Not Reported in Cal.Rptr.3d, 2007 WL 1520034 (Cal.App. 4 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2007 WL 1520034 (Cal.App. 4 Dist.))

Court of Appeal, Fourth District, Division 3, California.
Lisa WEAVER, Plaintiff and Appellant,
v.
ORMCO CORPORATION et al., Defendants and Appellants.

No. G033036.
(Super.Ct.No. 01CC14887).
May 23, 2007.

Appeal from a judgment and postjudgment order of the Superior Court of Orange County, Robert H. Gallivan, Judge. Affirmed in part; reversed in part and remanded.
Morrison & Foerster, Thomas J. Umberg, B. Scott Silverman, and Sarvenaz Bahar, for Plaintiff and Appellant.

Ballard, Rosenberg, Golper & Savitt, John B. Golper, Elsa Banuelos, John J. Manier, Alexander A. Molina; Dunn **Koes**, Pamela E. Dunn, and Daniel J. **Koes**, for Defendants and Appellants.

Paul, Hastings, Janofsky & Walker, Paul W. Crane, Jr., and Jaime D. Byrnes, for Amici Curiae Employers Group and California Employment Law Council.

OPINION

O'LEARY, Acting P.J.

***1** Lisa Weaver sued her former employer Ormco Corporation,[FN1] for hostile workplace sexual harassment. Her complaint included several tort causes of action, including under the California Fair Employment and Housing Act (FEHA) for sexual discrimination and harassment (Gov.Code, § 12940, subd. (j)) [FN2] and failure to prevent sexual discrimination and harassment from occurring (§ 12940, subd. (k)). Following a trial, the jury returned a verdict finding in Ormco's favor on all but the failure to prevent cause of action on which it awarded Weaver $20.000 in damages.

FN1. The defendants are Sybron Dental Specialties, Inc., and a former subsidiary Sybron Dental Management, Inc. (collectively Sybron), and Weaver's employer Ormco, which is another Sybron subsidiary. For convenience, unless the context indicates otherwise, we will refer to the defendants collectively and in the singular as Ormco.

FN2. All further statutory references are to the Government Code, unless otherwise indicated.

Ormco appeals contending the verdict must be reversed because the jury was not instructed a private plaintiff must be subjected to actionable sexual harassment to prevail on a cause of action against an employer for failing to prevent sexual harassment from occurring. We agree there was instructional error requiring reversal of the judgment and remand for a new trial on the failure to prevent sexual harassment cause of action.

Weaver cross-appeals contending the trial court improperly allowed an employment law attorney to testify as Ormco's expert on the reasonableness of Ormco's sexual harassment policies and the adequacy of steps it took to investigate complaints. Although we agree with Weaver the expert should not have been permitted to testify, we conclude the error was harmless because the expert's testimony went to the cause of action on which Weaver prevailed.

I

Not Reported in Cal.Rptr.3d, 2007 WL 1520034 (Cal.App. 4 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2007 WL 1520034 (Cal.App. 4 Dist.))

FACTS [FN3]

FN3. "We consider the evidence most favorable to [Weaver], since we must indulge all reasonable inferences and resolve all doubt in favor of upholding the judgment. [Citation.]" (*Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1340, fn. 2, citing *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)

Ormco manufactures and sells dental and orthodontic products. Weaver was hired in January 2000 as an account manager performing inside sales at Ormco's Account Management Center (AMC), in Orange. She had been referred to the company by her mother who was an acquaintance of Sybron's president, Floyd Pickrell. Weaver's direct supervisor was Jeremy Harrison, manager of the AMC.

Rick Wilderotter began working as an Ormco sales representative in Colorado in July 2000.[FN4] His direct supervisor was Mark Vigna, Western Regional Manager.

FN4. Wilderotter was a defendant in this action, but eventually was dismissed. He did not appear at trial, but portions of his videotaped deposition were played for the jury.

Weaver's first encounter with Wilderotter was in August 2000 when he came to the Orange facility for a week of training. In one or two workplace conversations with Weaver and another female employee, Shannon White, Wilderotter (who was married) made sexual comments about Weaver's legs and White's breasts.

On the evening of Saturday, August 19, 2000, Weaver and some friends were at a restaurant with a group of Ormco employees including Wilderotter. Harrison had encouraged Weaver to attend the dinner. During the evening, Wilderotter made more overtly sexual comments to Weaver, and again commented to White about her breasts. The latter comment was overheard by another employee who found it inappropriate.

The following Monday morning, Weaver, White, and other Ormco employees were congregated outside Harrison's office, talking about the weekend. Weaver and White mentioned Wilderotter's sexual comments. They described Wilderotter as being very aggressive, nicknaming him "Rottweiller." Weaver and White testified Harrison was listening to the conversation and facially responded indicating shock and disbelief when they described Wilderotter's comments. Weaver expected Harrison would follow up and human resources would investigate the matter. (Harrison testified he only overheard comments about Wilderotter being a "player," and denied any complaints were made.)

***2** On Thursday August 24, 2000, several Ormco employees, including Weaver and Wilderotter, went out for dinner after the training class had finished. Weaver told Wilderotter she was not sexually active and was still a virgin, and Wilderotter said he would " 'love to break [her] in.' " Wilderotter made several other sexual remarks to Weaver. Weaver did not report the comments, but after that evening, she and White agreed Wilderotter was "disgusting," an "H.R. nightmare[,]" and they would avoid him in the future.

In November 2000, Ormco held a three-day national sales meeting at a hotel in Huntington Beach. Weaver attended and shared a room with another female employee. Wilderotter attended too. During the first few days, Weaver interacted with Wilderotter and had no problems, although he did make some inappropriate and odd sexual comments about another Ormco employee, Megan Coffey.

On the last night of the meeting, there was an open-bar reception followed by an awards banquet. Weaver testified Wilderotter kept "leering" at her during the reception. At the end of the evening, Weaver agreed to go to the jacuzzi with a group of male employees, including Wilderotter. Weaver got

into the elevator to go to her room for her bathing suit, and Wilderotter got in with her. Wilderotter attempted to kiss Weaver in the elevator, but she pushed him away indicating she was not interested. Weaver retrieved her swimming suit from her room, but could not change in her room because her roommate had a guest. She walked past Wilderotter's room as she searched for a public restroom. Wilderotter, who was standing outside the room, suggested she change in his room. She agreed. Weaver testified that when she went inside his room, Wilderotter raped her. Wilderotter denied raping Weaver and claimed they had consensual intercourse.

