Filed 12/11/08

**CERTIFIED FOR PARTIAL PUBLICATION***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| LAURA YOUNG,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>EXXON MOBIL CORPORATION et al.,<br><br>Defendants and Appellants. | B189263<br><br>(Los Angeles County<br>Super. Ct. No. BC328516) |

APPEAL from a judgment of the Superior Court for the County of Los Angeles. Elizabeth A. Grimes, Judge. Affirmed, as modified.

Danz & Gerber, Karl Gerber and Ann Guleser for Plaintiff and Appellant.

Weston, Benshoof, Rochefort, Rubalcava & MacCuish, Alston & Bird, Martha S. Doty and Sayaka Karitani for Defendants and Appellants.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of Part I of the Discussion section.

## SUMMARY

An employee who was terminated after closing down a 24-hour service station for several hours, in violation of company policy, sued her employer and her supervisor, alleging claims of harassment on the basis of mental disability, retaliation, and wrongful termination, among others. The employer and supervisor sought and obtained summary judgment, and the supervisor then sought attorney fees. The court found the claims against the supervisor were frivolous and brought in bad faith, but awarded nominal attorney fees of $1.00 because the supervisor's fees were paid by the employer. The employee appealed from the grant of summary judgment, and the employer and supervisor cross-appealed from the award of attorney fees. We find no merit in either appeal and affirm the judgment, with a modification in the amount of costs.

## FACTUAL AND PROCEDURAL BACKGROUND

Laura Young, a student at Antelope Valley College, worked as a sales associate at an ExxonMobil service station in Lancaster on a part-time basis from April 2004 until she was fired on September 16, 2004. The station was open 24 hours a day. On September 15, 2004, Young worked a shift, alone, from 9:00 p.m. until midnight. The person scheduled to relieve her at midnight did not arrive. Young called Wanda Najera, the assistant station manager, "some time after midnight," yelling and very angry, saying she had to leave because she had to study, and that she was shutting down the station. Najera told her she couldn't do that, and that she (Young) should wait for Najera to come to the station. At 12:25 a.m., Young shut down all the gas pumps and never turned them back on, effectively closing the station (a "posted offense" which she knew could result in a suspension or discharge without prior notice). At 1:12 a.m., she logged off her cash register, and the station was then completely shut down. Young called Angela Lopez, the station manager, at about 1:30 a.m., yelling and, according to Lopez, "out of control." Lopez told Young she would get someone there as soon as she could, and called Najera. Young also called Najera a second time, again yelling at Najera, and Najera told her she would be there as soon as possible. When Najera got to the station around 3:00 a.m., the

station was completely shut down; Najera restarted the pumps and started operating the station.

The next morning, Lopez called Karen Johnson, a Territory Manager for Exxon Mobil (Exxon). Johnson went to the station on September 17 and met with Lopez about the incident. Johnson also reviewed Young's personnel file, which reflected a number of verbal and written warnings to Young concerning absences, problems with customers, and incidents of insubordination.[1] Lopez had prepared forms for Young's termination. Johnson did not have authority to terminate employees; she contacted Exxon's human resources department in Houston and described the circumstances. The department concluded that termination was proper on grounds of insubordination and neglect of duty, based on Young's conduct during the early morning hours of September 16th, and provided an "endorse code" demonstrating that Young's termination was endorsed by the department. Johnson thereupon signed the separation form terminating Young's employment.

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[1] Young's personnel filed showed a warning on May 6, 2004, for not appearing for work the previous day and not calling, and a warning on June 23, 2004, for "coming late almost every day." The file shows a warning on July 3, 2004, when she failed to appear for work the previous day without calling, and then "gave [Lopez] an attitude in front of another cashier . . . ." A warning on August 1, 2004, stated Young "smashed another sales associate," should control her temper, and that her "attitude towards employees and customers is getting out of [hand]." Another warning on the same date stated it was the second warning for Young's temper; that she needed to control her attitude; and that "next time she could be subject to suspension or possible termination without any notice." This incident involved a customer who asked for assistance with a broken cappuccino machine and was "very irritated" when Young informed him "that money was more important" (apparently referring to customers in line to pay for purchases). A warning on September 11, 2004, involved a customer complaint that Young was unwilling to help the customer when she put money in the car wash and received no wash; the customer said Young was "rude and very disrespectful," and told Lopez she had "never experience[d] such treatment from a cashier . . . ." A warning dated September 13, 2004, stated that Young yelled at the assistant manager (Najera), rudely and in front of another sales associate.

A few months later, Young filed a charge with the Department of Fair Employment and Housing, alleging she was fired, harassed, and retaliated against by Lopez and other Exxon employees based on a mental disability. She requested and received a right-to-sue notice, and on February 9, 2005, filed a complaint against Exxon and Lopez. The complaint alleged causes of action against Exxon and Lopez for disability discrimination and harassment in violation of the Fair Employment and Housing Act (FEHA, Gov. Code, § 12900 et seq.) and for intentional infliction of emotional distress, as well as causes of action against Exxon for wrongful termination in violation of public policy and violation of Labor Code section 1102.5, subdivision (c).[2] The substance of Young's complaint was as follows.

