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AGUILAR v. AVIS RENT A CAR SYSTEM, INC. 980 P.2d 846 (Cal. 1999)

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FACTS

Plaintiffs were Latino employees of the Avis Rent A Car San Francisco Airport facility.[1] As "drivers," plaintiffs moved Avis vehicles between parking lots and from one airport location to another.[2] Defendant John Lawrence was the service station manager at the San Francisco Avis location.[3] Defendant Kathy Black was a supervisor at the same location.[4]

Plaintiffs filed suit against Avis Rent A Car System, Inc. and ten named individuals, including defendants Lawrence and Black.[5] The complaint alleged (1) employment discrimination in violation of the Fair Employment and Housing Act (hereinafter "FEHA");[6] (2) wrongful discharge in violation of public policy; (3) intentional infliction of emotional distress; and (4) negligent infliction of emotional distress.[7] The complaint, alleging that Lawrence constantly verbally harassed plaintiffs,[8] also requested injunctive relief against both Lawrence prohibiting verbal harassment and Avis prohibiting the allowance of such verbal harassment.[9]

The complaint further alleged that Black conducted a discriminatory investigation by detaining and questioning only Latino employees regarding a suspected theft of a calculator.[10] During the investigation, Black brought in a police officer and warned plaintiffs that if they did not cooperate in the investigation, the Immigration and Naturalization Service would be contacted.[11] After finding the calculator the following day, Black apologized to plaintiffs.[12]

On October 27, 1994, the jury returned special verdicts, finding that (1) Black had unlawfully harassed or discriminated against five plaintiffs; (2)

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1. Aguilar v. Avis Rent A Car System, Inc., 980 P.2d 846, 849 (Cal. 1999).
2. *Aguilar*, 980 P.2d at 849.
3. 980 P.2d at 849.
4. *Id.*
5. *Id.*
6. CAL. GOV'T CODE § 12900 (West 1999). Section 12920 of the FEHA declares "as the public policy of [California] it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age." *Id.*
7. 980 P.2d at 849.
8. Lawrence allegedly referred to the Latino drivers using derogatory names, including "motherfuckers," and demeaned them "on the basis of their race, national origin and lack of English language skills." *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

Lawrence had unlawfully harassed or discriminated against four plaintiffs; and (3) Avis knew or should have known of defendants' conduct and failed to stop it.[13]

Two months later, the trial court held a hearing regarding plaintiffs' request for injunctive relief.[14] The court found that sufficient evidence existed for the jury to find that as to four plaintiffs, Lawrence had engaged in acts of harassment "so continual and severe as to alter the working conditions."[15] After finding "a substantial likelihood based on [Lawrence's] actions that he will [continue such action] in the future unless restrained," the court determined that the injunction was appropriate. [16] In addition to entering judgment against Avis and Lawrence,[17] the trial court issued an injunction that stated as follows:

> Defendant John Lawrence shall cease and desist from using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees of Avis Rent A Car System, Inc., and . . . further refrain from any uninvited intentional touching of said Hispanic/Latino employees, as long as he is employed by Avis Rent A Car System, Inc., in California.[18]

The injunction also prohibited Avis from investigating or permitting investigations that are limited to only Hispanic/Latino employees, "unless the circumstances are such that no employees other than Hispanic/Latinos are reasonably subjects or targets of such investigation(s)." [19]

Defendants appealed the trial court's award of damages and the "mandatory and prohibitory" injunction.[20] Specifically, they argued that the injunction constituted a prior restraint, violating their First Amendment right to free speech.[21] However, instead of providing the Court of Appeal with a

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13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. Damages were awarded against Avis: (1) in the amount of $15,000 each to the five employees harassed by Black; and (2) in the amount of $25,000 each to the three employees harassed or discriminated against by Lawrence. Damages were awarded against Lawrence in the amount of $25,000 each to three of the four employees the jury found he harassed. *Id.*
18. *Id.* at 850.
19. *Id.* The injunction further ordered Avis "to post certain notices advising employees to report any instances of discriminatory or harassing conduct by Avis or its employees and to publish a policy statement in English and Spanish delineating employee rights and manager responsibilities with regard to employee complaints of racial or national origin harassment or discrimination. . .." *Id.* (internal quotations omitted).
20. *Id.*
21. *Id.* at 848.

recorder's transcript of the trial court proceedings as is customary, defendants elected to provide only an appellants' appendix of the proceedings. [22]

