

**DIANE REIFSCHEIDER, Plaintiff and Appellant, v. THE REGENTS OF THE
UNIVERSITY OF CALIFORNIA, Defendant and Respondent.**

B123338

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT,
DIVISION FOUR**

2001 Cal. App. Unpub. LEXIS 2713

October 12, 2001, Filed

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APPEAL from a judgment of the Superior Court of Los Angeles County, Marvin M. Lager, Judge. Super. Ct. No. BC152958.

COUNSEL: Law Offices of Chen & Haggerty and Edward J. Haggerty for Plaintiff and Appellant.

Equal Rights Advocates and Rose B. Fua, The American Association of University Women of California, American Civil Liberties Union Foundation of Northern California, American Civil Liberties Union Foundation of Southern California, California Women's Law Center, National Women's Law Center, University of California Student Association, and We Advocate Gender Equity, as Amici Curiae on behalf of Plaintiff and Appellant.

Little Mendelson and Gordon A. Letter; Greines, Martin, Stein & Richland, Barbara W. Ravits and Michael D. Fitts for Defendant and Respondent.

JUDGES: CURRY, J. Concur: EPSTEIN, Acting P.J., HASTINGS, [*2] J.

OPINION BY: CURRY

OPINION:

Diane Reifschneider (Reifschneider) appeals from the judgment entered in favor of The Regents of the University of California (Regents) on her claim for damages under the Fair Employment and Housing Act (FEHA) arising from the alleged sexual harassment of Reifschneider, then a research assistant, by her supervisor and Ph.D. adviser, Malcolm Nicol (Nicol), a Chemistry professor at the University of California, Angeles (UCLA).

Reifschneider contends the trial court abused its discretion in excluding evidence of Nicol's prior relationship with individuals other than Reifschneider, which exclusion prejudiced her ability to refute a consent defense. She contends the court also abused its discretion and prejudiced her ability to counter a consent defense by restricting the timeframe of the evidence allowed (with the exception of later-occurring sexual harassment claims) to that alleged in her administrative complaint, i.e., excluding all evidence of FEHA violations subsequent to July 1995, as well as evidence of the timing and handling of the UCLA internal investigation of her administrative complaint. n1

n1 In her opening brief, Reifschneider also contends the trial court committed prejudicial error by instructing the jury on employer liability pursuant to *BAJI No. 12.20*, which limited sexual harassment claims to incidents committed "within the scope of their employment" instead of giving an instruction pursuant *BAJI No. 13.01* on a principal/agent theory of liability.

She further contends the trial court erred in granting summary adjudication in favor of the Regents on the following issues: (1) Does the exclusivity bar of Workers' Compensation preempt her causes of action for negligent infliction of emotional distress and negligent supervision and retention; (2) Are those causes of action barred by the discretionary immunity set forth in *Government Code sections 815.2 and 820.2*; (3) Did she state a private cause of action under *Education Code section 212.5*; (4) Did she state a cause of action against the Regents based on a theory of direct liability under the Unruh Civil Rights Act (*Civ. Code, § 51.7*) arising from her faculty-student sexual harassment claims; (5) Did she state a cause of action against the Regents under the Ralph Civil Rights Act (*Civ. Code, § 51.9*) based on her sexual harassment and sexual assault claims; and (6) Did issues of the Regents' ratifications of the purported acts of sexual harassment and sexual assault present triable issues of fact?

An amici curiae brief in support of Reifschneider's position on *Education Code section 212.5* was filed by Equal Rights Advocates, The American Association of University Women of California, American Civil Liberties Union Foundation of Northern California, American Civil Liberties Union Foundation of Southern California, California Women's Law Center, National Women's Law Center, University of California Student Association, and We Advocate Gender Equality (collectively Amici). The Regents have filed a response to the brief of the Amici.

At oral argument, Reifschneider's attorney conceded that reversal of the judgment was warranted, if at all, based only on the evidentiary claims. We therefore deem her remaining claims to have been abandoned and do not further address them.

