

1                                    IN THE UNITED STATES DISTRICT COURT  
 2                                    FOR THE NORTHERN DISTRICT OF CALIFORNIA

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 4 DIANE MCKINZY,

No. C 10-1866 CW

5                                    Plaintiff,

ORDER GRANTING IN  
 PART AND DENYING IN  
 PART DEFENDANTS'

6                                    v.

MOTIONS FOR SUMMARY  
 JUDGMENT (Docket No.  
 48); DENYING  
 PLAINTIFF'S MOTION TO  
 CONTINUE DISCOVERY  
 (Docket No. 56); AND  
 DENYING DEFENDANTS'  
 MOTION TO MODIFY THE  
 COURT'S PRETRIAL  
 SCHEDULING ORDER  
 (Docket No. 81)

7 NATIONAL RAILROAD PASSENGER  
 CORPORATION, also known as  
 8 AMTRAK; WILFRED HUBBARD; DOES I  
 through X, inclusive,

9                                    Defendants.  
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United States District Court  
 For the Northern District of California

13                                    Defendants National Railroad Passenger Corporation (Amtrak)  
 14 and Wilfred Hubbard seek summary judgment or, in the alternative,  
 15 partial summary judgment in their favor on all claims filed by pro  
 16 se Plaintiff Diane McKinzy. Docket No. 48. McKinzy has opposed  
 17 the motion. In addition, McKinzy moves to extend the discovery  
 18 cutoff. Docket No. 56. Having considered all of the parties'  
 19 submissions and oral argument, the Court grants Defendants' motion  
 20 in part and denies it in part.<sup>1</sup>

22                                    BACKGROUND

23                                    On October 1, 2007, McKinzy began work as Assistant Passenger  
 24 Conductor for Amtrak, based in Oakland, California. Amended

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 27 <sup>1</sup>To the extent that the Court relied upon evidence to which  
 28 Defendants object, those objections are overruled. To the  
 extent the Court did not rely on evidence to which the  
 parties objected, the objections are overruled as moot.

1 Declaration of Diane McKinzy, Exh. A. Pursuant to a collective  
2 bargaining agreement, the first ninety to 120 days of her  
3 employment, including training, were considered probationary. Id.  
4 McKinzy's new hire training was supervised by Rick Peseau, a  
5 Senior Officer at Amtrak's Employee Development Department at the  
6 Oakland station. Declaration of Rick Peseau in support of  
7 Defendants' Supplemental Brief at ¶ 2-3.  
8

9 In January 2008, McKinzy was transferred to the San Francisco  
10 station where she was required to restart her probationary period.  
11 McKinzy claims that the decision to transfer her and require her  
12 to restart her probationary status was discriminatory based on  
13 sex. In support of this claim, McKinzy attested that she was the  
14 only female in a training class that was transferred from Oakland  
15 to San Francisco, due to lack of work. McKinzy Amended Dec. at  
16 2:22-24. At the time McKinzy was transferred, two male assistant  
17 conductors from Oakland were also transferred for retraining in  
18 San Francisco and were required to restart their probationary  
19 period. Peseau Dec. at ¶ 6.  
20

21 Peseau attested that McKinzy was "let go" from Oakland  
22 "principally" because Amtrak experienced a reduction in its  
23 workforce due to inclement weather that led to cancellation of  
24 certain train service. Id. at ¶ 7. However, Peseau also stated  
25 that her performance in Oakland was poor; she was late to class in  
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1 some instances, failed to bring her equipment and did not complete  
2 her homework.<sup>2</sup> Id.

3 In response to McKinzy's charge of discrimination, which she  
4 later submitted to the Equal Employment Opportunity Commission,  
5 Amtrak stated that "there was not enough work and too many persons  
6 on the Oakland Crew Base to allow [McKinzy] to complete her  
7 probation hours." McKinzy Amended Dec., Ex. B. The letter does  
8 not mention any poor performance by McKinzy. Amtrak stated that  
9 on January 8, 2008, McKinzy was offered and accepted a move to the  
10 CalTrain Crew Base in San Francisco, with the proviso that she  
11 would restart her probationary period.<sup>3</sup> According to Amtrak,  
12 McKinzy was required to receive classroom training and would work  
13 for a ninety to 120 day probationary period thereafter.