The California Court of Appeal rejected defendants' argument that the injunction was a prior restraint, but agreed that the injunction's language prohibiting "derogatory racial or ethnic epithets" was vague.[23] The court therefore reversed and remanded the injunction portion of the order.[24] The court directed the trial court to redraft the injunction to limit its scope to the workplace, stating that an injunction that reached beyond the workplace improperly exceeds the scope of the FEHA violation sought to be prevented.[25] Lawrence and Avis challenged the Court of Appeal's order, arguing that even the limited injunction constituted an improper restraint on freedom of expression.[26] The Supreme Court of California granted certiorari to determine this issue.[27]

HOLDING

The Supreme Court of California, in a 4-3 decision, held that a remedial injunction prohibiting the continued use of racial epithets in the workplace does not violate the right to free speech, provided there has been a judicial determination that the use of such epithets will contribute to a hostile or abusive work environment.[28]

ANALYSIS

The plurality opinion, written by Chief Justice George, began his analysis with a definitional discussion of employment discrimination.[29] The relevant form of employment discrimination at issue in this case was harassment on the basis of race or national origin.[30] The California Code of Regulations specifically states that harassment of an employee is unlawful "if the entity, or

22. *Id.* Although providing a summarized appellant's appendix is a permissible procedural choice (*see* CAL. CT. R. 5.1 (1999)), the court viewed this election as risky and unfortunate in such an important First Amendment case. As appellants, defendants bore the burden of providing a record on appeal that was adequate to adjudicate their claims, *see id.* at 864 (Werdegar, J., concurring).

23. *Id.* at 850.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 848.

29. *Id.* at 850.

30. *Id.* at 850-51. *See* CAL. GOV'T CODE § 12940 (h)(1).

its agents or supervisors, knows or should have known of [the harassment] and fails to take immediate and appropriate corrective action."[31]

The California courts have adopted the same standard for evaluating claims under the FEHA as the U.S. Supreme Court has recognized in the context of sexual harassment.[32] To be actionable, the harassment complained of must be "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment."[33] The harassment cannot be "isolated, sporadic, or trivial[;] rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or generalized nature."[34]

The plurality established that Lawrence's conduct created a hostile or abusive work environment on the basis of race.[35] The court then examined whether prospective relief was necessary to prevent the recurrence of that unlawful conduct, as the FEHA specifically provides for prospective remedies.[36]

Despite the trial court's finding that there is "a substantial likelihood based on [Lawrence's] actions that he will [harass and discriminate] in the future unless restrained,"[37] defendants argued that the injunction was improper because the record did not show that Lawrence "engaged in ongoing conduct that arguably might justify injunctive relief."[38] The court determined that, in order to prevail on this claim, defendants must show that the finding by the trial court was not supported by substantial evidence.[39] However, the court stated that because defendants elected not to provide the Court of Appeal with a transcript of the trial court proceedings, defendants had no basis upon which to prove that the injunction was unsupported by the evidence adduced at trial.[40] Thus, defendants could support their claim only with the inference from the trial court's comments that Lawrence had ceased his unlawful conduct during the pendency of the proceedings.[41] The court concluded that the trial court did

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31. *Id.* at 851 (quoting CAL. CODE REGS. tit. 2, § 7287.6 (b)(1)(A) (1999)). Harassment is defined to include "verbal harassment, e.g. epithets, derogatory comments or slurs on a basis enumerated in the Act[.]" 980 P.2d at 851. Verbal harassment may also constitute employment discrimination under the federal counterpart of the FEHA, the Civil Rights Act of 1964, tit. VII. 42 U.S.C. § 2000(e) (1994).

32. *Id.* at 851.

33. *Id.* (quoting Fisher v. San Pedro Peninsula Hospital, 214 Cal. App. 3d 590, 608 (1989)).

34. *Id.* (quoting *Fisher*, 214 Cal. App. at 610).

35. *Id.* at 852. Lawrence conceded that the jury findings that he had violated the FEHA were supported by substantial evidence.

36. *Id.* CAL. GOV'T CODE § 12920.5 provides: "In order to eliminate discrimination, it is necessary to provide effective remedies that will both prevent and deter unlawful employment practices and redress the adverse effects of those practices on aggrieved persons."

37. 980 P.2d at 852-853 (quoting Aguilar v. Avis Rent A Car System, Inc., No. 948597 (San Fran. Super. Ct. Feb. 14, 1995)).