As a result of a tumor removed from her brain when she was a child, Young suffers from a mental disability: visual and audio processing deficiencies,[3] manic depression and obsessive compulsive disorder. Exxon was not aware of Young's disability when she was hired in April 2004, but on July 3, 2004, Young was given a warning for showing disrespect to Lopez when Lopez reprimanded her for failing to appear for work without calling. Young then advised Lopez of her disability, telling Lopez that she needed to take medication "to avoid becoming manic and to control

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[2] Labor Code section 1102.5, subdivision (c), provides that an employer "may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation."

[3] According to Young, she has a "learning disability" with "no name," which she described this way: "I understand things; I comprehend things perfectly. But the speed at which my eyes and ears observe what is to be processed by the brain, the brain process itself is a slower process, not much slower. But when, over a period of time, just, just like when you time something, the lengthier the project or activity, the more noticeable the slowness might be noticed, even though it's really not that slow, but perfectly comprehendable." (Young also testified she worked as a chemistry tutor at school during the time she was employed by Exxon.)

compulsive behaviors associated with [her] mental and physical disabilities associated with her childhood brain surgery."[4]

Young's complaint alleged that shortly after Lopez learned of Young's disabilities, Young's co-workers "engaged in a continuous, severe and pervasive campaign of harassing" Young. This consisted of ignoring Young; physically obstructing her from moving around in the station's work area; telling customers, vendors and suppliers that they worked with a "psycho-retard"; and showing up late to work so that Young would be required to work longer hours. Young reported her co-workers' behavior to Lopez and asked Lopez to instruct them to stop the harassing behavior. Instead of doing so, Lopez retaliated against Young by telling her "this type of stuff just happens"; cutting Young's hours; refusing to schedule around Young's school schedule; refusing to allow Young to train new employees assigned to the graveyard shift; telling other employees that she (Lopez) did not know why Young was attending college because Young was retarded; and telling another Exxon Mobil manager that she (Lopez) was working with a "retard." On September 7, 2004, after Young "made a number of verbal complaints" to Lopez, Young drafted a handwritten letter about her complaints and gave it to Lopez along with print-outs from websites discussing the laws on disability discrimination. The "ultimate act of retaliation" occurred when Lopez told Young her employment was terminated. Young sought general, special and punitive damages, as well as attorney fees.

Exxon and Lopez moved for summary judgment or, in the alternative, summary adjudication of each cause of action and of Young's claim for punitive damages. They asserted there was no evidentiary support for Young's claims; even if Young could establish a prima facie case of disability discrimination, Exxon had legitimate, non-discriminatory reasons for terminating Young, and Young could not establish those

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[4] The record of this July 3, 2004 warning contains the notation that Young told Lopez that she "didn't mean it," has a brain problem and needs to take medication to control her attitude, and reacts badly when she misses her medication.

reasons were pretextual. As for Young's harassment claim, Exxon contended most of her allegations lacked evidentiary support, and her co-workers' conduct was not severe or pervasive enough to constitute disability harassment (and, as to her claim against Lopez, Young admitted in her deposition that Lopez herself did not harass her). Finally, Exxon contended the punitive damages claim failed as a matter of law because the alleged wrongful acts were not committed by officers or managing agents of Exxon.

The trial court granted the motion for summary judgment, finding Exxon showed legitimate, non-discriminatory and non-retaliatory reasons for terminating Young's employment, and Young presented no facts showing Exxon's stated reasons were pretextual.[5]

Lopez then filed a motion for attorney fees under Government Code section 12965, contending that Exxon, on behalf of Lopez, incurred substantial attorney fees defending Young's "unreasonable, frivolous, and meritless claims against Lopez individually." Lopez sought $18,750 in attorney fees, approximately one quarter of the total fees incurred in the action. (Exxon's counsel stated this was a fair and reasonable apportionment, as the harassment wrong targeting Lopez "made up approximately 1/4 of the case ….")

The trial court found that Young's claims against Lopez were "unreasonable, frivolous, meritless and vexatious," "without foundation" and "brought in subjective bad

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[5] The trial court stated in part: "[Young] has demonstrated that sometime between late June and August of 2004, [Young] told Ms. Lopez that she had a brain or mental condition that required her to be on medication. On August 1, 2004, the day after an incident involving pushing, shoving and hitting between [Young] and a co-worker, Amber, [Young] complained to Ms. Lopez that Amber had called her a 'psycho retard.' On September 7, 2004, [Young] complained to Ms. Lopez that her co-workers harassed her by calling her 'psycho retard,' physically obstructing her in her work area, and/or ignoring her. [Young's] evidence does not demonstrate 'weakness, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action.' [Citation.] Nor does [Young] offer any evidence that [Exxon] acted with discriminatory animus, or that there was a causal connection between her complaint on September 7 and her termination on September 16."

faith." However, while the fees claimed to be attributable to Lopez's defense were reasonable in amount, Exxon paid for the defense. The court observed that an award to Lopez "would actually be an award to Exxon, which does not claim [Young's] claims against it were frivolous." The trial court concluded this "does not seem right," and awarded nominal attorney fees of $1.00.