[*3]

PROCEDURAL SUMMARY

On October 3, 1995, Reifschneider filed an administrative complaint against Nicol and UCLA with the Department of Fair Employment and Housing (DFEH) in which she alleged Nicol sexually harassed her from June 1993 to May 1995. On October 19, 1995, without first investigating the claims, DFEH issued her "right to sue" letters.

On July 1, 1996, Reifschneider filed a civil action against Nicol, Dr. Charles Knobler (Knobler), his successor, the Regents, and then UCLA Chancellor Charles Young (Young). She alleged Nicol had sexually harassed her from October 1993 through about August 1995, and pleaded causes of action against Nicol and the Regents for sexual harassment in violation of FEHA.

Reifschneider also pleaded causes of action, inter alia, against all defendants for violation of *Civil Code sections 51.7 and 51.9*; sexual harassment in violation of *Education Code section 212.5*; sexual assault and battery; intentional and negligent infliction of emotional distress; and negligent retention and supervision.

Prior to trial, the court granted the Regents' motion for summary adjudication [*4] of issues and dismissed all of the non-FEHA causes of actions. Motions for summary judgment were granted in favor of both Knobler and Young.

The matter proceeded to trial on Reifschneider's causes of action against Nicol and the Regents for sexual harassment under FEHA and on her causes of action against Nicol for battery and for intentional and negligent infliction of emotional distress. At trial, the Regents stipulated that Nicol was Reifschneider's supervisor during all relevant time periods.

The jury returned a special verdict. It found Nicol did not subject Reifschneider to sexual harassment, either "quid pro quo" or in a hostile environment, and that he did not commit a battery, nor intentionally inflict emotional distress on her. After finding Nicol negligently inflicted emotional distress on Reifschneider, the jury awarded her economic damages in the amount of \$ 105,000. No non-economic damages were awarded. The jury made the additional specific finding that none of Reifschneider's damages were caused by Nicol while he was acting within the scope of his employment by the Regents.

Judgment was entered in favor of Reifschneider against Nicol in the sum of \$ 105,000 [*5] and against Reifschneider and in favor of the Regents.

Reifschneider moved against both Nicol and the Regents for judgment notwithstanding the verdict (JNOV) and for a new trial. After announcing its tentative ruling to deny both motions, the court announced its intent to grant its own motion for JNOV in favor of Nicol on the negligent infliction of emotional distress cause of action on the ground that

Nicol did not owe Reifschneider any duty outside the employment setting. Reifschneider settled with Nicol. The court subsequently denied her motion against the Regents.

No appeal has been taken from the judgments entered in favor of Knobler and Young nor from that portion of the judgment in favor of Nicol.

FACTUAL SUMMARY

We view the evidence in the light most favorable to the judgment; we presume the existence of every fact the trier could reasonably deduce from the evidence; and we defer to the trier's determination of the credibility and weight of the evidence. (See, e.g., *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 614.) The following summary is based on this appellate standard of review. n2

n2 We note that in her reply brief, Reifschneider concedes "the present appeal does not attack the factual findings in the case, nor does it challenge the sufficiency of the evidence in support of the judgment."

[*6]

In 1988, Reifschneider commenced graduate studies in chemistry at the University of Southern California. About a year later, however, she was terminated from the research group of Dr. Curt Witting, her advisor, based on her problems in getting along with colleagues and his belief that she lacked the ability to obtain a Ph.D. with him or "with people of similar research goals and values as" Dr. Witting possessed.

In 1990, upon her transfer to UCLA, Reifschneider continued to experience problems with advisors. Within a few months, she quit the research group of her advisor, Dr. Baugh, for the reasons that he had criticized her work, refused to let her do any significant hands-on laboratory research, and because he was "a sexist pig." After switching to Dr. Peter Felker, Reifschneider felt compelled to drop out of his group. She complained about having to work with a senior graduate student, with whom she had a problematic relationship. She decided to leave, because she could not do certain experiments.

