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Employment Law Commentary

Low-level Supervisors Create Big Liability in California Sexual Harassment Suit: *Fuentes v. AutoZone*

By Lindsay Andrews

California's Second District Court of Appeal recently affirmed a jury verdict awarding a plaintiff in a Fair Employment and Housing Act (FEHA) sexual harassment suit $160,000 in damages, $23,898.76 in costs, and a staggering $677,025.00 in statutory attorneys' fees. The Second District Court of Appeal opinion in *Fuentes v. AutoZone, Inc.* further illuminates the definition of sexually harassing behavior and the meaning of "severe and pervasive" in the context of sexual harassment suits. The court's opinion stands as a costly warning to employers that they must act quickly (very quickly) in response to complaints of sexual harassment. The nearly $861,000 AutoZone paid out to the plaintiff does not even take into account the defendant's own legal expenses, which were surely greater than the fees paid to the plaintiff's attorneys. To avoid a similar fate, employers must ensure supervisors at all levels of the business understand that the employer can be liable for their actions and such liability can easily reach into the millions. They must also be committed to the employer's sexual harassment policy and understand their responsibilities under it.

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The Harassing Behavior

The plaintiff, Marcela Fuentes, was a part-time cashier for defendant AutoZone. She alleged that the acting store manager, Melvin Garcia, and another manager, Gonzalo Carillo, at her store subjected her to inappropriate sexual behavior and comments over the course of approximately one month. Specifically, she alleged one or both of them:

- Spread rumors among other employees that she had sexually transmitted herpes;
- Accused her of being in a sexual relationship with a co-worker;
- Suggested she could make more money working as a stripper; and
- Physically forced her at the checkstand to "turn around and display her buttocks to customers, while [Garcia] was laughing and clapping."

When Fuentes confronted Garcia about the herpes rumor, he threatened to fire her if she mentioned the issue again. To deflect attention from her body, Fuentes wore a sweatshirt tied around her waist but was cited for a dress code violation and forced to remove it. These events all occurred within just a three-week period of time from approximately May 27, 2003, to June 19, 2003. Within one month of the harassing behavior starting she reported it to a district manager and asked for and received a transfer to another store. After reporting to the district manager, Fuentes was placed on administrative leave while AutoZone investigated her claims. Carillo and Garcia were eventually terminated on August 9, 2003, less than three months after their harassing behavior began. Fuentes, who remained an AutoZone employee until 2005, filed suit for sexual harassment in violation of California's Fair Employment and Housing Act.

Elements of a Sexual Harassment Claim Under California's Fair Employment and Housing Act (FEHA) Gov. Code, § 12900 et seq.

FEHA provides causes of action for two types of sexual harassment: (1) "*quid pro quo*" harassment in which employment benefits are made directly contingent on submission to sexual conduct and (2) harassment created by a "hostile environment." Fuentes pursued her claim under the hostile environment theory of sexual harassment. The California Supreme Court has held that a plaintiff in a hostile work environment claim must prove the conduct was both objectively and subjectively harassing such that "a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail . . . if a reasonable person . . . considering all the circumstances, would not share the same perception." *Hughes v. Pair*, 46 Cal.4th 1035, 1044 (2009) (internal citations omitted). Additionally, the conduct must be "severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex." *Id*. at 1043 (internal citations omitted). The California Supreme Court has recently reaffirmed "[t]here is no recovery 'for harassment that is occasional, isolated, sporadic, or trivial'" and "an employee seeking to prove sexual harassment based on no more than a few isolated incidents of harassing conduct must show that the conduct was '*severe in the extreme*.'" *Id*. (emphasis added).

On appeal, AutoZone asserted Fuentes's testimony was inherently improbable and did not satisfy California's standard of severe and pervasive behavior. It relied primarily on three prominent sexual harassment cases, each of which had found arguably more objectionable and threatening conduct did not qualify as severe and pervasive for purposes of FEHA liability. The Court of Appeals roundly rejected AutoZone's arguments, differentiated each case in turn, and upheld the jury's verdict.