On April 4, 2006, judgment was entered in favor of Exxon and Lopez in the amount of $25,999.93 ($1.00 in attorney fees and $25,998.93 in costs). (Exxon admits the amount of costs shown in the judgment was erroneous, and the judgment should have reflected a total amount of $7,249.93 ($1.00 in attorney fees and $7,248.93 in costs).) Young appealed, and Exxon and Lopez cross-appealed the attorney fee award of $1.00.

## DISCUSSION

### I.

Young challenges the grant of summary judgment on several grounds. She claims there was evidence of severe and pervasive harassment, and the trial court failed to consider that Young's harassment claim could succeed without a finding that her termination was pretextual. Young also contends there was evidence of retaliation, including the temporal proximity between Young's September 7, 2004 complaint of harassment and her September 16 termination. She asserts her "irritability and attitude problem is a part of her disability," so terminating her for misconduct caused by her disability was functionally the same as firing her because of her disability. Young further claims the summary judgment hearing should have been continued to allow her to depose Karen Johnson and Wanda Najera.

We reject all of Young's contentions. Her evidence, as a matter of law, does not establish harassment sufficiently severe or pervasive to be actionable under the FEHA, and the trial court correctly concluded Young's evidence was insufficient to demonstrate that Exxon's stated reasons for Young's termination were pretextual. Because no triable issues of material fact exist, Exxon and Lopez were entitled to summary judgment. We discuss Young's various contentions in turn.

### A. Young failed to present evidence that Exxon's stated reasons for her termination were pretextual.

It is an unlawful employment practice for an employer to discriminate against a person because of a physical or mental disability. (Gov. Code, § 12940, subd. (a).) To establish a prima facie case of discrimination, Young had to show, in addition to her disability (which was not disputed for purposes of Exxon's summary judgment motion), that she was otherwise qualified to do her job, and was terminated because of her disability. (See *Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 886.) On a motion for summary judgment, Young had to establish a prima facie case and, because Exxon offered a legitimate, nondiscriminatory reason for her termination, had to "'offer evidence that the employer's stated reason is either false or pretextual, or evidence that the employer acted with discriminatory animus, or evidence of each which would permit a reasonable trier of fact to conclude the employer intentionally discriminated. [Citation.]'" (*Ibid.*) Young failed to do so.

First, none of Young's evidence supports the notion that there was any causal connection between her disability and her termination. There is no merit to Young's argument that her "irritability and attitude problem is a part of her disability," so terminating her for misconduct caused by her disability was functionally the same as firing her because of her disability. Young cites *Gambini v. Total Renal Care, Inc.* (9th Cir. 2007) 486 F.3d 1087, in which the court concluded a jury could reasonably infer that the plaintiff's violent outburst, which was one of the reasons for her termination, was a consequence of her bipolar disorder, "which the law protects as part and parcel of her disability." (*Id.* at p. 1094.) In *Gambini*, plaintiff was "in the throes of a medication change" and "struggling to perform her job because of her symptoms." (*Id*. at pp. 1094, 1091.) The court stated that "where an employee demonstrates a causal link between the disability-produced conduct and the termination, a jury must be instructed that it may find that the employee was terminated on the impermissible basis of her disability." (*Id.* at p. 1093.) In Young's case, however, her own evidence was that, so long as she took her medications on the prescribed schedule, she was "perfectly normal." She further testified

there was only one occasion during her employment at Exxon when she was not able to comply with her medication schedule, and that was the occasion that precipitated her revelation to Exxon of her disability, on July 3, 2004. Consequently, the conduct causing her termination could not have been caused by her disability, by her own admission.

Second, even assuming Young presented a prima facie case, her evidence did not suggest that Exxon's stated reasons for her termination – insubordination and neglect of duty – were pretextual, or that Exxon acted with discriminatory animus, so as to permit a reasonable trier of fact to conclude Exxon intentionally discriminated. It was undisputed that Young completely shut down the station, and Young admitted she "yelled out of frustration" when she called Lopez that night. Young also admitted at her deposition that Lopez, who recommended her termination, did not harass Young.[6] (While she claims Exxon, through Lopez, discriminated against her by failing to prevent harassment by her co-workers, there was (as we conclude below) no evidence of actionable harassment.) In any event, Young's evidence simply did not support the proposition that Young's disability was a motivating factor in her termination.