Weaver did not immediately report the incident to anyone at Ormco. She did tell Harrison after the sales meeting that Wilderotter's conversation was "sexually charged" and he was "sexually inappropriate," but Harrison did not follow up. Weaver did, however, discuss the incident with her psychotherapist, family members, and some friends. In early 2001, at a social function, Weaver told her friend Cindy Kuess, an Ormco product line manager, Wilderotter raped her. Kuess took no action because Weaver asked her to keep it confidential. Kuess did encourage Weaver to report the incident to her supervisor or to the human resources department.

Weaver did not see Wilderotter again until he came back to Orange for a training session in March 2001. At that time, Wilderotter made some sexual comments to Weaver about her looks and her long legs, but she did not make any report about the comments.

On April 17, 2001, Weaver submitted her resignation to Harrison. When interviewed by Chris Collins from the human resources department as to her reasons for resigning, Weaver said she was resigning because she had been raped by Wilderotter, but she would not elaborate.

*3 Wilderotter was suspended pending an investigation. During the investigation, it was discovered that two other women apparently had disturbing encounters with Wilderotter at the November 2000 sales meeting. Megan Coffey, a Seattle-based sales representative, testified she had frequently been on the receiving end of sexual comments and questions from Wilderotter. One night during the November 2000 meeting, Coffey, Wilderotter, and some other Ormco employees were sharing a taxi ride back to the hotel. When Coffey leaned forward to pay the driver, Wilderotter put his hand down the back of her pants. Later, as they walked through the parking garage, he pushed Coffey up against the wall and tried to kiss her, but she pushed him away. Then as she was walking away from him down a hallway, he came up behind her and grabbed her breasts.

Coffey did not complain to Ormco because she had a prior negative experience with the human resources department and did not believe it would investigate. At a 1999 convention Coffey and White had attended, male coworkers called Coffey's room and asked her to come model lingerie for them. The men later came to Coffey's room and took everything from the room's mini-bar, causing her problems with reimbursement. Coffey only reported the mini-bar incident to human resources, not wanting her coworkers to get in trouble for the lingerie modeling request. She suffered repercussions, later being ostracized and called "H.R. bitch[.]" by the coworkers she had reported. Coffey had other incidents at Ormco. She testified that once during a sales trip, an Ormco manager, Greg Baker, made sexually explicit comments to Coffey regarding his and his wife's sexual habits.

Sarah Scott testified whenever she spoke with Wilderotter, the conversations always were of a sexual nature. One night at the November 2000 sales meeting, Wilderotter pulled her into his hotel room, pulled down the front of her dress, and grabbed her breasts. Scott also reported that one night at the November 2000 sales meeting, she was out drinking with several employees including her manager, Robert Davis. During the evening, Davis repeatedly pestered Scott to have sex with him.

Not Reported in Cal.Rptr.3d, 2007 WL 1520034 (Cal.App. 4 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2007 WL 1520034 (Cal.App. 4 Dist.))

Scott did not report any of the incidents at the time because she did not trust the human resources department, did not think it would do anything, she was already having job problems, and believed she would suffer negative repercussions if she complained. Sometime after Scott's allegations about Davis were investigated, Scott was fired for excessive tardiness.

Harrison was interviewed by Andy Astadurian, director of human resources for Sybron, about Weaver's allegation she had told him of Wilderotter's August 2000 sexual comments. Although a document titled reprimand was placed in Harrison's file, both Harrison and Astadurian denied he was reprimanded. Wilderotter was fired due to his conduct at the November 2000 sales meeting.

After Wilderotter was fired, Baker wrote a letter of recommendation for Wilderotter on company letterhead. Although Baker's title was territory manager, he did not supervise or manage any employees. Baker testified he wrote the letter, and sent it via e-mail to Wilderotter, but upon realizing it was inappropriate, told Wolderotter he could not use it. He denied the signature on the copy presented at trial was his.

The Culture at Ormco

***4** There was significant evidence of what might best be described as a licentious culture at Ormco. Some of the events or comments were witnessed by Weaver, some were reported to her after the fact, and some she had no knowledge of (until presumably discovered in the course of this litigation).

Weaver attended a company meeting in 2000 at which Pickrell was giving out service awards. He commented on the good looks of a female award recipient and said he knew she would do well at the company when he saw her great legs as she bent over a file cabinet. At a going away party for a manager, Weaver overheard numerous sexually oriented jokes. At an April 2000 trade show, Matt Holloway, a Texas-based sales representative, caressed and kissed Weaver's hand. Later, he told Weaver she would be a good "scout" for the "Player's Club." Weaver learned from White the "Player's Club" was a group of male Ormco employees who looked for attractive female customers to "entertain." Ryan Tinker, an Ormco sales representative, sometimes sent Weaver "pornographic e-mails," but stopped when she told him to.

As part of its sales training, Ormco showed employees a videotape in which an employee impersonates the Austin Powers character. (See Austin Powers: International Man of Mystery (New Line Cinema 1997).) An edited version of the video was shown to the jury. In the video, the Austin Powers character is shown talking to a female human resources representative and displays a very sexually-oriented attitude, including using the Austin Powers signature comment, "Do I make you horny?" When rules prohibiting sexual harassment in the workplace are mentioned, the Austin Powers character exclaims, "Sexual harassment. Sounds kinky baby. Where do I sign up?" There was no evidence Weaver or any employee found the videotape offensive.

White and Coffey told Weaver about Coffey's experience at the 1999 convention, when male coworkers asked Coffey to model lingerie for them and then looted her hotel room's mini-bar. Weaver understood Coffey had been ostracized by the men as a result of her reporting the incident to human resources.

On her first day of work, Weaver was told about Ormco's January 2000 "Extravaganza[,]" a company vacation in the Virgin Islands given to certain employees as a reward for sales performance. Apparently, late one night some Ormco employees, along with several nonemployee hotel guests, were observed jumping naked on a trampoline and skinny-dipping in the ocean.