In the first case, *Hughes v. Pair*, 46 Cal.4th 1035 (2009), the California Supreme Court upheld summary judgment motion for the defendant where the harassing conduct was limited to comments made by defendant on a single day. The defendant was one of the trustees of a child's trust and his allegedly harassing behavior was directed at that child's mother, the plaintiff.[1] The plaintiff alleged the trustee made sexual passes at the plaintiff on a phone call and then, later that night at a public event reportedly told her, "I'll get you on your knees eventually. I'm going to fuck you one way or another." The Supreme Court found the conduct was not sufficiently pervasive as it occurred over the course of just one day. Nor was it severe enough to constitute harassment because the Court found no real threat of sexual assault.

Additionally, AutoZone argued *Mokler v. County of Orange*, 157 Cal. App 4th 121 (2007), a case preceding *Hughes*, created a high bar for finding conduct is severe and pervasive under FEHA. In *Mokler*, the plaintiff, a county employee, alleged that the defendant, a member of the county board of supervisors, sexually harassed her on three separate occasions over a five-week period. The harassing behavior included remarks about her marital status (calling her an "aging nun") and her body. In the last incident, the supervisor put his arm around the plaintiff, asked for her home address, and rubbed his arm against her breast. Notwithstanding the supervisor's "offensive" behavior, the *Mokler* court held that the supervisor's actions were not sufficiently severe or pervasive so as to "alter the conditions of the victim's employment and create an abusive work environment."

Finally, AutoZone argued that a third case, *Haberman v. Cengage Learning, Inc.*, 180 Cal.App 4th 365 (2009), correctly interpreted *Hughes* to hold that the type of conduct at issue here was not actionable under FEHA. In *Haberman*, the plaintiff, a sales manager, alleged one of the defendants, a national sales manager, engaged in harassing behavior (including comments about the plaintiff's appearance, her marital status, and comments with sexual innuendo) on 13 separate occasions over the course of approximately two to three years. The *Haberman* court

1. Plaintiff brought her complaint under Cal. Civ. Code § 51.9, which prohibits sexual harassment in some business relationships outside the context of the traditional workplace.

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reasoned the incidents were "brief and isolated" and thus could not be so severe or pervasive as to alter the conditions of her work environment.

The *Fuentes* court swiftly differentiated *Hughes* and *Mokler*, finding that unlike the situation in *Fuentes*, the harassers in those two cases "did not supervise the plaintiff's work, and their conduct had no pervasive impact on the plaintiff's work environment." *Fuentes* at *19. In contrast, "[t]he herpes rumor and the demands that she display her body to customers unreasonably interfered with Fuentes's ability to perform her work." *Fuentes* at *16. Similarly, the *Fuentes* court dismissed AutoZone's arguments under *Haberman*, reasoning "[the *Haberman* defendants'] inappropriate comments were made sporadically over the period of several years and did not sink to the level of the vulgar comments made about Fuentes." *Id*. at *19. In addition, the court reasoned Carillo and Garcia's harassing behavior occurred in front of both customers and employees and thus "created a workplace 'permeated with discriminatory intimidation, ridicule and insult' far more severe and pervasive than the circumstances presented in the cases cited by AutoZone." *Id*.

Fuentes teaches that courts have broad discretion to engage in a "totality of the circumstances" balancing test to determine when conduct crosses the threshold of rude and offensive and becomes so sufficiently severe and pervasive that it is actionable under FEHA. The *Fuentes* court easily found that a few incidents occurring over the course of just three weeks was sufficient to constitute sexually harassing behavior under FEHA. In reaching its conclusion, the court was particularly concerned with the level to which both employees and customers were witness to, and participants in, the offending behavior. This evidence of widespread involvement strongly supported a finding that the harassment had permeated Fuentes's work environment and changed the conditions of her employment, notwithstanding the relatively short period of time over which it occurred.

Regardless of the dual objective/subjective standard under FEHA, *Fuentes* demonstrates that sexual harassment suits remain highly subjective. Consequently, it's hard to speculate exactly what level of conduct will strike a jury as unlawful. The jury in *Fuentes* certainly believed that AutoZone should be responsible for their managers' crude behavior even though Fuentes was transferred and the managers were ultimately terminated. California employers already know the importance of having written harassment policies, including documentation, discipline, and training, in place before an incident occurs. The *Fuentes* case serves to remind employers that they must enlist the support of all employees, especially supervisors, to enforce the policy and to immediately report harassing behavior in order to avoid significant liability as occurred in *Fuentes* and preserve a workplace free of harassment.

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