**B. Young's claims of retaliation are without merit.**

The FEHA protects employees against retaliation for filing a complaint or opposing conduct unlawful under the FEHA. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 472.) To prove a retaliation claim, either under the FEHA or in a claim for wrongful termination in violation of public policy, Young must show she engaged in a protected activity, Exxon subjected her to an adverse employment action, and there was a causal link between the protected activity and the employer's action. (*Loggins v. Kaiser Permanente International* (2007) 151 Cal.App.4th 1102, 1108-1109 (*Loggins*).) Again, if a prima facie case is established, and Exxon shows a legitimate, non-retaliatory reason for its adverse employment action, Young must produce evidence that reason was pretextual and the adverse employment action was actually taken in

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[6] "Q. … Is it your testimony that [Lopez] did not harass you, as you understand harassment? [¶] A. That is correct."

retaliation for her complaint. (See *Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 990 (*Nadaf-Rahrov*).) Again, Young failed to do so.

As to her termination, Young argues she complained to Lopez of disability discrimination on September 7, 2004, and that the causal connection between her complaint and the termination "is established by their closeness in time." Young is mistaken. Temporal proximity does not alone satisfy the burden of showing pretext. (*Loggins, supra,* 151 Cal.App.4th at pp. 1112-1113 ["temporal proximity, although sufficient to shift the burden to the employer to articulate a nondiscriminatory reason for the adverse employment action, does not, without more, suffice also to satisfy the secondary burden borne by the employee to show a triable issue of fact on whether the employer's articulated reason was untrue and pretextual"]; cf. *Nadaf-Rahrov, supra,* 166 Cal.App.4th at pp. 990-991 [evidence of what plaintiff described as hostility toward her (failure to inform her of her rights, refusal to discuss vacant positions with her, failure to provide workers' compensation forms) did not support an inference of retaliatory intent and did not demonstrate animus toward plaintiff, much less animus based on her request for accommodation of her disability].)

Young also claims that Exxon retaliated against her "for being disabled" and for complaining of harassment by cutting her hours; refusing to schedule around Young's school schedule; assigning her to graveyard shifts; and requiring her to continue to work after her shift ended if her replacement did not show up. These claims likewise are without evidentiary support. First, except for the dates of August 26 (when Young says she called Exxon's human resources department) and September 7, Young does not otherwise identify any dates or approximate dates on which she claims to have complained of harassment. Second, as to cutting Young's hours, the evidence showed a decrease in Young's hours after September 7, but the decrease coincided with Young's return to school and her desire to work fewer hours when in school.[7] As to graveyard

[7] At her deposition, Young testified that her hours never increased; they always decreased, and began to decrease when her disability was discovered (which Young's

shifts, Young was not scheduled for any graveyard shifts after she complained to Lopez on September 7. And the evidence showed all employees worked after their shifts ended if their replacements did not appear. Accordingly, even if these scheduling claims could be said to rise to the level of an adverse employment action (see *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1036, 1052 [employer's adverse action must "materially affect the terms and conditions of employment" to be actionable]), the evidence showed no causal connection between any complaints of harassment and the employer's scheduling decisions.

### C. Young failed to present evidence of severe or pervasive harassment.

Young correctly points out that the trial court did not explicitly address her claim of harassment, and that she was not required to show her termination was pretextual in order to succeed on a harassment claim. However, she must present evidence the harassment was severe or pervasive, and this she did not do. We briefly review the applicable principles.

In *Muller v. Automobile Club of So. California* (1998) 61 Cal.App.4th 431 (*Muller*),[8] the court considered the requirements for a claim of harassment based on a mental disability, and looked for guidance to cases addressing the requirements for a hostile environment claim of sexual harassment. (*Id.* at p. 446.) For an actionable claim, the cases require harassment that is sufficiently severe or pervasive that it alters the conditions of employment and creates an abusive working environment. (*Ibid.*) "'In determining what constitutes "sufficiently pervasive" harassment, the courts have held

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evidence showed was July 3, 2004). Exxon's payroll records, however, showed Young's hours more than doubled after the two-week period July 1 – July 14, 2004, continued at the doubled rate for the remainder of the summer, and then were halved during the two-week period September 9 – September 22, 2004.

[8] *Muller* was disapproved on other grounds in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031, fn. 6.

that acts of harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature. [Citation.]' [Citation.]" (*Ibid.*) As our Supreme Court subsequently stated (observing that California courts have adopted the same standard under the FEHA), the United States Supreme Court has made it clear that, under federal law, "'conduct must be extreme to amount to a change in the terms and conditions of employment . . . .'" (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 130.) The standard is an objective one; the conduct must create an environment that a reasonable person would view as hostile or abusive. (*Ibid.*)

In this case, Young has not produced evidence of extreme conduct altering the terms and conditions of employment, or a concerted pattern of harassment of a repeated or routine nature. Her evidence consisted principally of testimony from a co-worker, Angie Lorea, who, when Young filed her complaint, signed a declaration stating that she witnessed Young "being subjected to ongoing harassment" throughout the approximately six months she worked with Young. Specifically, Lorea's February 10, 2005 declaration said that:

- Co-workers (identified as Amber, Edgar and Iris) "would harass Laura Young." They would:
    1. ignore Young, and "would use their bodies to obstruct [Young's] attempts to move" within their working area;
    2. "call in sick or call in to tell [Young] they would be late" so she would have to work more hours;
    3. "inform customers, other employees, vendors and suppliers that they worked with a 'Psycho-Retard' . . . and the customers, vendors and suppliers would ask if the 'Psycho-Retard' was working . . . ."
- Lopez told her (Lorea) that she did not see why Young was attending college because Lopez believed she (Young) was retarded.
- Lorea complained about the harassment to Lopez, who did nothing about it and told her "'this type of stuff just happens' . . . ."

