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Please note:

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If you have questions or comments, please contact Jim Schenkel at 415-553-4000, or email info@quojure.com.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LIMESTONE

WANDA GREEN,

Plaintiff,

v.

ACME RETAIL, INC., and MAURICE
WHITE,

Defendants.

Case No. 54321

PLAINTIFF’S MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANT
MAURICE WHITE’S MOTION FOR
SUMMARY ADJUDICATION OF
FIRST CAUSE OF ACTION

Date:
Time:
Dept.
Complaint filed: February 25, 20__

ARGUMENT

1. Because plaintiff has made no contradictory admissions, the court cannot properly disregard her deposition testimony concerning instances of misconduct other than those described in her handwritten notes and the affidavit Acme’s counsel prepared for her to sign based on those notes.

White’s motion for summary adjudication is based on the notion that the handwritten notes, which Green prepared when she first complained of White’s harassment on or about April 3, 20__, and an affidavit Acme’s counsel prepared and Green signed on or about May 3, 20__, constituted Green’s admissions that these are the sole alleged

1 instances of White’s harassment. Based on the content of those two documents, White
2 urges the court to ignore Green’s deposition testimony concerning other instances of
3 misconduct. He invokes a narrow exception to the rules of civil procedure that control
4 summary judgment motions, but the facts of this case do not fit within this exception.

5 Summary judgment is a drastic measure that deprives the losing party of a trial on
6 the merits, and it may not be granted unless it is clear from the evidence that there are no
7 triable issues of fact. *People ex rel. Riles v. Windsor University* (1977) 71 Cal.App.3d
8 326, 331. The moving party’s affidavits or declarations are to be strictly construed and
9 those of the opponent liberally construed. *Chern v. Bank of America* (1976) 15 Cal.3d
10 866, 873. In ruling on the motion, the court must consider both the evidence and “all
11 inferences reasonably deducible from the evidence,” but it may not grant summary
12 judgment “based on inferences reasonably deducible from the evidence, if contradicted by
13 other inferences or evidence, which raise a triable issue as to any material fact.” Code Civ.
14 Proc. § 437(c). All doubts as to whether there are triable issues of fact are to be resolved
15 in favor of the party opposing summary judgment. *Zelda, Inc. v. Northland Ins. Co.*
16 (1997) 56 Cal.App.4th 1252, 1259.

17 *D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1 recognized that
18 admissions against interest have a very high credibility value. This is especially true
19 when . . . the admission is obtained not in the normal course of human activities and affairs
20 but in the context of an established pretrial procedure whose purpose is to elicit facts. *Id.*
21 at 21-22. Accordingly, when such an admission becomes relevant to the determination, on
22 motion for summary judgment, of whether or not there exist triable issues of fact (as
23 opposed to legal issues) between the parties, it is entitled to and should receive a kind of
24 deference not normally accorded evidentiary allegations in affidavits.

25 *Id.* at 22 (emphasis omitted).

26 Courts thus consistently refuse to allow a triable issue of fact to be conjured by the
27 submission of an affidavit contradicting a declarant’s prior deposition testimony. See *Neu-*

1 *Visions Sports, Inc. v. Soren/McAdam/Bartells* (2000) 86 Cal.App.4th 303, 309; *Leasman*
2 *v. BeechAircraft* (1975) 48 Cal.App.3d 376, 382-383. But this is not a hard-and-fast rule.

3 *Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 482 was among the first of
4 several cases to state that *D'Amico's* holding should be viewed "with caution," and it
5 referred skeptically to *Leasman*. The *Price* court concluded that "an uncritical application
6 of the *D'Amico* decision can lead to anomalous results, inconsistent with the general
7 principles of summary judgment law" (and quoted the startled exclamation of
8 commentators Weil and Brown):

9 "Note that if the case went to trial, the judge or jury might choose to believe the
10 contradictory testimony. But for summary judgment purposes, a party is bound by his or
11 her admissions made in the course of discovery!"

12 *Price*, 213 Cal.App.3d at 482 (citing Weil & Brown, CAL. PRACTICE GUIDE: CIVIL
13 PROCEDURE BEFORE TRIAL (1988) ¶ 10:84; emphasis omitted).

14 The *Price* court refused to conclude "that admissions should be shielded from careful
15 examination in light of the entire record" and held that "[a] summary judgment should not
16 be based on tacit admissions or fragmentary and equivocal concessions. . . ." *Ibid*.