At an April 2000 convention in Chicago (which Weaver did not attend), the company hosted an event for employees and customers. After most at-

Not Reported in Cal.Rptr.3d, 2007 WL 1520034 (Cal.App. 4 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2007 WL 1520034 (Cal.App. 4 Dist.))

tendees had left, an intoxicated Ormco sales representative performed a strip tease for the remaining guests. When Davis, the employee's manager, learned about the incident, he told the employee his conduct was inappropriate.

There were also several incidents about which Weaver did not know until after she resigned. At a company dinner in 1996, Pickrell, sat next to a female employee, Shelly Kominek, and in full view of several other employees, continuously pestered her making suggestive comments, touching her under the table, and trying to kiss her. The vice president of human resources at one point told Pickrell to "leave the poor girl alone." Kominek filed a complaint with human resources, which was eventually settled.

***5** White testified a male Ormco manager, Pat Turner, habitually stared at her breasts while talking to her. At a party for customers in 1999, she saw a coworker "dancing provocatively and grinding" with a customer. At a 1999 sales meeting, Holloway propositioned White to go to his room and "get a real workout and work up a sweat." Another woman employee complained a male coworker once asked her if she was "wearing black panties?" Scott testified a male coworker frequently visited "sexual chat rooms" on his computer at work displaying pictures of naked women.

At one sales meeting, a national sales manager made comments to the group about the women in the room all "look[ing] lovely tonight...." At a national sales meeting in 1998, there was a "team-building" exercise in which employees of another Sybron subsidiary "mooned" and "flipped off" Ormco employees, in the presence of Pickrell and other managers. At that same meeting, Pickrell came up to White and another woman, saying he wanted his picture taken "with the prettiest girls in the company," putting his arm around White's waist "real tightly[.]"

At a 2002 company holiday party "pirate" gift exchange, a female employee unhappily wound up with the gift she had brought-a hand-held back massager. Pickrell made a comment that if someone would take it from her, she would give them a back massage with it. He was later advised by in-house counsel he should be more careful about his remarks.

There were other incidents involving Wilderotter as well. Wilderotter twice told Baker he wanted to have sex with a particular female customer, and made inquiries to Harrison about Weaver's "availability." Ormco human resources employee, Lynn Blanchette, testified that when she worked in the customer care department, she had several consensual sexually explicit telephone conversations with Wilderotter. Blanchette told Scott about one conversation she had with Wilderotter suggesting the three of them have sex together.

II
PROCEDURAL FACTS

Weaver's first amended complaint went to trial on five causes of action including: sex discrimination and harassment in violation of section 12940, subdivision (j)(1), failure to prevent sex discrimination and harassment in violation of section 12940, subdivision (k), constructive discharge, negligent hiring, and intentional infliction of emotional distress.

Following a lengthy jury trial, the jury responded to a series of general verdict forms separately ruling on each cause of action. It ruled against Weaver on her common law causes of action (constructive discharge, negligent hiring, and intentional infliction of emotional distress). It found against Weaver on her claim for "sex discrimination/sexual harassment," but ruled in her favor on her claim for "failure to maintain an environment free from sex discrimination/sex harassment[.]" The jury found Weaver sustained $20,000 in noneconomic damages "caused by the conduct upon which [it] based its finding [ ] of liability." Although the jury found by clear and convincing evidence Ormco acted with oppression, fraud, or malice, it declined to award any punitive damages.

Not Reported in Cal.Rptr.3d. 2007 WL 1520034 (Cal.App. 4 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2007 WL 1520034 (Cal.App. 4 Dist.))

***6** Ormco filed a motion for partial judgment notwithstanding the verdict (JNOV). It contended Weaver's judgment for failure to prevent sexual harassment in violation of section 12940, subdivision (k), could not stand in view of her failure to prevail on her cause of action for sexual harassment under section 12940, subdivision (j)(1). The motion was denied. The court subsequently awarded Weaver $63,652 in costs and $596,400 in attorney fees.

III
FAILURE TO PREVENT SEXUAL HARASSMENT CLAIM

Ormco contends the verdict in favor of Weaver on her failure to prevent sexual harassment cause of action must be reversed because Weaver failed to prove she suffered sexual harassment within the meaning of the FEHA. Ormco couches its analysis in two arguments: (1) the jury instruction on the failure to prevent claim was defective because it did not instruct the jury Weaver had to suffer actionable harassment as a prerequisite to her recovery on her failure to prevent harassment claim; and (2) the trial court should have granted its motion for JNOV on the failure to prevent cause of action because the jury found against Weaver on her cause of action for harassment.

Both of Ormco's arguments are premised upon the same fundamental legal issue: Is proof of actionable sexual harassment under the FEHA a prerequisite to Weaver prevailing on a cause of action against her employer under section 12940, subdivision (k), for the employer's failure to prevent sexual harassment? We conclude it is.

A. The Statutory Scheme: Elements of a Failure to Prevent Cause of Action

We begin with the statutory scheme of the FEHA as it pertains to sexual harassment. Two different employer obligations are implicated here: the duty to not sexually harass an employee and the duty to take reasonable steps to prevent workplace harassment from occurring.

1. Sexual Harassment

Section 12940 of the FEHA describes a variety of unfair employment practices including discrimination on the basis of sex. (§ 12940, subd. (a).) "[T]he FEHA expressly and separately prohibits workplace harassment based on sex." (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1039.) Section 12940, subdivision (j)(1), specifically provides it is unlawful for "an employer ... because of ... sex ... to harass an employee.... Harassment of an employee ... by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action.... An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."

"Sexual harassment can consist of verbal communications, such as asking for a date, telling sexual jokes, bragging about sexual exploits, making comments regarding appearance or anatomy, or using terms with double meanings (one of which is sexual). However, nonverbal actions can also constitute unlawful harassment, such as touching oneself or another (particularly in sexually sensitive places), suggestive eye contact, or posting or circulating sexually oriented posters, cartoons, or pictures. [Citations.]" (2 *Advising Cal. Employers and Employees* (Cont.Ed.Bar 2007) § 15.90, p. 1332; see Cal.Code Regs., tit. 2, § 7287.6, subd. (b)(1).)