At her deposition, however, Lorea, while continuing to maintain that Young's co-workers, particularly Amber, "would make fun of [Young] all the time," testified that she never heard Amber make any of her remarks (calling Young "psycho bitch" and "retard") in Young's presence. Young found out about the comments only after Amber, who thought Young knew about the comments, went to Young and apologized. (The record does not show when this occurred. However, Lorea testified that her conversation with Lopez to complain about the co-worker comments, when Lopez replied, "This kind of stuff just happens," occurred "towards the end" of Young's employment.) In addition:

- Lorea retracted her statement that Lopez referred to Young as retarded, stating that Lopez did not use the word "retarded."
- Lorea admitted that Iris did not treat Laura in the same way Amber and Edgar did. She admitted she had never seen Iris "block" Young.[9]
- Lorea admitted that she had never seen Edgar use his body to obstruct Laura or otherwise use his body in an offensive manner towards Laura, and that Edgar "ignored [Young], not obstructed her . . . ." (Lorea later said she did observe Edgar, on two occasions, "just getting in the way, not moving, not responding to [Young] asking him to move.") Lorea talked to Edgar about the name-calling and "not responding to" Young. Edgar told Lorea that Young was "psycho," he didn't like Young and was not going to talk to her or respond to her, and he didn't want anything to do with Young because she had said something to him in front of a customer that upset him.
- Lorea witnessed Amber using her body to obstruct Laura "maybe two times," and "[i]t was just blocking, moving around, not moving out of the

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[9] Lorea testified: "Iris wasn't like Amber and Edgar. It wasn't as bad. She was aware, but because her and Amber would talk and her and Edgar, but she really didn't jump on the bandwagon. She didn't treat Laura like they did."

way . . . ." Lorea heard Amber inform a customer that she worked with a psycho retard "[p]robably two or three times."

- With respect to her declaration statement that "customers, vendors and suppliers" referred to Young as the "psycho-retard," Lorea testified this referred, not to any customer, but to a man who performed repairs for the station's carwash; Lorea said the carwash repairman came in one day and asked her "if the psycho retard was there . . . ."[10]
- Lorea admitted she never heard Edgar or Iris tell any vendor, customer or supplier that they worked with a psycho retard.
- Lorea never observed any interactions between Young and any second person working in the cashiers' area (which everyone agreed was an extremely small, cramped area), but Young told her about an occasion on which Amber "was moving her body in front of [Young]" so that Young could not get into the safe to place money there.[11]
- Lorea's statement in her declaration that Amber, Edgar and Iris would call in sick or call in to tell Young they would be late "so that [Young] would have to work more hours" was not something she personally witnessed; she "just heard about it."

Young's deposition testimony added little to the details of the alleged harassment; she claims to have heard Amber on the phone with Betty Bramblett, a manager at another

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[10] Young's deposition testimony was that she was not aware that vendors had referred to her as "psycho retard" until after she was fired.

[11] Lorea also testified Young told her Lopez was cutting her hours, and that Young would show her the schedules and complain about it. But the documentation showed no significant change in Young's hours, after she advised Lopez of her disability, until she went back to school in September.

service station, referring to her (Young) as a "psycho retard."[12] (This occurred after an incident on July 30, 2004, which resulted in a written warning to Young after co-worker Amber complained that Young hit her; Young says Amber pushed her several times.)

In the end, Young's evidence of harassment she experienced directly consisted of the July 30 shoving incident with Amber, for which Young was "written up" when Amber complained, the subsequent comment she heard Amber make to Bramblett that she (Young) was a "psycho-retard," and co-workers ignoring her and getting in her way or blocking her on several occasions (in an admittedly very cramped working space).[13] In addition, the evidence showed her co-workers made denigrating comments about her in her absence: one comment by co-worker Edgar to Lorea that Young was "psycho," two or three comments Lorea heard co-worker Amber make to customers, to the effect that she worked with a "psycho-retard," one comment by the carwash repairman to Lorea, and Lopez's comment to Lorea said she didn't understand why Young was attending college because she wasn't going to accomplish anything. Young was unaware of the comments of the carwash repairman and Lopez until after she was fired, and was unaware of the other comments until Amber mentioned them and Young subsequently questioned Lorea about them – which occurred at some unspecified time but, accordingly to Lorea, toward the end of Young's employment.

We cannot conclude that Young's evidence shows conduct "severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive" (*Miller v. Department of Corrections, supra,* 36 Cal.4th at p. 462) or that Young was subjected to "'a concerted pattern of

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[12] A declaration from Bramblett stated that Young's allegation that Amber referred to Young as a "psycho-retard" in the conversation was "absolutely false."