38. *Id.*

39. *Id.* at 853.

40. *Id.*

41. *Id.*

not err in finding that there was a substantial likelihood that Lawrence would continue his unlawful actions unless restrained.[42] The court further emphasized that "[t]he mere fact that a defendant refrains from unlawful conduct during the pendency of a lawsuit does not necessarily preclude the trial court from issuing injunctive relief to prevent a post trial continuation of the unlawful conduct."[43]

Defendants' next argued that the injunction was a prior restraint on their rights to free speech, and that it was therefore invalid under the First Amendment to the U.S. Constitution and under the California Constitution, art. 1, § 2.[44] The court disagreed.[45]

The court first addressed the claim under the U.S. Constitution.[46] The court emphasized that while the right to free speech is stated in broad terms, it is not absolute.[47] The court implicitly suggested that speech of this nature is not constitutionally protected, citing the U.S. Supreme Court decisions in *Meritor Savings Bank v. Vinson*[48] and *Harris v. Forklift Systems, Inc.*[4950] These two decisions held that the use of sufficiently severe or pervasive racial epithets constitutes employment discrimination in violation of Title VII of the FEHA.[51] Further, the U.S. Supreme Court explicated that under certain circumstances spoken words are not constitutionally protected.[52] Drawing on these cases, the court asserted "that the First Amendment permits imposition of civil liability for past instances of pure speech that create a hostile work environment."[53]

Similarly, the court determined that the First Amendment also permits the issuance of an injunction to prohibit the continuation of such discriminatory actions.[54] Under well established law, the injunction is not invalid as a prior restraint, "because the order was issued only after the jury determined that defendants had engaged in employment discrimination, and the order simply precluded defendants from continuing their unlawful activity."[55] After

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42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).
49. Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).
50. 980 P.2d at 854.
51. *Id.*
52. *Id.* (quoting R.A.V. v. St. Paul, 505 U.S. 377, 389 (1992) (providing sexually derogatory "fighting words" as an example of speech that is not constitutionally protected)).
53. *Id.* at 855.
54. *Id.* at 856.
55. *Id.* at 856-858. *See* Kramer v. Thompson, 947 F.2d 666, 675 (3d Cir. 1991) ("The United States Supreme Court has held repeatedly that an injunction against speech will generally not be considered an

interpreting several decisions of the U.S. Supreme Court,[56] the court determined that in each case the Supreme Court "recognize[d] that once a court has found that a specific pattern of speech is unlawful, an injunctive order prohibiting the repetition, perpetuation, or continuation of that practice is not a prohibited 'prior restraint' of speech."[57] The court therefore concluded that "the pervasive use of racial epithets that has been judicially determined to violate the FEHA is not protected by the First Amendment, and such unlawful conduct properly may be enjoined."[58]

Next, the court turned to defendants' claim that the injunction violated the California Constitution.[59] Defendants relied on *Dailey v. Superior Court*[60] in which the California Supreme Court found that a superior court order constituted a prior restraint in violation of the California Constitution.[61] The court distinguished *Dailey* as involving a true prior restraint, not an injunction prohibiting conduct that has been judicially determined to be unlawful.[62] The court then denied defendants' claim explaining that the broad language of the California Constitution could not be interpreted to protect all speech in every circumstance.[63] The court concluded that under the California Constitution,

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unconstitutional prior restraint if it is issued after a jury has determined that the speech is not constitutionally protected.").

56. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 55 (1973) (upholding Georgia which "imposed no restraint on the exhibition of [obscene materials] until after a full adversary proceeding and a final judicial determination . . . that the materials were constitutionally unprotected"); Pittsburgh Press Co. v. Human Rel. Comm'n, 413 U.S. 376, 388-389 (1973) (upholding order prohibiting a newspaper from publishing advertisements in manner that would constitute employment discrimination); Freedman v. Maryland, 380 U.S. 51, 58 (1965) (stating that "only a procedure requiring a judicial determination suffices to impose a valid final restraint"); Times Film Corp. v. Chicago, 365 U.S. 43, 50 (1961) (rejecting the argument that a municipal ordinance requiring "submission of all motion pictures for examination prior to their public exhibition" constituted a prior restraint on expression); Kingsley Books, Inc. v. Brown, 354 U.S. 436, 440 (1957) (rejecting argument that criminal provision authorizing limited injunctive remedy prohibiting distribution of booklets found after due trial to be obscene amounts to prior censorship and thereby violates First Amendment).