In June 1993, Nicol reluctantly accepted Reifschneider into his research group. He had a heavy academic load but was persuaded to accede to her request after she told him [*7] she had been "blocked" from completing her Ph.D. for years and had been the subject of "hazing."

Initially, Reifschneider performed well. She then developed difficulties in obtaining access to certain equipment and in working cooperatively with others. At times, she considered leaving graduate school. When she complained to Nicol, however, he would attempt to take care of the problem. In one instance, after she related that a more senior student was tying up the equipment, Nicol spoke to each of them and allowed Reifschneider to give presentations outside the other's presence.

After a while, the relationship between Reifschneider and Nicol became personal as well as professional. Nicol, who had been a UCLA professor for almost 30 years, was divorced. Reifschneider, who was about 27 years old, had been twice divorced. Several months before joining Nicol's research group, Reifschneider sought medical treatment for various physical and emotional ailments, including significant depression, severe headaches, and entire body weakness and tiredness.

Reifschneider telephoned Nicol frequently at his home to discuss both professional and personal problems. She confided in Nicol about [*8] such personal matters as her many childhood traumas, her parents' rejection of her following her first marriage, her problems with men, her current health and financial problems, and her concerns about the future.

Nicol gave Reifschneider money to assist her with financial problems. For instance, on May 20, 1995, he gave her a check for \$ 5,000 to pay off a student loan in the amount of \$ 4,000 and outstanding MasterCard bills in the amount of \$ 1,000.

Between October 1994 and July 1995, Nicole lavished over \$ 47,120 in gifts on Reifschneider.

Reifschneider denied asking Nicol to buy all the gifts she received. However, she admitted that she retained the gifts and denied knowing of any gifts she refused.

During their entire relationship, Reifschneider gave Nicol the single gift of a watch in July 1995.

Nicol first raised the possibility of a sexual relationship and marriage with Reifschneider in August 1994. He offered to move with her, to marry her, and to have a family together. He also mentioned his desire of leaving his specialized laboratory equipment to her upon his possible retirement in a few years if she had an academic position then. Reifschneider, who simply [*9] smiled and said nothing, did not either reject or discourage Nicol.

In October 1994, Nicol again broached the subject of marriage. After Reifschneider smiled and began to cry, they proceeded to his condominium to continue the discussion "about marriage, children, and career."

Reifschneider admitted she told Nicol many times that she loved him. She told a student she thought Nicol liked her, and after ridiculing him, the two laughed about it. Nicol told the same student that he loved Reifschneider. A neighbor of Nicol observed Nicol and Reifschneider on various occasions from November 1994 to around sometime in April 1995. They appeared "very comfortable" together, e.g., walking arm-in-arm, touching, hugging, or embracing each other in the elevator. Reifschneider confided to another student that her long-term goal was to return to UCLA as a professor and take over Nicol's equipment.

Nicol and Reifschneider had intimate sexual relations during the timeframe of October 1994 and January 15, 1995. On October 1, 1994, during the drive back to the hotel after a day of sightseeing, shopping, and dining out, Nicol and Reifschneider stopped to admire a romantic view. After he placed [*10] his arm around her, she said it was too public a place and they returned to the hotel. In her room, she undid her jeans and the two began making love on the bed. They stopped, however, because both were tired, and Nicol returned to his room.

On October 7, 1994, Reifschneider came down with food poisoning at work. After declining Nicol's offer to be taken to emergency or to her apartment, she accepted his offer to take her to his place. Once there, she changed into the big T-shirt Nicol gave her and got into bed. At some point, she initiated sexual contact with Nicol in the bed.

On October 15, 1994, following dinner and a discussion about "marriage, children, and career" at Nicol's place, Reifschneider stayed the night during which she and Nicol hugged and fondled each other before falling asleep.

On October 18, 1994, they had sexual intercourse during a business trip to Stanford.

On November 12, 1994, following sexual intercourse at Nicol's condominium, Reifschneider and Nicol went shopping at Nordstrom's where Nicol spent over \$ 800 in gifts for her, including a beaded, strapless evening gown she chose and wore that evening to dinner and the opera.