[13] Young also asserts Lopez harassed her by refusing to schedule Young's work hours around her school schedule. Young's own testimony shows, however, that her complaints on this score began no later than early June, at least a month before July 3, 2004, when she revealed her disability to Lopez.

harassment of a repeated, routine or a generalized nature.'" (*Muller, supra*, 61 Cal.App.4th at p. 446.) Case precedents demonstrate that actionable disability harassment requires much more than the sporadic remarks to which Young was subjected *in absentia*. Whether a work environment is hostile or abusive is determined by looking at all the circumstances, including "'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.'" (*Miller, supra*, 36 Cal.4th at p. 462.) Here, the coworkers' remarks were certainly hurtful and offensive, when they became known, but they can scarcely be characterized as frequent. The conduct was not physically threatening, and did not interfere with Young's work performance.

The circumstances in *Shaver v. Independent Stave Co.* (8th Cir. 2003) 350 F.3d 716 (*Shaver*) are instructive. In *Shaver*, the court concluded that verbal harassment of the plaintiff did not rise to the level of actionable disability harassment. (*Id.* at p. 721.) The plaintiff had had a portion of his brain replaced with a metal plate. His co-workers (some of them supervisors) referred to him as "platehead" over a period of about two years, and several co-workers suggested he was stupid; a much uglier remark was made on another occasion, but outside plaintiff's presence, "a fact that lessens but does not undo its offensiveness." (*Ibid.*) But, "[t]aken as a whole," the harassment was not actionable; it was not so severe as to result in psychological treatment; it was not "explicitly or implicitly threatening," and did not involve "harassing conduct of a physical nature . . . ." (*Id.* at p. 722; see also *Muller, supra*, 61 Cal.App.4th at p. 446 [three isolated remarks, two made jokingly by a supervisor, could not reasonably be viewed as a concerted pattern of disability harassment, but rather fell into the category of "'occasional, isolated, sporadic, or trivial' instances of inappropriate conduct"].)

As the *Shaver* court observed, "anti-discrimination laws do not create a general civility code," and conduct that is "merely rude, abrasive, unkind, or insensitive does not come within the scope of the law." (*Shaver, supra*, 350 F.3d at p. 721; see *Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 1007-1008

["Legislature did not enact a 'general civility code' when it passed the FEHA into law"].) So it is here.[14]

### D. The trial court did not abuse its discretion in refusing to continue the hearing so that Young could take additional depositions.

Young argues the trial court should have continued the summary judgment hearing so that Young could depose Wanda Najera (the assistant manager) and Karen Johnson (the territory manager). There was no abuse of discretion.

Code of Civil Procedure section 437c mandates a continuance of a summary judgment hearing "[i]f it appears from the affidavits submitted . . . that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented . . . ." (Code Civ. Proc., § 437c, subd. (h).) The party seeking the continuance must provide supporting declarations that "detail the specific facts that would show the existence of controverting evidence," and "must justify the need, by detailing both the particular essential facts that may exist and the specific reasons why they cannot then be presented." (*Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 715-716 (*Lerma*).) A declaration "stating that unspecified essential facts may exist" is not sufficient. (*Id.* at pp. 715-716.)

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[14] Because Young has no viable claims against Exxon for disability discrimination, disability harassment or retaliation, it necessarily follows that her claims for wrongful termination in violation of public policy, retaliation in violation of the Labor Code, and intention infliction of emotional distress likewise fail. Nor need we address Young's claim there were triable issues of fact on her punitive damages claim (on which Exxon sought summary adjudication in the event its summary judgment motion was denied). On appeal, Young also claims Exxon and Lopez failed to accommodate her disability, by "prevent[ing her] from going home to take medication when she was asked to work longer than her scheduled shift." No evidence supports this claim, as by Young's own testimony, after the July 3, 2004 occasion on which she told Lopez of her disability, she (Young) was never without her medication.

Here, a declaration from Young's counsel, Karl Gerber, stated that "[c]ritical testimony and evidence exist that cannot be presented to the Court . . . ," and that Johnson's testimony was "critically important for the punitive damage and termination aspects of the case . . . ." A declaration from another of Young's lawyers, Benjamin Kennedy, stated that counsel "believe[d] [Young would] be severely prejudiced if she is not permitted to have the depositions of Karen Johnson and Wanda Najera who provided declarations in support of Defendants' summary judgment motion." The only reason stated to justify why the depositions had not been taken was that defense counsel had "failed to provide any dates" for the depositions.[15]

The trial court did not abuse its discretion in concluding that Young did not make the necessary showing that the depositions of Najera or Johnson "might disclose facts essential to justify opposition." The declarations Young presented were entirely conclusory in nature. They did not detail in any way "the particular essential facts that [might] exist" (*Lerma, supra,* 120 Cal.App.4th at p. 716) and that they expected to elicit from Najera or Johnson to controvert Exxon's evidence. So, even if we were to conclude that Young presented good reasons for failing to notice the depositions on a timely basis – itself a dubious proposition – the conclusory statements that the testimony was "critically important" do not suffice to comply with the requirement to present facts "that would show the existence of controverting evidence." (*Lerma, supra,* 120 Cal.App.4th at p. 715.)