***7** California courts apply the federal threshold standard applicable to harassment claims under Title VII of the federal Civil Rights Act (42 U.S.C. § 2000e-2(a)(1)), to claims of sexual harassment under the FEHA. (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 462-464.) It is not sufficient that there simply be some offensive conduct; to be actionable the harassing conduct must either constitute "quid pro quo" harassment (where employment is conditioned upon submission to unwelcome sexual advances) or, the theory pursued in this case,

Not Reported in Cal.Rptr.3d, 2007 WL 1520034 (Cal.App. 4 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2007 WL 1520034 (Cal.App. 4 Dist.))

result in a hostile work environment (where the work environment is hostile or abusive on the basis of sex). (*Ibid.*; see also *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 516-517 (*Beyda*).)

"[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.] The working environment must be evaluated in light of the totality of the circumstances: '[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include 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.] [¶][T]the evidence in a hostile environment sexual harassment case should not be viewed too narrowly: '[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 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* (2005) 36 Cal.4th 446, 462.) Here, the jury returned a general verdict finding against Weaver on her hostile workplace sexual harassment/discrimination cause of action against Ormco.

2. Failure to Take Reasonable Steps to Prevent Harassment

In addition to making it unlawful for employers to sexually harass an employee, the FEHA also demands employers take all reasonable steps to prevent harassment from occurring in the workplace. This obligation is articulated in section 12940, subdivision (j)(1) (the actual anti-harassment section), in the second to last sentence which provides, "An entity[,]" described in the first sentence of the subdivision as being employers and other employment-related entities, "shall *take all reasonable steps to prevent harassment from occurring.* " The obligation is also articulated in section 12940, subdivision (k), which similarly provides it is an unlawful employment practice, "For an employer [and other employment related entities], to fail to *take all reasonable steps necessary to prevent discrimination and harassment from occurring.*"

***8** Although the "reasonable steps" language in both subdivisions (j)(1), and (k), of section 12940 is virtually identical (both require an employer "take all reasonable steps necessary to prevent ... harassment from occurring"), our Supreme Court has described section 12940, subdivision (k), as embodying "a separate unlawful employment practice...." (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1040.) And in *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 286-287 (*Trujillo*), the court explained section 12940, subdivision (k), creates a separate actionable tort enforceable by a private plaintiff who can establish the usual tort elements of duty of care, breach of duty (a negligent act or omission), causation, and damages.[FN5] However, it is also clear from *Trujillo* and other authorities there can be no private cause of action for violation of 12940, subdivision (k), absent a finding the plaintiff suffered actionable harassment (i.e., quid pro quo or hostile workplace) under the FEHA.

FN5. We pause here to address several pending motions:

On September 9, 2004, Ormco filed a

> motion asking us to take judicial notice of part of the appellate record in the Trujillo case-namely, the trial court order granting JNOV. It urges us to utilize that order in analyzing the Trujillo case. We deny the request.
>
> On May 26, 2005, Weaver filed a motion asking us to take judicial notice of the legislative history of section 12940, subdivision (k). We grant that request. In the same motion, Weaver asked us to take judicial notice of other parts of the appellate record in the Trujillo case-namely, the appellate briefs. We deny that request.
>
> On August 14, 2006, Weaver filed a motion for judicial notice of the new Judicial Council of California Civil Jury Instructions (2006) CACI No. 2527 on a section 12940, subdivision (k), failure to prevent cause of action. We grant that motion. Weaver's motion for judicial notice of the draft version of the instruction is denied as moot.
>
> In the same request, Weaver has asked that we take judicial notice of the advisory committee report to the Judicial Council recommending approval of the new CACI No. 2527. Weaver has not demonstrated the report "falls within the class of documents that traditionally has been considered in determining legislative intent, and, thus, we deny the request." (See *People v. Fuhrman* (1997) 16 Cal.4th 930, 939, fn. 8.)

3. The Trujillo Case

In *Trujillo, supra,* 63 Cal.App.4th 280, the plaintiffs sued their employer and a supervisor alleging the supervisor engaged in harassing and discriminatory conduct. Among the causes of action were claims for violation of the FEHA due to racial discrimination, harassment, hostile work environment, and failure to prevent discrimination and harassment. The jury returned a special verdict "finding [the] defendants had committed no discriminatory, racially harassing, or retaliatory conduct...." (*Id.* at p. 283.) But, the jury found the employer had nonetheless violated section 12940, subdivision (k),[FN6] by failing to take all reasonable steps necessary to prevent discrimination and harassment from occurring. The trial court granted the employer's motion for JNOV concluding a necessary foundational prerequisite for the private plaintiff's failure to prevent cause of action was that the plaintiff actually suffered discrimination or harassment. The jury's finding there was no discrimination or harassment precluded such a finding. (*Id.* at pp. 284-285.)

> FN6. At the time Trujillo was decided, the subdivision was enumerated (*i*), but it has since been redesignated as subdivision (k), and for convenience we will use the latter enumeration when discussing Trujillo.

In affirming the JNOV, the appellate court endorsed "the commonsense approach used by the trial court.... '[T]here's no logic that says an employee who has not been discriminated against can sue an employer for not preventing discrimination that didn't happen, for not having a policy to prevent discrimination when no discrimination occurred....' Employers should not be held liable to employees for failure to take necessary steps to prevent such conduct, except where the actions took place and were not prevented. Plaintiffs have not shown this duty was owed to them, under these circumstances." (*Trujillo, supra,* 63 Cal.App.4th at p. 289.)

Weaver dismisses the significance of *Trujillo.* She agrees a private plaintiff must have experienced *some* degree of harassing conduct to pursue a failure to prevent harassment claim under section 12940, subdivision (k), but asserts there is no requirement it amount to actionable harassment under the FEHA, i.e., in the hostile work place context, the harassing conduct had to be sufficiently severe

or pervasive so as to alter the conditions of employment and create a work environment that qualifies as hostile or abusive. *Trujillo,* she points out, involved a special verdict form, whereby the jury did not simply rule against the plaintiffs on their FEHA discrimination and harassment causes of action, but the jury made special verdict findings of "no discriminatory, racially harassing, or retaliatory conduct...." (*Trujillo, supra,* 63 Cal.App.4th at p. 283.) Thus, Weaver argues *Trujillo* only stands for the proposition there must be *harassing conduct,* not that the harassing conduct must arise to an actionable level under the FEHA.