17 It is undisputed that Green prepared the handwritten notes at the request of Acme's
18 counsel after the April 3, 20__ meeting in which she first told him of White's offensive
19 conduct toward her. Nowhere do these notes state that this was a list of *every* instance of
20 White's improper conduct toward her. Acme's counsel prepared the declaration Green
21 signed on May 3, 20__; she felt that, if she did not sign it, she would be fired. Still, that
22 declaration also does *not* state that it is a comprehensive list of every incident that took
23 place. The same holds true for statements contained in the reports of Green's physicians.
24 Green's deposition testimony concerning additional instances where White touched her
25 arm, leered at her, or made inappropriate comments do not directly contradict her earlier
26 statements. Further, neither of these statements was made during the context of a formal
27 legal proceeding, such as a deposition, where the party was represented by counsel, as
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1 required under *D'Amico*. White can attempt at trial to impeach the credibility of Green's
2 testimony concerning those additional incidents, but he cannot do so in the context of a
3 motion for summary adjudication.

4
5 **2. Green alleged sufficient instances of White's harassing conduct to raise**
6 **triable issues of fact as to her sexual harassment claim against White.**

7 To raise a triable claim for hostile work environment harassment, the plaintiff must
8 show that she was subjected to unwelcome conduct based on gender, which was
9 sufficiently severe *or* pervasive to alter the work environment so as to make it abusive.
10 *Guthrey v. State* (1998) 63 Cal.App.4th 1108, 1122 . Stated another way, the plaintiff
11 must show that the unwelcome conduct unreasonably interfered with her job performance
12 or created an intimidating, hostile, or offensive working environment. See *Aguilar v. Rent*
13 *A Car Sys., Inc.* (1999) 21 Cal.4th 121, 130 (citing with approval federal-law definitions of
14 hostile work environment). Under FEHA, the conduct itself need not be sexual. Gov't
15 Code §§ 12940(j)(4)(C); 12926(p).

16 In deciding whether the conduct was severe or pervasive enough to constitute
17 hostile environment harassment, the fact finder must consider the totality of the
18 circumstances. *Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 466. Such
19 circumstances include the conduct's frequency; its severity; whether it was physically
20 threatening or humiliating, or merely offensive; and whether it unreasonably interfered
21 with the plaintiff's work performance (although the plaintiff need not show that he or she
22 could not perform the job). Harassment is actionable even where it is not directed at the
23 plaintiff personally, but occurs in her presence, or is directed at her but does not occur in
24 her presence (e.g., the harasser talks with others about her), if it permeates her work
25 environment. See *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 518.

26 Green testified in deposition that, several times per week while White worked for
27 Acme between February and April 20__, he would touch her on the arm, compliment her
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1 outfit, and ask her to step outside with him. When she did, he made comments about her
2 hair and make-up. Although he never directly requested that Green have sex with him, she
3 did interpret his invitation to use his cabin as intimating that the two of them should go
4 there together. In all, Green recalled some 20-25 incidents over approximately two months
5 in which White's comments and demeanor toward her made her feel uncomfortable. As a
6 matter of law, that is sufficient to create a triable issue of fact as to whether White's
7 conduct was sufficiently pervasive to create a hostile work environment.

8 White argues that his conduct did not constitute actionable harassment as a matter
9 of law because all he did was compliment Green's appearance, and no reasonable person
10 could find that unwelcome or offensive. But in evaluating the conduct, the court must
11 view the totality of the circumstances surrounding it. As a subjective matter, Green
12 testified that White made her feel uncomfortable because he would stand or sit very close
13 to her, make comments such as how he would ask her out if he was not about to get
14 married, and even say, "I love you" to her. He offered her the key to his cabin in a manner
15 suggesting that it was an invitation for the two of them to go there together. This was
16 conduct of a sexual nature, unwelcome, and altered the conditions of Green's employment.
17 Triable issues of fact exist as to whether a reasonable woman, under the same totality of
18 circumstances, would find White's conduct unwelcome or offensive.

19
20 **CONCLUSION**

21 Green requests that the court deny White's motion for summary adjudication of her
22 first cause of action.

23
24 Dated:

Respectfully submitted,

25
26 _____
Attorney for Plaintiff