During their November [*11] 1994 Hawaii trip, Nicol and Reifschneider engaged in sexual intimacies on several occasions but Nicol could not recall whether they had actual intercourse. During the trip, Reifschneider "threw a tantrum" and was still angry with Nicol during the return voyage to Los Angeles. Nicol, who continued to love her, began to question their relationship, because he was concerned about her behavior.

In December 1994, during their Stanford business trip, Reifschneider invited Nicol to stay in her room where they had intimate sexual relations. However, they continued to have arguments.

Sometime that December, a female coworker told Reifschneider that she felt left out, because of the additional attention showered on her. Reifschneider responded, "Sexual harassment is not the kind of attention you want." She did not, however, inform the coworker at that time about her opera dates with Nicol, their frequent restaurant dinners, or the many gifts he had bought her.

During a Christmas visit with her family in Nebraska, Reifschneider's brother suggested she check with a lawyer regarding possible sexual harassment. Around January 1995, she discussed the subject of sexual harassment with [*12] Nicol. When Nicol asked if she felt sexually harassed, however, she responded in the negative.

On January 15, 1995, following an argument, Reifschneider told Nicol they should not sleep together anymore. He responded that he was sorry she felt that way but hoped they could resume an intimate relationship in the future. He respected her wishes.

Sexual contact, other than sexual intercourse, however, continued. Reifschneider, who sometimes was nude or wore her robe completely open, would ask Nicol to hug and massage her to help her to sleep. Sometime before April, Reifschneider had told Nicol several times that she loved him. On April 14 and again April 15, 1995, Nicol touched her public hair as he massaged her.

At trial, Reifschneider testified that all sexual contact with Nicol was nonconsensual. In contrast, she told her psychiatrist in October 1996, she "was agreeable" to having sex with Nicol.

Although sexual relations between them essentially ceased in January 1995, Nicol continued to shower Reifschneider with gifts and paid for other expenses. From May into July 1995, he also paid \$ 27.50 per hour for 6 to 15 hours a week for a housekeeper. In June 1995, he also [*13] paid \$ 1,500 for cosmetic surgery, and also for medication, so that Reifschneider would have replacement cheek implants and collagen injections in her lips. In June 1995, he also gave her \$ 4,000 to pay for the \$ 300 a month in increased rent for the larger apartment into which he helped her move; a rental car so that she would not have to stay with her parents during a July 1995 visit to Nebraska; some of her debts; and some of her psychiatric bills and medications.

In mid-April 1995, Reifschneider, whose depression had worsened, told Nicol she was suicidal. Nicol, who was concerned, arranged for her to be seen by a psychiatrist, Dr. Silber, who had treated him in the past. She quit, however, after a couple of weeks.

In July 1995, during their final social encounter, Nicol spent around \$ 1,644 in gifts, meals, and medication for Reifschneider.

On July 31, 1995, Reifschneider filed a complaint with UCLA claiming Nicol sexually harassed her.

At some point during April 1995, at Reifschneider's request, Nicol wrote her letters which she believed contained evidence of his misconduct. In one letter, Nicol admitted he "harassed" her. In another, he admitted to subjecting her [*14] to "sexual harassment and abuse." In yet another, he admitted he "abused" her and caused her "damage."

Dr. Knobler, Reifschneider's new advisor, was responsible to ensure Reifschneider in fact performed the work she was being paid for as a research assistant. Despite repeated requests, Reifschneider failed to submit regular progress reports. Dr. Knobler gave her an incomplete grade for the Spring Quarter because of her failure to submit the requisite reports. In July 1996, Dr. Knobler requested the personnel officer not to renew Reifschneider's appointment as a research assistant, which essentially terminated her employment with UCLA.