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16 On January 31, 2008, McKinzy worked her last day in Oakland,  
17 and, on February 5, 2008, she transferred to San Francisco.  
18 McKinzy Amended Dec., Ex. B. McKinzy was assigned to Amtrak's  
19 Caltrain line that ran between San Francisco and San Jose. As  
20 noted earlier, Sturken supervised McKinzy and Hubbard. According  
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23 <sup>2</sup> Alan Sturken, the trainmaster in charge of the trains  
24 on which McKinzy and Hubbard later worked, attested to the  
25 same facts regarding McKinzy's performance in Oakland.  
26 However, the Court disregards his statements because they  
27 lack foundation.

28 <sup>3</sup> Amtrak's response states that McKinzy accepted the  
offer to join CalTrain on January 8, 2009, but because  
McKinzy did not work for Amtrak during 2009, it appears that  
2008 is the correct date.

1 to Sturken, McKinzy began work as a probationary assistant  
2 conductor in San Francisco on March 10, 2008.

3 McKinzy became a member of the United Transportation Union on  
4 March 21, 2008, McKinzy Decl., Ex. H. According to the letter  
5 offering her employment with Amtrak, McKinzy was required to join  
6 the union within sixty calendar days after she first performed  
7 compensated service in her position. Amended McKinzy Decl., Ex.  
8 A. However, Amtrak's response to McKinzy's EEOC complaint stated  
9 that if she completed her probationary period--a period of ninety  
10 to 120 actual work days--in San Francisco, following her transfer  
11 from Oakland, then she would be required to join the union.  
12 McKinzy Amended Dec., Ex. B.

14 McKinzy claims that Hubbard, while working as the conductor,  
15 sexually harassed her on several occasions when they worked  
16 together on the Caltrain line. McKinzy contends that most of the  
17 harassment occurred during trips on "baseball trains," referring  
18 to trips bringing passengers to and from San Francisco for Giants  
19 games at AT&T park.

21 When asked about the first incident of harassment by Hubbard,  
22 McKinzy stated that she and Hubbard had been talking. No one was  
23 present at the time. During the discussion, which may have  
24 involved rules for boarding the train, Hubbard said, "[Y]ou know,  
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1 perhaps you might consider being intimate with me." McKinzy Dep.<sup>4</sup>  
2 at 207:13-14. She responded, "Don't say that to me." Id. at  
3 218:1-4. Hubbard said, "Okay" and did not speak to her for the  
4 rest of the day. Id. at 218:8-12.

5 The second incident, as McKinzy describes it, occurred during  
6 a trip on a "baseball train." Id. at 232:3-5. The train was at a  
7 stop, prior to boarding time, and McKinzy had a break. Id. at  
8 233:1-9. While standing near the doors to the first cab, Hubbard  
9 approached her and asked her to have sex. Id. at 234:8-15.  
10 McKinzy declined and told him politely to stop propositioning her.  
11 Id. at 234:19-24. When Hubbard did not respond, McKinzy walked  
12 away and proceeded with her job duties. Id. at 235:10-19, 237:11-  
13 17. McKinzy felt very uncomfortable. Id. at 234:19-21.

14 McKinzy testified that the next incident also occurred on a  
15 train. Hubbard reportedly told McKinzy, "You know, I'd like to  
16 have sex with you. I don't pay for pussy, you know. I don't pay  
17 for sex. What do you think about it?" Id. at 240:18-23. Hubbard  
18 "kept asking [McKinzy] to have sex with him." Id. at 239:1-2.  
19 The conversation went on for about two to four minutes. Id. at  
20 240:2-14. McKinzy asked Hubbard to stop talking to her in that  
21 manner, but he responded, "Well, just think about it." Id. at 21-  
22 22. McKinzy felt that Hubbard was not taking her seriously. Id.