***9** We disagree with Weaver's minimization of *Trujillo. Trujillo* indicates it was the absence of *actionable* harassment or discrimination that precluded judgment on the failure to prevent cause of action, not simply the lack of *any* harassing conduct at all. As the court noted, "[T]here is a significant question of how there could be legal causation of any damages (either compensatory or punitive) from such a statutory violation, where the only jury finding was the failure to prevent *actionable* harassment or discrimination, which, however, did not occur." (*Trujillo, supra,* 63 Cal.App.4th at p. 289, italics added.) Indeed, recently in *Carter v. California Depart. of Veterans Affairs* (2006) 38 Cal.4th 914, 925, fn. 4 (*Carter*), our Supreme Court specifically cited *Trujillo* for the proposition that "courts have required a finding of actual discrimination or harassment *under FEHA* before a plaintiff may prevail under section 12940, subdivision (k) [,]" (italics added) although the court specifically declined to comment upon whether it agrees with that position. (See *Carter, supra,* 38 Cal.4th at p. 925, fn. 4 ["We do not express a view on whether [section 12940,] subdivision (k) must be read in pari materia with [section 12940,] subdivision (j)(1)"].)

4. Other Authorities

Several federal courts have agreed with *Trujillo* that *actionable* harassment or discrimination under the FEHA must be demonstrated to prevail on a claim for failure to prevent harassment or discrimination. In *Kohler v. Inter-Tel Technologies* (9th Cir .2001) 244 F.3d. 1167, 1174, fn. 4, the court noted the requirement that an employer take reasonable steps to prevent harassment "is only a basis for liability if the plaintiff proves that actual discrimination or harassment occurred." In *Tritichler v. County of Lake* (9th Cir.2004) 358 F.3d 1150, 1154, the court noted the jury was properly instructed the plaintiff must "be found to have been subjected to sexual harassment stemming from a hostile environment" before it could reach the issue of whether section 12940, subdivision (k), had been violated as well. (See also 2 Cal. Employment Law (Mathew Bender 2006) § 41.81[7][a], p. 41-437 ["no suit may be maintained for violation of [§ 12940, subd. (k),] if the plaintiffs have not actually suffered any employment discrimination or harassment"]; Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2006)[¶]10:481.2, p. 10-75["[n]o [section 12940, subd. (k)[,] action lies for failure to take necessary steps to prevent harassment if no harassment in fact occurs"].)

5. Statutory Interpretation

Weaver counters that as a matter of statutory interpretation, section 12940, subdivision (k), must be read as permitting a plaintiff to recover damages for an employer's failure to prevent workplace sexual harassment based on something less than actionable sexual harassment. In other words, the "harassment" an employer must endeavor to prevent under section 12940, subdivision (k), can be something different (and less than) the quid pro quo or hostile workplace "harassment" an employer must take steps to prevent under section 12940, subdivision (j)(1). To hold otherwise, she urges, would render section 12940, subdivision (k), meaningless as it would simply duplicate the cause of action already provided for in section 12940, subdivision (j)(1). We disagree.

***10** We begin by reiterating the virtually identical language of both subdivisions. Section 12940, subdivision (j)(1), provides it is an unlawful employment practice to sexually harass an employ-

ee and states an employer "shall *take all reasonable steps to prevent harassment from occurring.* " (Italics added.) Section 12940, subdivision (k), provides it is an unlawful employment practice, "For an employer [and other employment related entities], to fail to *take all reasonable steps necessary to prevent* ***discrimination and harassment*** *from occurring.*" (Italics and bold added.)

" ' "To understand the intended meaning of a statutory phrase, we may consider use of the same or similar language in other statutes, because similar words or phrases in statutes in pari materia [that is, dealing with the same subject matter] ordinarily will be given the same interpretation." [Citations.]' [Citation.]" (*People v. Coker* (2004) 120 Cal.App.4th 581, 588 .) Given that the language in both subdivisions is virtually identical, and nothing on the face of the statute indicates they were intended to have a different meaning, we assume they mean the same thing.

Furthermore, subdivision (k), was added to section 12940 in 1984 (Stats.1984, ch. 1754, Sen. Bill No.2012 (1983-1984 Reg. Sess.)). The anti-harassment subdivision (subdivision (j)(1)), including its requirement that an employer "shall *take all reasonable steps to prevent harassment from occurring* " (italics added) was already part of section 12940 and judicial concepts of what was recognized as actionable sexual harassment were already firmly ensconced in the law (see discussion *Meritor Sav. Bank, FSB v. Vinson* (1986) 477 U.S. 57, 67, and cases cited therein). When the language of a statute has already "been judicially construed and a subsequent statute on a similar subject uses identical or substantially similar language, the usual presumption is that the Legislature intended the same construction, unless a contrary intent clearly appears. [Citation.]" (*People v. Lopez* (2003) 31 Cal.4th 1051, 1060.)

There is nothing in the legislative history of section 12940, subdivision (k), supporting a conclusion the harassment it was aimed at preventing was different than that envisioned by section 12940, subdivision (j)(1). As noted in *Trujillo,* the "[l]egislative history is not particularly informative...." (*Trujillo, supra,* 63 Cal.App.4th at p. 287.) The only document Weaver points to is a letter from the California Manufacturers Association opposing Senate Bill 2012 because "[the] bill presents practical difficulties which include the duty of an employer to defend a discrimination suit even where there was no discrimination or harassment; in other words, the bill does not require an actual incident or occurrence of discrimination prior to suit." Weaver argues the lack of any response to this objection or ensuing amendment to the bill indicates the Legislature intended no occurrence of harassment would be required prior to a private plaintiff bringing suit against an employer who did not have adequate procedures in place to prevent harassment. We do not believe the lack of a response to an opponent's speculative criticism indicates an endorsement of the opponent's interpretation. Furthermore, Weaver concedes some degree of harassment must be experienced by a private plaintiff to prevail on a cause of action under section 12940, subdivision (k).