57. 980 P.2d at 858.

58. *Id.* at 859.

59. *Id.* (quoting CAL. CONST., art. I, § 2(a) ("Every person may freely speak, write or publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.")).

60. Dailey v. Superior Court, 44 P. 458, 460 (Cal. 1896) (invalidating as prior restraint in violation of First Amendment superior court order prohibiting performance or advertising of play that was based upon circumstances of pending criminal case).

61. 980 P.2d at 860.

62. *Id.*

63. *Id.* at 860-61. *See* Wilson v. Superior Court, 532 P.2d 116, 122 (Cal. 1975) (recognizing that injunction restraining speech may be issued to protect private rights or to prevent deceptive commercial practices); People ex. rel Busch v. Projection Room Theater, 550 P.2d 600, 609 (1976) (stating "[i]t is entirely permissible from a constitutional standpoint to enjoin further exhibition of specific magazines or films which have been finally adjudged to be obscene following a full adversary hearing"); People ex rel. Gallo v. Acuna, 929 P.2d 596, 610-611 (Cal. 1997) (explaining that specific injunction, issued against particular party on basis of proven past course of conduct, poses less of danger to free speech interests than general statutory prohibition).

like the U.S. Constitution, the injunction was not a prior restraint of speech, "because defendants simply were enjoined from continuing a course of repetitive speech that had been judicially determined to constitute unlawful harassment in violation of the FEHA."[64]

Finally, defendants argued that even if the injunction was permissible, the trial court's order was too broad.[65] However, because the trial court added an exemplary list of prohibited speech to limit the scope of the injunction to the workplace, and as neither party sought review of that limitation, the court determined that the issue was not proper.[66] Nevertheless, the court did respond to defendants' claim that, even with the limitation, the injunction was overly broad because it enjoined Lawrence's speech even when he is outside the hearing of plaintiffs and other Latino employees.[67] Refusing to accept that argument, the court emphasized that the use of racial epithets even outside the hearing of plaintiffs would still contribute to the atmosphere of racial hostility and would perpetuate the hostile work environment created by defendants.[68] In affirming the appellate court, the plurality concluded by repeating the trial court's finding that, "[b]ecause Lawrence's past use of racial epithets in the workplace had been judicially determined to violate the FEHA, prohibiting [Lawrence] from continuing this discriminatory activity does not constitute an invalid prior restraint of speech."[69]

CONCURRING OPINION

In Justice Werdegar's concurring opinion, he opined that the plurality should have confronted the fundamental question of whether speech that creates a racially hostile work environment is protected by the First Amendment.[70] Concluding that such speech is not protected,[71] Justice Werdegar found the plurality's holding to be justified because it involved "speech occurring in the workplace, an unwilling and captive audience, a

64. *Id.* at 861.
65. *Id.*
66. *Id.*
67. *Id.* at 861-862.
68. *Id.* at 862.
69. *Id.* at 863 (quoting Aguilar v. Avis Rent A Car System, Inc., No. 948597 (San Fran. Super. Ct. Feb. 14, 1995)).
70. *Id.* at 865 (Werdegar, J., concurring).
71. Justice Werdegar recognized that the Supreme Court decisions in Connick v. Myers, 461 U.S. 138 (1983), CSC v. Letter Carriers, 413 U.S. 548 (1973), and NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), demonstrate that strong public policies governing the workplace, whether public or private, may justify some limitations on an employer's or employees' First Amendment rights. *Id.* at 870-871 (Werdegar, J., concurring).

compelling state interest in eradicating racial discrimination, and ample alternative speech venues for the speaker."[72]

DISSENTING OPINIONS

Justices Mosk, Kennard, and Brown dissented, each characterizing the injunction as a prior restraint under both the U.S. Constitution and the California Constitution.[73] Judge Mosk opined that the California Constitution provides a speech protective provision "more definitional and inclusive" than the First Amendment.[74] Thus, unlike the U.S. Constitution, the California Constitution plainly permitted holding defendants responsible for any abuse of the right, but did not permit a prior restraint in the form of an injunction.[75] In their respective dissents, Justice Mosk and Justice Kennard cited two reasons for the invalidity of the injunction.[76] First, the record failed to establish that the injunction was necessary to prevent a recurrence of defendants' wrongful acts of employment discrimination.[77] Second, the injunction was not narrowly tailored, because it prohibited Lawrence from addressing epithets to any Hispanic employee, not just the four plaintiffs whom Lawrence harassed.[78]

Justice Brown accused the plurality of recognizing "the FEHA exception to the First Amendment,"[79] and merely brushing aside the important constitutional protection of an individual's right to free speech with little analysis or authority.[80] She viewed the damages remedy against defendants as "sufficient to deter any unwanted racial discrimination" by creating a middle ground between upholding the injunction as a prior restraint and subjecting plaintiffs to employment discrimination.