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26 <sup>4</sup> All excerpts from McKinzy's deposition cited in this  
27 order were included as Exhibit A to Duyen T. Nguyen's  
28 Declaration in Support of Defendants' Motion for Summary  
Judgment.

1 at 241:18. In deposition, McKinzy was asked why Hubbard would  
2 have shown such persistence. Her response indicates that she felt  
3 pressure because Hubbard was monitoring her job performance and  
4 she was a probationary employee. Id. at 239:6-11.

5 McKinzy described a subsequent incident that occurred while  
6 she was working in San Francisco. At the time, she was "clonking  
7 the brakes." Clonking entails bending over to tighten the train  
8 brakes to prevent it from rolling. Id. at 243:15-25. The task  
9 required McKinzy to pull up and down on the adjuster attached to  
10 the brake, the resistance increasing with each pull. Id. at  
11 243:17-22, 246:22-247:11, 248:4-17. As McKinzy faced the train,  
12 trying to keep it from moving, bent over in a near squat, clonking  
13 the brakes, Hubbard approached her from behind and touched her  
14 buttocks close to her "private area." Id. at 244:1-15, 248:14-19.  
15 McKinzy testified, "I was clonking the brakes and he came up  
16 behind me and touched me on my butt. But the way I was bent over  
17 it was a little--he got a little closer to my private area as well  
18 as my butt because the way I had to bend over to clonk the  
19 brakes." Id. at 244:1-5. She yelled. Id. at 248:22. She jumped  
20 up and said, "What are you doing." Id. at 248:25-249:5. She  
21 asked Hubbard, "Why did you touch my butt? Why did you do that?  
22 Why are you touching me?" Id. at 251:12-13. Hubbard responded,  
23 "I don't know. I just felt like it." Id. at 251:14-15. Hubbard  
24 apologized. Id. at 251:2-19.  
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1 McKinzy also testified as to what was apparently a fifth  
2 incident of harassment, which occurred on a day when a train had  
3 derailed. Again, Hubbard broached the topic of whether McKinzy  
4 would have sex with him. Id. at 273:7-274:14.

5 Hubbard denies having ever harassed McKinzy or attempting to  
6 pursue anything other than a working relationship with her.

7  
8 Sturken testified that he reviewed Amtrak's records and found  
9 two occasions when Hubbard and McKinzy worked together. On April  
10 16, 2008 both worked on train number sixty-six, departing at  
11 4:27 pm from San Francisco to San Jose, and on train number  
12 eighty-nine, departing at 6:50 pm from San Jose to San Francisco.  
13 On April 19, 2008 both worked together again on train number  
14 forty-six departing San Francisco to San Jose at 8:00 pm, and on  
15 train number fifty-one departing at 10:30 pm from San Jose to San  
16 Francisco. McKinzy insists that she worked with Hubbard more than  
17 twice and continues to seek records to this effect.

18  
19 Amtrak has an anti-harassment and discrimination policy,  
20 memorialized in its employee handbook, "Amtrak Standards of  
21 Excellence." McKinzy acknowledged that she received the handbook  
22 on September 24, 2007. Id., Ex. B. The policy states Amtrak's  
23 commitment to managing the company and administering programs free  
24 from sex discrimination and in conformance with all applicable  
25 federal, state and local laws. Declaration of Susan Venturelli,  
26 Ex. A. McKinzy testified that in training she was informed that  
27 she could submit complaints to management, the human resources  
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1 department or hot-line telephone number. McKinzy Dep. at 167:24-  
2 168:3.

3 In her deposition, McKinzy testified that conductors,  
4 including Hubbard, supervised her work, although she conceded that  
5 they could not fire or suspend her. McKinzy Dep. at 169:13-15,  
6 169:24-25; 179:2-4. According to McKinzy, a conductor could give  
7 a report about an assistant conductor that could lead to his or  
8 her termination. Id. at 169:14-18. McKinzy faulted Hubbard's  
9 declaration for failing to disclose his duties giving orders to  
10 assistant conductors and providing a report as part of the  
11 assistant conductor's performance evaluation. In his declaration,  
12 Hubbard does not deny that he was McKinzy's supervisor.