***11** We do not share Weaver's concern that by concluding section 12940, subdivision (k), requires a private plaintiff to have suffered actionable harassment (as opposed to some lesser degree of merely harassing conduct), we render the provision meaningless as simply a duplication of the cause of action provided for in subdivision (j)(1).[FN7] As *Trujillo* noted, an employer violates section 12940, subdivision (k), simply by failing to have procedures in place to prevent harassment from occurring, but when the plaintiff has not actually suffered harassment as a result, "this seems to be an area where the DFEH would have jurisdiction to remedy inadequate procedures." (*Trujillo, supra,* 63 Cal.App.4th at p. 289.)

FN7. We observe that whereas section 12940, subdivision (j)(1), the anti-harassment subdivision, itself requires an employer to "take all reasonable steps to

> prevent *harassment* from occurring[,]" (italics added), the anti-discrimination subdivisions in section 12940 do not contain a similar "reasonable steps" directive. (See § 12940, subds. (a), (b) & (c).) Subdivision (k), extends the obligation to take reasonable steps requirement to *discrimination* as well (i.e., an employer must "take all reasonable steps necessary to prevent *discrimination and harassment* from occurring.") (Italics added).

Furthermore, although we agree with Ormco the failure to prevent cause of action requires a finding of actionable harassment under the FEHA, that does not equate to a conclusion that to prevail on a section 12940, subdivision (k), cause of action, a plaintiff must first prevail on a section 12940, subdivision (j)(1), cause of action. Although both causes of action must be based upon a plaintiff suffering sexual harassment that would be actionable under the FEHA (i.e., quid pro quo or hostile workplace), as one commentator has noted, "[the] statutory tort [i.e., § 12940, subdivision (k),] is *not dependent on the employer's vicarious liability* for the harassment." (Chin et al., Cal. Practice Guide: Employment Litigation, *supra,* [¶] 10:481.1, at p. 10-75 .) Although we are cognizant published jury instructions "are not themselves the law, and are not authority to establish legal propositions or precedent" (*People v. Morales* (2001) 25 Cal.4th 34, 48, fn. 7), we note the new CACI No. 2527, relied upon by both Ormco and Weaver, contains no respondeat superior requirement. Thus, additionally prevailing on a section 12940, subdivision (k), failure to prevent cause of action "may have no effect where the employer is already vicariously liable for the harassment [citation]. In such cases, any *damages* resulting from its breach of duty to prevent the harassment would likely be the *same* as those resulting from the harassment itself. [¶] On the other hand, the employer's indifference to harassment may create *additional exposure to emotional distress damages* where the indifference rendered plaintiff helpless to remedy or stop the harassment." (Chin et al., California Practice Guide: Employment Litigation, *supra,* [¶] 10:481.1, at p. 10-75.) In other words, a plaintiff could lose on her hostile workplace sexual harassment cause of action under section 12940, subdivision (j)(1), because she cannot prove the employer should be held vicariously liable for any particular employee's sexually harassing conduct. But, the hostile workplace sexual harassment suffered by the plaintiff could nonetheless be actionable under section 12940, subdivision (k), because the employer failed to take reasonable steps to prevent harassment from occurring in the workplace.

6. Conclusion

***12** We agree with the conclusion of *Trujillo* that there must be a finding of actual harassment or discrimination under the FEHA for a plaintiff to prevail on cause of action under section 12940, subdivision (k). "Employers should not be held liable to employees for failure to take necessary steps to prevent such conduct, except where the actions took place and were not prevented." (*Trujillo, supra,* 63 Cal.App.4th at p. 289.) We further conclude the harassment or discrimination suffered by the plaintiff must be *actionable* under the FEHA, i.e., in this case sexual harassment that meets the level of hostile work place harassment. We must then turn to how that rule plays out in this case in view of the jury instructions given and the jury's verdicts.

B. The Jury Instructions on Failure to Prevent Were Erroneous

In view of the foregoing analysis, we agree with Ormco the jury instruction on the section 12940, subdivision (k), failure to prevent sexual harassment cause of action was woefully inadequate. We further agree the inadequate instruction requires reversal of the judgment.

The elements of a private cause of action against an employer for sexual harassment under section 12940, subdivision (j)(1), are: "(1) [p]laintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3)

the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608, fn. omitted; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1122-1123.) The jury was given BAJI Nos. 12.05 and 12.20, instructing it on the elements of a hostile workplace sexual harassment cause of action and on an employer's respondeat superior liability for such harassment.

Over Ormco's objections, the jury was given a special instruction on the section 12940, subdivision (k), failure to prevent sexual harassment cause of action which was prepared by Weaver. In full, the instruction read: "The essential elements of a claim for failure to maintain a workplace free from sexual harassment are: [¶] (1) The employer had knowledge of the employee's propensity to engage in sexually harassing behaviors, prior to the employee engaging in such behaviors; [¶] (2) The employer did not take actions reasonably calculated to: [¶] a. Stop the employee from engaging in sexually harassing behaviors; or [¶] b. Persuade other employees from [*sic*] engaging in sexually harassing behaviors."

The instruction was patently incorrect. Not only did the instruction omit any causal connection between Weaver and "sexually harassing behaviors" in the workplace, it failed to instruct Weaver must show she was subjected to actionable harassing conduct within the meaning of FEHA, e.g., hostile workplace sexual harassment as a result of the Ormco's failures. (*Trujillo, supra,* 63 Cal.App.4th at p. 289.) The instruction allowed Weaver to recover simply if there was any "harassing behavior" taking place in the workplace, regardless of whether that "behavior" amounted to harassing conduct that was sufficiently severe or pervasive so as to have the effect of altering the conditions of Weaver's employment and creating an intimidating, hostile, abusive, or offensive working environment.

FN8

FN8. Ormco's other ground for assailing the special instruction-it did not require proof Ormco had knowledge Wilderotter had the specific propensity to commit rape-is without merit. As already noted, a cause of action for failure to prevent sexual harassment under section 12940, subdivision (k), is not dependent on employer vicarious liability for harassment. (Chin et al., Cal. Practice Guide: Employment Litigation, *supra,* [¶] 10:481.1, p. 10-75.) An employer violates section 12940, subdivision (k), by failing to have procedures in place to prevent harassment from occurring. (*Trujillo,supra,* 63 Cal.App.4th at p. 289; cf *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054.) And as we have already discussed at length, that violation becomes actionable by a private plaintiff if she has in fact suffered actual harassment.