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[15] Defense counsel submitted a reply declaration showing that Young wanted to take the depositions in early December, which was agreeable to Exxon, but had to check attorney Gerber's schedule for dates; Exxon was never given specific dates and was never requested to provide specific dates; and the only reason for delay in the depositions was not any conduct on Exxon's part, but Young's failure to notice the depositions until December 21, when the depositions were set for January 2, 2006.

**II.**

Exxon and Lopez cross-appealed from the order and judgment awarding attorney fees of only $1.00 to Lopez. They assert that because the trial court found Young's claims against Lopez individually were "unreasonable, frivolous, meritless and vexatious," and the fees "claimed to be attributable to the defense of Ms. Lopez [were] reasonable in amount," the trial court abused its discretion in nonetheless refusing to award the $18,750.00 requested to Lopez. We find no abuse of discretion by the trial court.

We review the principles governing attorney fee awards in FEHA actions, and then turn to the trial court's order in this case.

In actions under the FEHA, the court, in its discretion, may award reasonable attorney fees to the prevailing party. (Gov. Code, § 12965, subd. (b).) California courts have followed federal law, and hold that, in exercising its discretion, a trial court should ordinarily award attorney fees to a prevailing plaintiff, unless special circumstances would render an award of fees unjust. A prevailing defendant, however, should be awarded fees under the FEHA only "in the rare case in which the plaintiff's action was frivolous, unreasonable, or without foundation." (*Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 Cal.App.4th 859, 864 (*Rosenman*).) *Rosenman* cites the high court's observation that the strong equitable considerations supporting an attorney fee award to a prevailing plaintiff – including that fees are being awarded against a violator of federal law, and that the federal policy being vindicated by the plaintiff is of the highest priority – are not present in the case of a prevailing defendant. (*Id.* at p. 865, citing *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 418-419 (*Christiansburg*).) *Rosenman* imposed "a nonwaivable requirement that trial courts make written findings" reflecting the criteria supporting an award "in every case where they award attorney fees in favor of defendants in FEHA actions." (*Rosenman, supra*, 91 Cal.App.4th at p. 868.) *Rosenman* added that the trial court "should also make findings as to the plaintiff's ability to pay attorney fees, and how large the award should be in light of the plaintiff's financial situation." (*Id.* at p. 868, fn. 42.)

Here, we have the unusual case in which an FEHA action is found to be frivolous as to one defendant but not the other, the latter of whom incurred, was liable for, and paid all the fees. Exxon says the issue to be decided is whether an individual defendant in an FEHA suit may obtain attorney fees as the prevailing party, even when the employer has defended the individual and the individual has not personally incurred or paid any attorney fees. Exxon points out that, in other statutory and contractual contexts, there are many circumstances in which courts have found that a prevailing party need not actually incur or pay attorney fees in order to be entitled to an award. We do not quarrel with that principle, but that is not the pertinent question in this case. The question is whether the trial court abused its discretion in refusing to award fees to a defendant who did not incur or pay them, when the fee award would redound to the benefit of another defendant which is *not* entitled to an award of fees. To this question, our answer, in this case, is "no." In other words, while a trial court should ordinarily award attorney fees to a prevailing defendant in an FEHA action when the court finds the plaintiff's action was frivolous, the court has the discretion not to do so if the actual beneficiary of the attorney fee award is a defendant to which an award could not otherwise be made.

Our conclusion is consonant with the principles described in *Rosenman* for fee awards in FEHA cases, and does not conflict in any way with the cases under other statutes that permit attorney fee awards to prevailing parties who have not paid or incurred fees.

First, *Rosenman* and its predecessor cases tell us the standard by which to measure the exercise of the trial court's discretion in awarding attorney fees to a prevailing defendant in an FEHA case: namely, only in the "rare case" in which the plaintiff's action was frivolous, unreasonable or without foundation. (*Rosenman, supra*, 91 Cal.App.4th at p. 864.) But *Rosenman* does *not* tell us that the trial court *must* award fees to a prevailing defendant on a frivolous FEHA claim, no matter what the circumstances, and we decline to read *Rosenman* and the other cases as depriving the court of its discretion once it finds the plaintiff's action was frivolous or groundless. (Cf. *Christiansburg, supra*, 434 U.S. at p. 421, emphasis added ["a district court may *in its*

*discretion* award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation"].) *Rosenman* itself suggests circumstances in which the court could appropriately reduce or deny a prevailing defendant fees in a frivolous case, when it tells us that the trial court must consider the plaintiff's ability to pay attorney fees, and that an award should not subject the plaintiff to financial ruin. (*Rosenman, supra*, 91 Cal.App.4th at p. 868, fn. 42.) And, just as there are circumstances in which a prevailing plaintiff, who ordinarily should recover attorney fees, may not recover them – when special circumstances make an award unjust – the same is true of a prevailing defendant in a frivolous case. This is just such a case: where the fee award to the prevailing defendant would redound to the benefit of another defendant who is not entitled to recover fees.