14 McKinzy testified that she called Sturken twice, leaving two  
15 voice mail messages. When asked to relay what she said "verbatim"  
16 in the messages, McKinzy responded that in the first message she  
17 asked Sturken to call her back, stating, "It's very important. I  
18 feel very uncomfortable about a situation and I need you to call  
19 me back." Id. at 174:3-9. The second time she called, McKinzy  
20 repeated, "It's very important. I need you to call me back." Id.  
21 at 174:10-11. According to McKinzy, Sturken never called back.  
22 Sturken disputes that McKinzy ever left a voice message on his  
23 phone asking him to call her back. Sturken Dec. at ¶ 12. McKinzy  
24 conceded that she "never completely made a complaint to Al  
25 Sturken." McKinzy Dep. at 171:23-25. McKinzy testified that she  
26 never saw Sturken on any of her trains. Id. at 316:11-12.  
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1 McKinzy testified that she called Charles Herndon twice and  
2 left similar messages. McKinzy Dep. at 174:13-16. Her testimony  
3 does not disclose whether she received a call back. Herndon  
4 attests that he never received a voice message from her asking him  
5 to call her back. Declaration of Charles Herndon at ¶ 8. McKinzy  
6 has provided no indication of when she made the phone calls to  
7 Sturken and Herndon.

8  
9 In addition to the harassment by Hubbard, McKinzy testified  
10 that an individual named Schraeder made disparaging comments to  
11 her based on her being a woman. McKinzy Dep. at 274:21-23.  
12 McKinzy does not provide Schraeder's first name or point to any  
13 evidence detailing the nature of his comments. Schraeder's  
14 comments do not appear to be related to McKinzy's harassment or  
15 discrimination claim.

16  
17 On May 21, 2008, McKinzy received a "Letter of Counseling"  
18 reminding her of her obligation to report to work on time. At  
19 that point, McKinzy had arrived late to work on five occasions.  
20 The counseling letter provided language in the General Code of  
21 Operating Rules and Amtrak's Standard of Excellence addressing  
22 attendance. Sturken Dec., Exh. E. On May 29, 2008, McKinzy  
23 arrived twenty-nine minutes late.

24  
25 On June 6, 2008, McKinzy met with Herndon, Sturken and  
26 another man whose name she could not recall, although he may have  
27 been Mark Collins. McKinzy was informed that she was terminated  
28 and received a letter stating that her application for employment

1 as an assistant conductor with Amtrak was "disapproved." During  
2 the meeting, McKinzy asked why Sturken and Herndon had failed to  
3 call her back and informed the men directly, for the first time,  
4 that she had been experiencing harassment. That day McKinzy also  
5 met in person with Sheila,<sup>5</sup> an Amtrak Human Resources officer, and  
6 told her that Hubbard had been harassing her. Id. at 319:19-  
7 320:13.  
8

9 On December 17, 2008, McKinzy submitted to the EEOC and the  
10 Department of Fair Employment and Housing a charge of  
11 discrimination. In her charge against Amtrak, McKinzy stated the  
12 following:

13 My most recent position was Assistant Conductor. From  
14 March through May 2008, I was sexually harassed by  
15 Wilford Hubbard Conductor. I worked with Mr. Hubbard  
16 5 or six times and each time, he stated that he wanted  
17 to f\*ck me. He also touched my buttock while we were  
18 working. I called the Train Masters, Al Sterkin and  
19 Charles Herndon, to report the sexual harassment, but  
20 my calls were never returned. On June 6, 2008, I was  
21 terminated.

22 Respondent stated that I was terminated because I did  
23 not pass my probation.

24 I believe I was discriminated against because of my  
25 sex (female) and retaliated against for engaging in  
26 protected activity, in violation of Title VII of the  
27 Civil Rights Act of 1964, as amended.

28 On November 30, 2011, based on its investigation, the EEOC  
was unable to conclude that the information obtained establishes

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<sup>5</sup> McKinzy does not indicate Sheila's last name.