***13** "Instructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict.' [Citations.]" (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.) The instructional error here quite obviously prejudicially affected the verdict. There were no other instructions that reasonably would have clarified or corrected the erroneous instruction on the section 12940, subdivision (k), failure to prevent cause of action. (See *Marich v. MGM/UA Telecommunications, Inc.* (2003) 113 Cal.App.4th 415, 429.) In view of the jury's verdict against Weaver on her other causes of action, there is a reasonable probability a properly instructed jury might have found against her on this cause of action as well.

C. Directions on Remand

Although the erroneous instruction on the failure to prevent cause of action requires reversal of the judgment for Weaver, Ormco argues that on remand the trial court should be directed to enter an order granting its motion for JNOV. It contends that

because Weaver lost her section 12940, subdivision (j)(1), harassment cause of action, she cannot legally prevail on her failure to prevent harassment cause of action under section 12940, subdivision (k). We disagree.

To the extent Ormco is arguing having lost a section 12940, subdivision (j)(1), harassment cause of action as a matter of law precludes Weaver from recovery on a section 12940, subdivision (k), failure to prevent harassment cause of action, we have already rejected that erroneous premise. The conclusion the latter cause of action requires a showing of actionable harassment under FEHA is not tantamount to holding a plaintiff must first prevail on the former. As noted in our discussion above, a properly instructed jury could rule against a plaintiff on a hostile workplace sexual harassment cause of action under section 12940, subdivision (j)(1), but still find in the plaintiff's favor under section 12940, subdivision (k).

To the extent Ormco is suggesting the factual issue of having suffered hostile workplace harassment was necessarily resolved against Weaver, it is also wrong. Ormco cites *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 673 (*Henderson*), reciting "the settled rule that a general verdict implies a finding in favor of the prevailing party of every fact essential to the support of his action or defense [citations]." From this rule Ormco extrapolates that because it prevailed on Weaver's section 12940, subdivision (j)(1), sexual harassment cause of action, it is entitled to an implied finding in its favor on *every* element of that cause of action. In other words, Ormco argues we must assume from the verdict against Weaver on her sexual harassment cause of action, the jury found the harassment did not constitute hostile workplace harassment, which would preclude a verdict in Weaver's favor on the failure to prevent cause of action. We disagree. The favorable verdict on that cause of action only entitles Ormco to a presumption the jury found at least *one* element of the sexual harassment cause of action to be missing; after all, that was the only thing "essential" to defeating that cause of action.

***14** We cannot agree with Ormco the jury's verdict against Weaver on her hostile workplace harassment cause of action means the jury, if properly instructed, would have made the same findings on the failure to prevent cause of action-i.e., it was only the erroneously given lesser standard of "harassing behavior" that enabled her to prevail on the latter cause of action. It is conceivable the jury ruled against Weaver on her sexual harassment cause of action because it believed her sexual encounter with Wilderotter was consensual, but ruled in her favor on the failure to prevent cause of action because she was subjected to harassing conduct other than the alleged rape. Had the jury understood that as to either cause of action, the harassing conduct had to reach an actionable level of hostile workplace sexual harassment, it may well have made that finding. Indeed, when fashioning the attorney fees award, the trial judge specifically commented, "[T]he court heard the evidence. Had this been a bench trial, it probably would have been a different result. I was impressed that [Weaver] was subjected to a hostile environment...." Accordingly, the erroneous instruction requires we remand for a new trial on the failure to prevent harassment cause of action.[FN9]

> FN9. In light of our conclusion that the judgment must be reversed, and the case remanded for a new trial, we need not address Ormco's contentions regarding evidentiary errors at the first trial.

IV
WEAVER'S CROSS-APPEAL

In her cross-appeal from the judgment, Weaver contends a defense expert witness was improperly permitted to testify. We agree the expert should not have been permitted to testify, but find Weaver has not demonstrated prejudice.

Weaver had designated as her human resources expert, Brian Kleiner, a college professor with a Ph.D., in human resources management, to testify

on: (1) sexual harassment policies and training; (2) adequacy of Ormco's policies and training; (3) appropriate procedures for investigating alleged sexual harassment; (4) adequacy of Ormco's investigations; and (5) whether alleged acts took place in a work-related setting. Ormco designated Bradley Booth, an attorney, as its expert to testify on the same topics. Booth's career was largely spent practicing labor and employment law, and included a lengthy stint as Chief Counsel for the California Department of Fair Employment and Housing (DFEH).

The court initially indicated it would not permit Booth to testify as an expert witness because as a lawyer his expert opinion on the topics would essentially be opinion on issues of law (usurping the court's role to instruct on the law). The court advised Ormco to find another expert. Ormco did not.

Well over a month into trial, the court conducted an Evidence Code section 402 hearing on whether Booth would be allowed to testify as an expert. In the hearing, Booth explained he had worked as a lawyer his entire career. He worked as legal counsel for the DFEH from 1979 to 1989, and then was in private practice representing plaintiffs in employment discrimination cases. Although since leaving the DFEH, Booth had conducted about 15 to 20 investigations of sexual harassment claims involving mostly public entity clients, the majority of his income (80 to 100 percent) came from legal advocacy work.

***15** When Weaver's counsel tried to question Booth about positions he had taken with regard to specific sexual harassment cases Booth had handled, Ormco objected the information was attorney-client privileged. Ormco repeatedly represented to the court that Booth could testify as an expert without revealing to the jury he was an attorney. Weaver's counsel objected he could not effectively cross-examine Booth without revealing he was an attorney.

The court ruled Booth could testify as an expert, so long as Ormco did not reveal he was an attorney. The court advised Weaver's attorney he could cross-examine Booth and it would be "[his] call if [he wanted] to step over the line here and get into the legalese." In establishing his qualifications, Ormco could have Booth testify he had a college and post-college degree, but could not testify he went to law school or had a doctorate.