At trial, Dr. Mintz, a psychiatrist, testified that he began treating Reifschneider on or about October 6, 1996. In his expert opinion, Reifschneider was suffering from post-traumatic stress disorder and rape-trauma syndrome as the result of Nicol's sexual harassment. He explained that her acceptance of Nicol's gifts was consistent with the "Stockholm syndrome" which involved a situation where hostages or prisoners learn to survive by identifying with and pacifying their captors. Dr. Mintz admitted, however, that she owed him \$ 150,000 and [*15] that he had a lien on any recovery she might obtain.

In rebuttal, Dr. Lieberman, a defense psychiatrist, opined that Reifschneider did not have Stockholm syndrome, which was not a listed diagnosis, and she did not suffer from post-traumatic stress disorder. She opined that in 1995, Reifschneider's severe depression was caused by the combination of her existing personality disorder and four additional factors: her parents' serious illnesses; her fear of success and guilt about possibility of surpassing her parents' educational levels; unresolved issues about her father, which were triggered by her relationship with Nicol; and fear of abandonment, because in February 1995, he informed her he would be on leave for the 1995-1996 academic year.

Specifically, she opined that Reifschneider's emotional state in April 1995, was the culmination of lifelong personality disorders rather than the product of then current traumatic events.

Dr. Lieberman opined that by age 17, Reifschneider already had "a very disturbed personality." In college, Reifschneider reported that she suffered from depression and anxiety. Dr. Lieberman further opined that Reifschneider's obsessive-compulsive, [*16] perfectionist personality, which may have enabled her to obtain good grades in class work, interfered with her ability to complete her Ph.D., which goal requires abstract, creative thinking in unstructured situations and the ability to be compatible with coworkers.

DISCUSSION

1. No Error in Exclusion of Evidence of Other Sexual Abuse by Nicol

Reifschneider contends the trial court abused its discretion in excluding all evidence of Nicol's prior sexual harassment of female students and employees. We find no abuse.

The Regents moved to exclude evidence of Nicol's alleged prior sexual conduct with individuals other than Reifschneider. Nicol filed separate motions to exclude evidence of his alleged prior sexual misconduct, respectively, with regard to two former students, Ms. Jacqueline G. and Ms. Suzanne J.

Nicol sought to exclude Reifschneider from proffering evidence to show that Nicol sexually harassed the two former students. He argued that in 1989, almost 10 years past, Ms. G. had complained that Nicol sexually harassed her, but the charge was voluntarily withdrawn by Ms. G. herself and found to be baseless after an internal investigation. Reifschneider admitted [*17] she was unable to locate Ms. G. for trial. To counter Reifschneider's charge, Nicol's attorney proffered the testimony of Ms. G.'s former husband that Ms. G. voluntarily withdrew her complaint and the testimony of another witness attacking Ms. G.'s credibility as "not a reliable witness" and someone who "was misrepresenting what had occurred." Ms. J, the other student, was deceased. Nicol argued that Reifschneider would contend he improperly touched Ms. J. Reifschneider alleged Nicol shared an apartment with Ms. J. Ms. J.'s mother would have testified that Ms. J.'s relationship with Nicol was "a close professional relationship" which was supportive and that Nicol was at Ms. J.'s bedside when she died.

Reifschneider argued that neither Ms. G.'s then husband nor Ms. J.'s mother would be able to disprove that sexual harassment of Ms. G. and Ms. J. had occurred.

The court granted the motions. It reasoned: "The evidence sought to be presented is barred by *Evidence Code section 352*. Further, the evidence is not admissible under 1101 in that it is not sufficient to show a common plan or scheme or other types of indicia outlined or illustrated by 1101 (B). [*18]

"Further, even if I were to reach a different conclusion with respect to the matters previously stated, the evidence would be properly excluded under *Evidence Code section 352* in that the probative value of the evidence is substantially outweighed by the probability that its admission will necessitate undue consumption of time; and further, that it will create a substantial danger of undue prejudice: The consumption of time is illustrated by, among other things, the tremendous amount of evidence that would be necessary on the Ms. "G" matter and on the other matters to inquire into the factual underpinnings of the charge, and to rule upon that would be very complex evidentiary questions.