1 statutory violations under Title VII. Declaration of Elias Munoz,  
2 Ex. C.

3 McKinzy has brought suit against Amtrak for (1) sex  
4 discrimination in violation of the California Fair Employment and  
5 Housing Act (FEHA); (2) sexual harassment in violation of the  
6 FEHA; (3) wrongful termination; (4) breach of the covenant of good  
7 faith and fair dealing; (5) negligent infliction of emotional  
8 distress; (6) intentional infliction of emotional distress; and  
9 (7) negligent hiring, training and supervision. In addition,  
10 McKinzy has sued Hubbard, as an individual, for (1) negligent  
11 infliction of emotional distress; (2) intentional infliction of  
12 emotional distress; (3) assault, (4) battery; and (5) punitive  
13 damages.  
14

15 DISCUSSION

16 I. Claims Against Amtrak

17 A. Sex Discrimination

18 Defendants contend that McKinzy has insufficient evidence to  
19 support her claim for sex discrimination. As noted previously,  
20 McKinzy asserts that the decision to transfer her from Oakland to  
21 San Francisco and require her to start her probationary period  
22 amounted to sex discrimination. McKinzy testified that Schraeder  
23 made derogatory comments about her being a woman. However, she  
24 does not argue or point to evidence that Schraeder was involved in  
25 the adverse employment action. Therefore, direct evidence of  
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1 Schraeder's bias does not support McKinzy's claim for sex  
2 discrimination.

3 California courts apply the framework established by  
4 McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to consider  
5 circumstantial evidence of discrimination in resolving motions for  
6 summary judgment on claims under the FEHA. Guz v. Bechtel Nat.,  
7 Inc., 24 Cal. 4th 317, 354 (2000). To establish a prima facie  
8 case of discrimination under the FEHA, McKinzy must show that  
9 (1) she belongs to a protected class, (2) she was qualified for  
10 the position, (3) she was subject to an adverse employment action,  
11 and (4) similarly situated individuals who were not members of the  
12 protected class were treated more favorably. Aragon v. Republic  
13 Silver State Disposal, Inc., 292 F.3d 654, 658 (9th Cir. 2002).  
14

15 McKinzy's claim fails under the McDonnell Douglas test  
16 because she cannot satisfy the fourth element. Undisputed  
17 evidence shows that two other male assistant conductors were  
18 transferred from Oakland to San Francisco at the same time as  
19 McKinzy and both were required to restart their probationary  
20 status.  
21

22 B. Harassment

23 "California courts have adopted the same standard [applied  
24 under Title VII] for hostile work environment sexual harassment  
25 claims under the FEHA." Lyle v. Warner Bros. Television Prods.,  
26 38 Cal. 4th 264, 279 (2006). Accordingly, to prevail McKinzy must  
27 establish that "she was subjected to sexual advances, conduct, or  
28

1 comments that were (1) unwelcome, (2) because of sex, and  
2 (3) sufficiently severe or pervasive to alter the conditions of  
3 her employment and create an abusive work environment." Id.  
4 (internal citations omitted). "In addition, she must establish  
5 the offending conduct was imputable to her employer." Id. Amtrak  
6 argues that McKinzy cannot establish sufficiently severe or  
7 pervasive harassment or harassment imputable to the company.  
8

9 "With respect to the pervasiveness of harassment, courts have  
10 held an employee generally cannot recover for harassment that is  
11 occasional, isolated, sporadic, or trivial; rather, the employee  
12 must show a concerted pattern of harassment of a repeated,  
13 routine, or a generalized nature." Id. at 283. To determine  
14 whether conduct rises to the level of actionable harassment,  
15 California courts consider "(1) the nature of the unwelcome sexual  
16 acts or words (generally, physical touching is more offensive than  
17 unwelcome verbal abuse); (2) the frequency of the offensive  
18 encounters; (3) the total number of days over which all of the  
19 offensive conduct occurs; and (4) the context in which the  
20 sexually harassing conduct occurred." Fisher v. San Pedro  
21 Peninsula Hospital, 214 Cal. App. 3d 590, 610 (1989).  
22