In testifying as to his qualifications, Booth explained he worked for the California State Employees Association doing a "variety of things" including being responsible for arbitration of collective bargaining agreements, "developing policies and practices for state employees[,]" and negotiating contracts. He "worked closely with personnel in discipline discharge cases and contract interpretation cases...." In 1988, Booth went to work for the DFEH and in 1992 was promoted "to one of the three highest administrative positions" reporting directly to the department director. At the DFEH, he "did a lot of different things as it relates to sexual harassment, sexual harassment policies." He made presentations to employers as to their responsibilities, conducted training on sexual harassment, and reviewed employer policies. Although not a direct supervisor of anyone, he had responsibility over the DFEH's personnel department in that he oversaw all discipline and discharge of employees. He was involved in development of a DFEH brochure on sexual harassment that was made available to the public. Booth left the DFEH in 1996 and "amongst other things" provided sexual harassment training to individual employers and employer groups and conducted investigations, including of sexual harassment complaints. Booth had conducted about 15 investigations of sexual harassment complaints for private and public employers. Booth explained what kinds of steps he would take in conducting such investigations.

Booth then testified as to his expert opinion regarding Ormco's sexual harassment policies and procedures. He opined Ormco had "met any requirements that they would need to meet in a stand-

ard personnel policy[,]" and its sexual harassment policies were "perfectly fine[.]" He disagreed with Kleiner's statement that Ormco had "the most sexually charged environment he has ever come across." Booth opined Ormco took its sexual harassment policies seriously, detailing three instances in which he believed immediate adequate responses came. Additionally, Booth believed Ormco promptly and adequately investigated Weaver's complaint Wilderotter had raped her.

***16** Weaver contends Booth should not have been permitted to testify. We agree the trial court abused its discretion. (*Dart Industries, Inc. v. Commercial Union Ins.* Co. (2002) 28 Cal.4th 1059, 1078 (*Dart Industries*) [trial court ruling on admissibility of evidence reviewed for abuse of discretion].) Although often expert opinion " 'may happen to embrace the ultimate issue of fact (e.g., a medical opinion whether a physician's actions constitute professional negligence), the calling of lawyers as "expert witnesses" to give opinions as to the application of the law to particular facts usurps the duty of the trial court to instruct the jury on the law as applicable to the facts....' " (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1179 (*Summers*).)

Here, the trial court attempted to avoid the obvious inherent unfairness of permitting an employment law attorney to testify as an expert on whether a particular employer's sexual harassment policies and procedures were reasonable, by simply not telling the jury he was a lawyer. As Weaver points out, by so doing she was denied the opportunity to effectively cross-examine Booth not only on his credentials, but on the basis for his opinions. (*McCarthy v. Mobil Cranes, Inc.* (1962) 199 Cal.App.2d 500, 506-507 [parties in civil proceedings have due process right to cross-examine witnesses].)

Ormco counters Weaver was not deprived of her opportunity to cross-examine Booth. Only Ormco was prohibited from eliciting testimony from Booth that he was a lawyer; Weaver was not so restricted and it was a tactical decision on her attorney's part to not reveal this information to the jury. Ormco misses the point. Had Weaver brought up in her cross-examination that Booth was a lawyer it would have only served to throw his testimony into the prohibited realm of a lawyer-expert testifying on the law. (*Summers, supra,* 69 Cal.App.4th at p. 1179.) Furthermore, it was apparent from the Evidence Code section 402 hearing that Weaver's cross-examination would be thwarted by claims of attorney-client privilege.

Although we agree with Weaver that it was error to permit Booth to testify as an expert, we may reverse only upon a showing the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; Evid.Code, § 354.) A miscarriage of justice results when " ' "after an examination of the entire cause, including the evidence," the court is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' " (*Clifton v. Ulis* (1976) 17 Cal.3d 99, 105-106.) Weaver argues that absent Booth's testimony it is reasonably probable she would have prevailed on her section 12940, subdivision (j)(1), hostile workplace sexual harassment claim. We do not believe that to be the case.

We agree with Weaver there is prejudice inherent in not being allowed to adequately cross-examine a witness because it is often impossible to determine what the cross-examination would have turned up. (See *Dole Bakersfield, Inc. v. Workers' Comp. Appeals BD.* (1998) 64 Cal.App.4th 1273, 1278.) But, we are satisfied Booth's testimony did not sway the jury or affect the verdict against Weaver on her hostile workplace sexual harassment cause of action.

***17** Booth's testimony was almost entirely confined to testimony about the reasonableness of Ormco's sexual harassment policies and the adequacy of its procedures for making and investigating complaints. The jury verdict in Weaver's favor on her failure to prevent cause of action demonstrates the

jury believed Ormco had not taken reasonable steps to prevent harassment from occurring in the workplace, indicating the jury did not put much stock in Booth's testimony. In Ormco's closing argument, Booth's testimony was mentioned by counsel only briefly on two occasions, both times concerning the adequacy of Ormco's investigation and response to complaints. Weaver has not demonstrated a reasonable probability that absent Booth's testimony, she would have prevailed on her hostile workplace sexual harassment claim.

V

ATTORNEY FEES AND COSTS

Ormco also contends the trial court abused its discretion when it awarded Weaver $63,711 in costs, including expert witness fees, and $596,400 in attorney fees. (§ 12965, subd. (b) [court has discretion to award prevailing party in FEHA action reasonable attorney's fees and costs, including expert witness fees].) Because we reverse the judgment and remand for new trial, the prevailing party is in doubt and whether the award will stand is in doubt. Accordingly, we vacate the postjudgment order awarding Weaver costs and attorney fees and express no view on whether the award or its amount was an abuse of discretion.

VI

DISPOSITION

The judgment in favor of Weaver on her cause of action under section 12940, subdivision (k), is reversed and the matter is remanded for a new trial on that cause of action. In all other respects, the judgment is affirmed. The postjudgment order awarding Weaver costs and attorney fees is vacated. In the interests of justice, the parties shall bear their own costs and attorney fees on this appeal. (Cal. Rules of Court, rule 8.276(a)(4).)

WE CONCUR: MOORE and IKOLA, JJ.

Cal.App. 4 Dist.,2007.
Weaver v. Ormco Corp.
Not Reported in Cal.Rptr.3d, 2007 WL 1520034 (Cal.App. 4 Dist.)

END OF DOCUMENT