"I would anticipate, further, the testimony that we are talking about has a substantial danger because of its inherent nature of prejudicing the jury and taking the eyes of the jury -- off the very important issues that are before the jury as raised by the complaint."

We have no quarrel with Reifschneider's recitation of case authority recognizing the probative value of prior incidents of sexual misconduct on the part of the charged perpetrator. (See, e.g., *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 987-988.) [*19] We also do not challenge her reliance on the authorities cited for the proposition that evidence of prior sexual harassment is relevant to show intent, motive, identity, etc., other than the propensity to commit the charged conduct. (See, e.g., *Evid. Code*, § 1101, subd. (b).)

The pivotal issue, instead, is whether the probative value of the proffered prior misconduct was "substantially outweighed" by the prejudicial impact of its admission. (*Evid. Code*, § 352.) The record provides ample support for the trial court's balance in favor of exclusion of that evidence on the ground of prejudice.

Clearly, the probative value of the proffered misconduct was relatively dim. The mere filing of a sexual harassment complaint does not establish, one way or the other, the truth of the allegations of harassment. Also, neither purported victim was available to testify at trial. (See, e.g., *Beyda v. County of Los Angeles* (1998) 65 Cal.App.4th 511, 521.) Reifschneider did not offer any probative evidence in support of such harassment claims, and, even if true, the incidents were relatively remote in time. (Cf. *Bihun v. AT&T Information Systems, Inc. supra*, 13 Cal.App.4th at p. 990 [*20] [sexual misconduct towards others "was occurring simultaneously" with harassment of plaintiff].) On the other hand, evidence refuting such harassment claims was proffered by the defense. Balanced against such minimal probative value is the equally clear prejudice which would flow from admission of such evidence. As the trial court properly pointed out, each incident would compel a "mini-trial" in itself, which would be disruptive of the jury's concentration on the material issues raised by the complaint, i.e., did Nicol or did he not sexually harass Reifschneider. Accordingly, the trial court did not abuse its discretion in excluding the proffered evidence of two prior incidents of alleged sexual misconduct by Nicol. (See, e.g., *Beyda v. County of Los Angeles, supra*, 65 Cal.App.4th 511, 516; cf. *Bihun v. AT&T Information Systems, Inc., supra*, 13 Cal.App.4th 976, 989-990.)

2. Exclusion of Remaining Assigned Sexual Abuse Evidence

On appeal Reifschneider complains she also was precluded by the court's above ruling from presenting: (1) the testimony of Suzanna Gibson DeMoss that when she informed Phyllis Jurgenson, manager of the UCLA [*21] graduate and undergraduate officers, about problems in the laboratory, Jurgenson's reply was "I know all about Malcolm [meaning, Nicol]"; and (2) the deposition testimony of Dr. David Schferl of the Los Alamos laboratory that when Reifschneider asked whether she had become another one of Nicol's "objects" he replied, "something in your voice tells me you already know the answer."

She further complains the ruling also foreclosed her from testifying about her conversations with Dr. Arlee Russell, a UCLA chemistry professor and Suzanna G. regarding a prior charge of sexual harassment against Nicol; about Nicol's denial to her in October 1993, concerning such prior charge; about Nicol's sudden announcement during his alleged first sexual assault on her on October 1, 1994, that he could handle both professional and sexual relationships with his graduate students because he had done so before; and about Nicol's admissions about prior sexual relationships with female graduate students made during a session with Nicol's psychiatrist, Dr. Siler, attended by both Nicol and Reifschneider.

With regard to the first item, we note that the trial court excluded as irrelevant the assigned [*22] response "I know all about Malcolm" or words to that effect just prior to the testimony of Ms. DeMoss, and thus, on an entirely different occasion than the hearing on the motion to exclude discussed *ante*. We find the court did not abuse its discretion in excluding such evidence. The inference sought to be drawn by Reifschneider is that Jurgenson knew that one of those problems was Nicol's sexual harassment of his female students. Such an inference is clearly speculative. (See, e.g., *People v. De La Plane* (1979) 88 Cal. App. 3d 223, 242 ["Evidence which produces only *speculative* inferences is *irrelevant* evidence."], emphasis in original.)