Second, as Exxon points out, there are many cases in which the courts have awarded attorney fees to prevailing parties who, like Lopez, are not actually liable for or have not incurred or paid fees. But in all those cases, the attorney fee award actually benefits the prevailing party or an entity which has provided the services and would otherwise not be compensated for them. (See, e.g., *Lolley v. Campbell* (2002) 28 Cal.4th 367, 370-371 [award under Labor Code provisions to indigent employee represented without charge by the Labor Commissioner]; *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1088 [award under Civil Code section 1717 to entity represented by in-house counsel]; *Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 681, 683-684 [award under Code of Civil Procedure section 1021.5 to plaintiffs who incurred no personal liability for services of attorneys employed by publicly funded agencies].)[16]

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[16] See also *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1192 [award under Civil Code section 1717 to defendants whose fees were actually paid by a third party; defendants were contractually liable for payment if third party had failed to pay]; *Beverly Hills Properties v. Marcolino* (1990) 221 Cal.App.3d Supp. 7, 9, 11 [award under Civil Code section 1717 to defendant represented by legal services group; section 1717 provides reciprocal remedy for a prevailing party who has not actually incurred legal fees, but whose attorneys have incurred costs and expenses in defending the prevailing party]; *Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1410 [award under

In this case, by contrast, an attorney fee award to Lopez, who did not incur or pay fees, would benefit only Exxon, which, under the statute and case law, was not entitled to fees on its own account.

Third, there was no evidence that Exxon incurred fees on Lopez's behalf that it would not have incurred had Lopez not been named as a defendant. While the trial court found the amount of fees "claimed to be attributable to the defense of Ms. Lopez" – one quarter of the total – was "reasonable in amount," it appears from the supporting documentation that those fees, for the most part, would have been incurred by Exxon whether or not Lopez (who was in any event a key actor in Young's lawsuit) was named as a defendant. Counsel's summary of ten "key activities undertaken on Angela Lopez's behalf" in defending Young's claims contains only one item that is even arguably particular to Lopez as a defendant: "[r]esearch and consideration regarding whether Lopez was a proper individual defendant or a sham defendant and whether the case might be removed to federal court."[17] Exxon neither identified nor estimated fees that were solely attributable to Lopez's presence in the case as a defendant, and it appears that any such fees were, at most, de minimis.

Fourth, *Rosenman* instructs that trial courts should "make findings as to the plaintiff's ability to pay attorney fees, and how large the award should be in light of the plaintiff's financial situation."[18] (*Rosenman, supra*, 91 Cal.App.4th at p. 868, fn. 42.)

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Civil Code section 1717 to prevailing defendant who did not ultimately incur attorney fees because his insurers provided his defense]; *Trout v. Carleson* (1974) 37 Cal.App.3d 337, 343 [award under Welfare and Institutions Code to plaintiff whose attorney worked for agency providing free legal services].)

[17] The other nine key activities undertaken on Lopez's behalf were responding to interrogatories and requests for documents on behalf of Lopez, meetings with Lopez and other witnesses, the case management conference, the hearing on summary judgment, drafting discovery, the motion for summary judgment, declarations by various witnesses, depositions, and preparation of the memorandum of costs and motion for attorney fees.

[18] As we have seen, *Rosenman* also expressly imposes a "nonwaivable requirement" that trial courts make written findings reflecting the applicable standard "in every case

The trial court declined to award fees except (at defense counsel's request) in the nominal amount of $1.00, and there was no reason to make any findings on Young's ability to pay. We note, however, that a February 20, 2006 declaration from Young showed she was a student who lived with her mother; owned no real property; earned $5,000 from her employment in 2005; had a $2,000 balance on her credit card; and would have to file for bankruptcy if required to pay $18,750 in attorney fees. These circumstances lend further support to the court's observation that it was "not moved to exercise its discretion in that way," that is, when the award to Lopez would actually be an award to Exxon "[r]ather than 'leveling the playing field' in frivolous FEHA cases" such as the one against Lopez.

In short, despite its finding that Young's case against Lopez was frivolous and vexatious, the trial court had the discretion to deny attorney fees to Lopez. Because the award would benefit only Exxon, a defendant which was not otherwise entitled to an award and which did not show it incurred any significant fees on Lopez's behalf that it would not have incurred in any event, we see no abuse of discretion in the trial court's decision.

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where they award attorney fees in favor of defendants in FEHA actions." (*Rosenman, supra*, 91 Cal.App.4th at p. 868.) The trial court here found Young's action against Lopez was without foundation and brought in subjective bad faith, but did not describe the evidentiary support for those conclusions.

## DISPOSITION

The judgment, modified to reflect costs of $7,248.93 rather than $25,998.93, is affirmed. The parties shall bear their own costs on appeal.

***CERTIFIED FOR PARTIAL PUBLICATION***

COOPER, P. J.

We concur:

RUBIN, J..

FLIER, J.