchco as an account manager four (4) years ago.
10 Plaintiff did a satisfactory job until recently and earned salary increases and bonuses. Last year
11 her work product begin to decline in quality, in part, due to excessive absences. Some of
12 Plaintiff's absences were approved but nonetheless led to decreased quality and late work
13 product. Where Plaintiff was once an enthusiastic and valued member of the team, her
14 participation and effort gradually decreased over time. When asked about this change, Plaintiff
15 denied being unhappy at work or needing help. Consequently, Plaintiff was disciplined for the
16 excessive absences by her supervisor Defendant Mike and placed on a performance plan, as is
17 company policy.

18 At about the same time as the discipline, Plaintiff made a complaint to Merchco's Human
19 Resources department, alleging that Mike made inappropriate advances towards her. Because
20 Merchco does not tolerate sexual harassment and always takes these types of allegations
21 seriously, Merchco hired an independent investigator. A two-week investigation was conducted.
22 No witnesses were found and only one email was found from Mike to Plaintiff which said
23 simply, "Mike to Kari Jones that stated: "Kari Jones – are you available this Friday evening?"
24 with a winking emoji face. There was no response to the e-mail from Plaintiff. Mike does not
25 recall sending the email or the circumstances but believes it could have been referencing an
26 important project the team had been working on or a team bonding activity that the team had
27 discussed organizing. Ultimately, Plaintiff's allegations were not substantiated.

28 Mike denies any inappropriate or harassing comments or behavior towards Plaintiff.

1 Mike believes prior to the recent events he and Plaintiff had a good relationship and worked well
2 together. Mike has one prior complaint by a female co-worker 7 years ago. The company
3 investigated, but was unable to find any evidence supporting the claim, so no action was taken.
4 Mike has been an exemplary employee at Merchco for ten (10) years and there have been no
5 other complaints about his behavior.

6 After being placed on the performance plan, Plaintiff made no further complaints about
7 Mike, but three months later abruptly quit her job without giving notice. Soon after, this lawsuit
8 was filed.

9 **III. LIABILITY**

10 Plaintiff's claims against both defendants are tenuous at best. There is no evidence of a
11 hostile work environment, sexual harassment, constructive termination, or retaliation. In fact, it
12 is well documented that her performance suffered due to her excessive absences. Plaintiff's sales
13 numbers declined in her last year of employment and her assigned projects and reports were
14 delivered much slower than in past years and were even sometimes late. Nonetheless, Merchco
15 took her allegations seriously and investigated them but found nothing other than one ambiguous
16 email. The reality is that Plaintiff chose to leave her job for unknown reasons and tried to blame
17 her departure on others.

18 **IV. DAMAGES**

19 Plaintiff has a duty to mitigate her damages. With her four years of experience at
20 Merchco, prior experience, and education credentials, Plaintiff should have had no problem
21 securing a new comparable position. Therefore, her lost wages should not be more than a few
22 months of her salary which, at the time she quit, was \$100,000 per year. Moreover, with no
23 evidence of harassment or retaliation, any award of general damages to Plaintiff should be
24 minimal.

25 **V. SETTLEMENT DISCUSSIONS**

26 There have not yet been any settlement discussions between the parties.

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VI. CONCLUSION

Plaintiff's damages are minimal, and Defendants' liability is non-existent. Nonetheless, Defendants will participate in mediation in good faith.

Dated: October 14, 2024

Merchco

By:

COURTNEY O'BRIEN
Attorneys for
MERCHCO and

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