We also find no abuse with regard to exclusion of the excerpts from Dr. Schferl's deposition testimony. Initially, we point out that the objection to this evidence also occurred in a different context. Moreover, as reflected in the colloquy of counsel and the court, the manner in which the subject was brought up and discussed at the deposition was confusing, and the context of the excerpts was difficult to sort out. For instance, the court announced, "I cannot understand what this question is about." Nicol's [*23] attorney characterized the pertinent deposition excerpts as "going on and on and it's rambling." Reifschneider's attorney himself had difficulty in placing the excerpts in the proper context. The court suggested counsel get together "to make this makes any sense[,] because it has to be somehow connected up to the prior question. There's a lot of other questions in the middle here." Reifschneider's attorney agreed. Additionally, although the trial court tentatively ruled that "the way it stands right now, I just don't think it's appropriate[.]" the record does not reflect any definitive ruling on its part. (See, e.g., *Haskell v. Carli* (1987) 195 Cal. App. 3d 124, 129 [failure to secure ruling waives issue on appeal].)

As for the remaining assigned specific instances of excluded evidence, we note that Reifschneider has failed to point out where in the record she brought up her claim of error and secured an adverse ruling from the trial court thereon. We therefore conclude she has forfeited her right to bring such claims of error on appeal. (See, e.g., *Haskell v. Carli*, *supra*, 195 Cal. App. 3d at p. 129 [failure to secure ruling waives [*24] issue on appeal]; *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 417 [issue not raised at trial cannot be raised for first time on appeal]; *People v. Saunders* (1993) 5 Cal.4th 580, 589; *People v. Cowan* (1941) 44 Cal.App.2d 155, 158.)

3. Exclusion of Evidence Regarding Retaliation Claims and UCLA's Investigation Not Abuse

Reifschneider contends the trial court abused its discretion in excluding evidence of the timing and length of UCLA's internal investigation of her UCLA complaint and evidence of UCLA's retaliation against her. We find no abuse.

In July 1995, Reifschneider made a complaint to UCLA about Nicol's sexual harassment.

On October 3, 1995, she filed the DFEH complaint alleging Nicol was her "advisor and supervisor from June 1993 to the present," and that he had harassed her sexually from June 1993 to May 1995. Reifschneider never amended her DFEH complaint.

On July 1, 1996, she filed her complaint in this action alleging Nicol had harassed her from October 1993 through August 1995 and that the Regents failed to prevent the harassment. She also never amended this complaint. [*25]

The Regents sought a pretrial ruling on their motion to preclude Reifschneider from presenting any evidence of FEHA violations not alleged in her DFEH complaint. Reifschneider opposed the motion on the ground she should be entitled to present evidence on "events up to and including the date of the filing of the charge," because her complaint

"was signed on or about October 2, 1995" and alleged she "was sexually abused and harassed repeatedly from June 1993 to the present." (Emphasis in original.) She also argued that UCLA's investigation of her UCLA complaint, which she claimed was "like or reasonably related" to her sexual harassment claim was still pending.

The Regents also moved to exclude evidence regarding the timing and length of UCLA's internal investigation of Reifschneider's complaint of sexual harassment against Nicol. They argued such evidence had no probative value and that its admission would confuse and mislead the jury and take undue consumption of time. Reifschneider opposed the motion on the ground that evidence of the Regents' failure to properly investigate sexual harassment and to act thereon was relevant, because such inaction "resulted in both [*26] a ratification of Nicol's conduct and a failure to make reasonable accommodations to a plaintiff who is in fear of her life to continue school alongside the professor who attacked her."