CONCLUSION

The *Aguilar* decision hinged on finding the appropriate balance between two fundamental rights, equality and freedom of expression. However, the balance invoked by the plurality in this case was heavily influenced by defendants' failure to provide the Court of Appeal a transcript of the trial court

72. *Id.* at 875 (Werdegar, J., concurring).
73. *Id.* at 878-95 (Mosk, Kennard & Brown, J.J., dissenting).
74. *Id.* at 881 (Mosk, J., dissenting) (quoting *Wilson*, 532 P.2d at 120).
75. *Id.* (Mosk, J., dissenting).
76. *Id.* at 878-882.
77. *Id.* at 878 (Mosk, J., dissenting) and at 882 (Kennard, J., dissenting).
78. *Id.* at 878 (Mosk, J., dissenting) and at 886 (Kennard, J., dissenting).
79. *Id.* at 891 (Brown, J., dissenting).
80. *Id.* at 893 (Brown, J., dissenting).

proceedings. The consequence of defendants' failure to include the factual record was clearly a distinguishing feature between the differing plurality and dissenting opinions.

Defendants may have utilized this strategy in hopes that the California Supreme Court would not have sufficient evidence before it to uphold the injunction.[81] However, the absence of the trial court transcript ultimately had the opposite effect. The California Supreme Court upheld the injunction determining that, without the factual record, defendants could not show that the injunction was unsupported by evidence adduced at trial.[82] The dissenters, on the other hand, found that without the factual record the injunction failed to overcome the speech's presumption of constitutionality.[83]

The conflict between the fundamental rights of equality and freedom is perhaps not resolvable. In attempting to strike an appropriate balance, courts tend to rely on some outside factor, however insignificant. Here, the court used the strategic absence of a factual record as a basis for determining whose rights should prevail.

The *Aguilar* decision has prompted controversy. The ACLU of Northern California, an organization that usually defends outrageous speech, supported the court's decision. Dorothy M. Erhlich, executive director of the ACLU of Northern California, San Francisco, said that the ACLU supports the right to equality as much as First Amendment rights.[84] Moreover, "where companies fail to protect workers from race discrimination, courts must act. The Constitution holds out a promise of equality as well as expressive freedom."[85] However, Margaret Crosby, also on staff at the ACLU of Northern California, feels that this decision is only a modest attempt to secure equality and will have little impact.[86] Lawrence retains his right to walk outside on the street and hurl racial slurs at passing strangers.[87] The injunction provides only a limited restraint on discriminatory speech.[88] In precluding such speech only

81. First Amendment principles settled since New York Times v. Sullivan, 376 U.S. 254, 285 (1964), require an appellate court to independently examine the record to assure that restrictions on free speech are justified.

82. 980 P.2d at 852.

83. *Id.* at 879 (Mosk, J., dissenting). *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (stating that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity").

84. Dorothy M. Ehrlich, *Court Enjoins Use of Racial Slurs in Workplace*, THE SAN DIEGO UNION-TRIBUNE, September 25, 1999, at Opinion.

85. *Id.* at Opinion.

86. Margaret Crosby, *When Rights Collide*, THE RECORDER, September 1, 1999, at 5.

87. *Id.*

88. *Id.*

in the workplace, the attempted goal of securing equality can never be reached.[89]

Some attorneys recognize that this decision may create "daunting, if not insurmountable" enforcement problems for employers, in addition to exposing the employers to penalties.[90] Other attorneys feel the decision will result in little impact because the ruling was so specific to Avis' situation.[91]
Where employment discrimination exists, not only are monetary damages appropriate, but individuals can be enjoined from continuing to make harassing and discriminatory remarks in the workplace. Hopefully, this decision will prompt employers to protect themselves by implementing comprehensive anti-harassment policies that discourage discrimination.

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89. *Id.*
90. William Bennett Turner, *First Amendment Gets Worked Over*, THE RECORDER, August 18, 1999, at 5.
91. *Id.*