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PERSPECTIVE

Ruling says exclusion of '#MeToo' evidence is reversible error

By Molly M. McKibben

Last month, Division Two of the 4th District Court of Appeal overturned a jury verdict in favor of a corporate defendant and its employee in a sexual harassment case. *Meeks v. Autozone, Inc.*, 2018 DJDAR 6265 (June 21, 2018). The Court of Appeal found that the trial court had abused its discretion in making a number of erroneous and prejudicial evidentiary rulings, including barring the plaintiff from testifying about the content of sexual text messages sent to her by the alleged harasser and precluding the plaintiff from presenting "#MeToo" evidence of the defendant's harassment of other female employees. The court specifically found that the trial court's rulings "had the unfortunate result of skewing the evidence" and may have unfairly "tipped the balance" in favor of the defense.

In August 2010, Natasha Meeks, a store manager at AutoZone, sued AutoZone and Juan Fajardo, another store manager, after four years of alleged sexual harassment. Meeks alleged that Fajardo regularly sexually harassed her from early on in her employment with AutoZone, including commenting on her body and clothes, asking her to go out with him, suggesting they have sex, sending her sexually explicit text messages that included videos and photographs, and trying to forcibly kiss her multiple times. Meeks reported his conduct to her district manager in October 2009. She alleged that the manager told her to "squash it" and AutoZone's human resources department did not contact her about her complaints until August 2010. Fajardo was terminated by AutoZone one month later, after which Meeks brought her suit for sexual harassment. After a number of evidentiary rulings by the trial court, the case went to trial and the jury returned a verdict for AutoZone and Fajardo, after which Meeks appealed.

"#MeToo" evidence is evidence of gender bias against employees other than the plaintiff. The trial court had originally excluded all evidence of Fajardo's sexual harassment of four other female AutoZone employees, finding that it was inadmissible character evidence, but stated that if Fajardo "opened the door" to such evidence the trial court would reconsider its ruling. Fajardo testified that he gave all employees, regardless of gender, compliments about their looks, that he had sent sexual text messages to Meeks and others but that they were jokes, and that he had hugged and "air-kissed" Meeks and other employees. Meeks asked the trial court to reconsider its prohibition and allow her to present her 3me too" evidence, but it largely refused. The court of appeal found that the trial court had misunderstood the law, and pointed out that California courts have held that #MeToo evidence can be admissible in harassment cases to prove a defendant's motive or intent.

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The trial court had granted the defendants' requests to prevent Meeks from testifying about the substance of sexual text messages Fajardo had sent her that she could not produce in discovery (neither could he), citing the secondary evidence rule. This rule provides that the contents of a writing may be proved at trial by oral testimony if certain conditions are met, including if the proponent no longer has possession of the writing absent fraud. *See* Cal. Evid. Code Section 1523. The trial court precluded Meeks' testimony about what she could remember about the specific contents of the texts because such testimony would be "unfair" and only allowed her to testify that she had received "a few sexual text messages" from Fajardo, that they were "extremely offensive," and that she was upset and frustrated by them.

The court of appeal dismissed the trial court's concern that Meeks' testimony on this issue would be "pure speculation," pointing out that allowing oral recounting of the contents of a writing is exactly what the secondary evidence rule exists for and the law did not require her to prove the contents of the texts verbatim. The court also rejected any argument of "unfairness" noting that the defendants could challenge the testimony through testimony from Fajardo. The court wrote that "[i]t is hardly unusual for trials of sexual harassment claims … to involve such he said/she said contests. In such circumstances, the trier of fact—in this case, the jury — is generally entrusted with judging the credibility of each witness and assigning the evidence the appropriate weight."

Finally, the Court of Appeal rebuked the trial court's decision to allow Fajardo to show the jury an irrelevant photograph Meeks had posted on social media of a tattoo she had. Fajardo defended himself by arguing that the sexual conversations that he had with Meeks were consensual, and in support of that defense, testified that Meeks had told him in a flirty manner about a tattoo she planned to get on her lower abdomen that went from hip to hip. On cross examination, the defense was permitted to publish to the jury a photograph of Meeks' tattoo that she had uploaded to a social media account. Evidence Code Section 1106 limits the evidence a defendant may use to support their assertion that the alleged harassing conduct was consensual — specifically, that opinion evidence, reputation evidence and evidence of specific instances of plaintiff's sexual conduct are not admissible to prove consent. Cal. Evid. Code Section 1106(a). The court found that given the location of the tattoo, the act of taking and sharing a photograph fell within the scope of the term "sexual conduct" and thus was inadmissible under Section 1106(a).

Throughout its opinion, the Court of Appeal noted the trial court's misunderstanding of the law in making its evidentiary rulings. It was clear that the trial court had allowed Fajardo to testify in areas that Meeks was prohibited from discussing and had favored Fajardo by allowing him to present irrelevant evidence while refusing Meeks' repeated requests to present relevant evidence of Fajardo's harassment of others.

Molly M. McKibben *is an attorney at Greene Broillet & Wheeler, LLP. Her trial practice focuses on catastrophic personal injury, wrongful death, municipal liability, and products liability.*

MOLLY M. MCKIBBEN

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