23 Here, Hubbard's conduct, if proven, could be found to rise to  
24 the level of actionable harassment because it amounts to a pattern  
25 of escalating harassment that included persistent, explicit,  
26 unwelcome propositions to have sex. McKinzy testified that she  
27 repeatedly rejected Hubbard's invitations to have sex. Finally,  
28

1 Hubbard touched her buttocks and nearly touched her "private  
2 area."

3 This case is distinguishable from the cases upon which Amtrak  
4 relies. In Anderson v. Family Dollar Stores of Arkansas, Inc.,  
5 579 F.3d 858, 862 (8th Cir. 2009), the plaintiff experienced  
6 repeated back rubs and cradling of her chin; the case did not  
7 involve sexual touching of the degree of offensiveness found in  
8 this case, nor did the alleged harasser make direct, in-person  
9 propositions for sex. In Jones v. Flagship Intern., 793 F.2d 714,  
10 716-17 (1986), the accused harasser propositioned the plaintiff  
11 while on a business trip to Detroit and again during a business  
12 trip to San Francisco. The accused later made a sexually  
13 suggestive comment, telling the plaintiff that she was "off the  
14 hook," because a friend was interested in her. In this case,  
15 however, there is evidence that Hubbard demonstrated greater  
16 persistence and touched McKinzy offensively.  
17

18  
19 Other cases cited by Amtrak are no longer good law. The  
20 opinion in Corbitt v. Home Depot U.S.A, Inc., 573 F.3d 1223, 1241  
21 (11th Cir. 2009), was vacated by Corbitt v. Home Depot U.S.A.,  
22 Inc. (Corbitt II), 589 F.3d 1136 (11th Cir. 2009). Although  
23 Corbitt II likewise found no actionable harassment under Title  
24 VII, that opinion was also subsequently vacated. Corbitt v. Home  
25 Depot U.S.A., Inc., 611 F.3d 1379 (2010). The Supreme Court and  
26 the Ninth Circuit have expressly rejected the standard applied in  
27 Rabidue v. Osceola Refining Co., 805 F.2d 611, 615 (6th Cir.  
28

1 1986).<sup>6</sup> See, Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993)  
2 (holding that a "discriminatorily abusive work environment, even  
3 one that does not seriously affect employees' psychological well-  
4 being" may be actionable.); Ellison v. Brady, 924 F.2d 872, 877  
5 (9th Cir. 1991).

6 Because McKinzy concedes that she did not complain about the  
7 harassment to Amtrak authorities until the day she was terminated,  
8 and she does not point to any other evidence that Amtrak knew or  
9 should have known about the misconduct, she cannot sue Amtrak for  
10 harassment by a co-worker. Cal. Govt. Code § 12940(j)(1)  
11 ("Harassment of an employee, an applicant, or a person providing  
12 services pursuant to a contract by an employee, other than an  
13 agent or supervisor, shall be unlawful if the entity, or its  
14 agents or supervisors, knows or should have known of this conduct  
15 and fails to take immediate and appropriate corrective action.")

16  
17 However, McKinzy asserts that Hubbard was her supervisor.  
18 "[U]nder the FEHA, an employer is strictly liable for all acts of  
19 sexual harassment by a supervisor." State Dept. of Health  
20 Services v. Superior Ct. (McGinnis), 31 Cal. 4th 1026, 1042 (2003)  
21 (emphasis in original). Amtrak asserts that Hubbard was not a  
22 supervisor because trainmasters, here Sturken, were in charge of  
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25 \_\_\_\_\_  
26 <sup>6</sup> The workplace at issue in Rabidue included posters of  
27 naked and partially dressed women and an employee who  
28 customarily called women "whores," "cunt," "pussy," and  
"tits," referred to the plaintiff as a "fat ass," and  
specifically stated, "All that bitch needs is a good lay."

1 overseeing the trains. This does not disprove that Hubbard was  
2 also McKinzy's supervisor.