The court granted the Regents' motions in part. It excluded all evidence and argument regarding UCLA's, i.e., the Regents', actions or omissions after May 1995, e.g., its purported failure to prevent harassment and to accommodate Reifschneider with a different advisor and its termination of Reifschneider in July 1996. The court reasoned that such matters were outside the scope of the DFEH complaint and would not be reasonably uncovered in investigation of Nicol's conduct. The court further reasoned that such evidence would be "extremely remote in terms of its probative value, and extremely time consuming" and thus, subject to exclusion under *Evidence Code section 352*. The court, however, did allow Reifschneider to present evidence and argument with regard to any alleged misconduct by Nicol until late July 1995. The court reasoned the proffered testimony would be that "although not engaging in oversexual [*sic*] conduct, [Nicol] did involve himself actively in [*27] the life of Ms. Reifschneider up through late July."

On appeal, Reifschneider alternatively argues the court's preclusion of any evidence regarding UCLA's actions or omissions after May 1995 was an abuse and, in any event, the court should have allowed evidence up to at least October 1995, because her DFEH complaint, which was dated October 2, 1995, alleged the harassment occurred until "the present."

Her claim of error is refuted by the record. The DFEH complaint alleged the harassment by Nicol occurred on "June, 1993-May, 1995." Her counsel in fact conceded Reifschneider had no claims of harassment after July 1995. The trial court relied on counsel's representation in selecting the July 1995 cut-off date.

Additionally, Reifschneider acknowledges *Okoli v. Lockheed Technical Operations Co. (1995) 36 Cal.App.4th 1607* directly disposes of her claim that the court abused its discretion in precluding evidence of UCLA's investigation of her UCLA complaint and its "retaliation" against her. She invites this court to disregard *Okoli* and follow instead "the weight of federal authority" which compels a contrary conclusion.

We decline her invitation. *Okoli* [*28] held that a plaintiff is barred from pursuing a retaliation claim at law for failure to exhaust administrative remedies where the retaliation claim was not first alleged in his or her DFEH complaint and such claim was not "like nor reasonably related to [the] DFEH claim and were not likely to be uncovered in the course of a DFEH investigation." (*Okoli v. Lockheed Technical Operations Co., supra, 36 Cal.App.4th at p. 1617.*)

These are the precise facts here. The DFEH complaint only alleged sexual harassment by Nicol. Reifschneider never amended it to allege separate claims, of retaliation or other misconduct on the part of UCLA after the harassment ceased. Also, such belated claims would not have been uncovered in any reasonable administrative investigation and arose from a different set of facts than her harassment claim against Nicol. (Accord, *Soldinger v. Northwest Airlines, Inc. (1996) 51 Cal.App.4th 345, 382* [citing *Okoli* for proposition that an "employee cannot assert retaliation occurring after filing DFEH charge when administrative charges had only alleged discriminatory denial of promotion"].)

Moreover, we do not find [*29] that a contrary conclusion is compelled under federal decisional authority. Reifschneider argues that "federal appellate courts have uniformly held that a second administrative complaint is not required prior to asserting a retaliation claim in court." In her reply brief, she urges the "sole exception" is *Johnson v. General Electric (1st Cir. 1988) 840 F.2d 132*. In a subsequent letter brief, however, she points out that *Johnson* has been abrogated on this point in *Clockedile v. New Hampshire Dept. of Corrections (1st Cir. 2001) 245 F.3d 1*.

In abandoning its prior position, the court in *Clockedile* explained that "*Johnson's* rule regarding retaliation claims should be abandoned simply because its premise as to what the EEOC investigates turns out to be incorrect." (*Clockedile v. New Hampshire Dept. of Corrections, supra, 245 F.3d at p. 4.*) The court also noted that "Title VII does not say explicitly that the court suit must be limited to just what was alleged in the agency complaint." (*Ibid.*)

In contrast, the issue of whether DFEH complaints must be amended to allege retaliation claims must be resolved under [*30] our state law. We therefore decline to follow federal court decisions allowing a retaliation claim not first presented to the federal administrative agency to be pursued in a federal Title VII action before a federal court.

DISPOSITION

The judgment is affirmed. The Regents to recover costs on appeal.

NOT TO BE PUBLISHED

CURRY, J.

We concur:

EPSTEIN, Acting P.J.

HASTINGS, J.