3 Amtrak also argues Hubbard was not a supervisor because he  
4 was a union member, not management. Amtrak's argument is  
5 unpersuasive because the definition of "supervisor" under the FEHA  
6 is not based upon the distinction between management and labor.  
7 The definition states,<sup>7</sup>

8  
9 "Supervisor" means any individual having the  
10 authority, in the interest of the employer, to hire,  
11 transfer, suspend, lay off, recall, promote,  
12 discharge, assign, reward, or discipline other  
13 employees, or the responsibility to direct them, or to  
14 adjust their grievances, or effectively to recommend  
that action, if, in connection with the foregoing, the  
exercise of that authority is not of a merely routine  
or clerical nature, but requires the use of  
independent judgment.

15 Cal. Govt. Code § 12926(r). McKinzy provides evidence that  
16 Hubbard had the responsibility to direct her on the job. This  
17 dispute of fact precludes summary judgment that she was not  
18 sexually harassed by her supervisor.

19 Next, Amtrak argues that the avoidable consequences doctrine  
20 provides a complete defense to McKinzy's sexual harassment claim.

21 "Under the avoidable consequences doctrine as recognized in  
22 California, a person injured by another's wrongful conduct will  
23 not be compensated for damages that the injured person could have  
24

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26 \_\_\_\_\_  
27 <sup>7</sup> Section 12926 is part of the FEHA and subdivision (r)  
28 was added in 1999 to include the definition of supervisor  
employed by the Agriculture Labor Relations Act. Chapman v.  
Enos, 116 Cal. App. 4th 920 (2004).



1 avoided by reasonable effort or expenditure." McGinnis, 31 Cal.  
2 4th at 1043. McGinnis explained, in the context of a claim for  
3 damages for hostile environment sexual harassment by a supervisor,

4 An employee's failure to report harassment to the  
5 employer is not a defense on the merits to the  
6 employee's action under the FEHA, but at most it  
7 serves to reduce the damages recoverable. And it  
8 reduces those damages only if, taking account of the  
9 employer's anti-harassment policies and procedures and  
10 its past record of acting on harassment complaints,  
11 the employee acted unreasonably in not sooner  
12 reporting the harassment to the employer.

13 Id. at 1049.

14 Thus, the doctrine of avoidable consequences is a defense  
15 only to damages. Here, there is evidence that McKinzy did not  
16 make a reasonable effort to complaint about the harassment.  
17 McKinzy did not call Amtrak's hotline or a Human Resources  
18 representative after she failed to receive a response to her  
19 voicemail messages, even though she was aware of those avenues for  
20 making a complaint. If a jury, taking account of Amtrak's anti-  
21 harassment policies and procedures and its past record of acting  
22 on harassment complaints, found that McKinzy was not reasonably  
23 diligent in reporting Hubbard's misconduct, Amtrak could be  
24 shielded from damages.

25 Summary judgment in favor of Amtrak on McKinzy's sexual  
26 harassment claim is denied, although McKinzy's damages may be  
27 limited.  
28

1 C. Failure to Prevent Harassment and Discrimination

2 Included in McKinzy's first cause of action for sexual  
3 harassment and discrimination in violation of the FEHA is a claim  
4 against Amtrak for failure to prevent harassment, pursuant to  
5 California Government Code section 12940(k). Amtrak moves for  
6 summary judgment as to this claim. Amtrak contends that a claim  
7 for failure to prevent harassment cannot lie in the absence of a  
8 finding of actual harassment, Trujillo v. North Co. Transit Dist.,  
9 63 Cal. App. 4th 280, 288-89 (1998). Amtrak argues McKinzy does  
10 not present sufficient evidence of harassment. As explained  
11 above, McKinzy has presented evidence upon which a reasonable jury  
12 could find Amtrak liable for sexual harassment by a supervisor.  
13 Accordingly, Amtrak's motion for summary judgment on this claim is  
14 denied.  
15

16 D. Violation of Public Policy

17 Amtrak construes McKinzy's third cause of action for  
18 "Violation of Public Policy" as a claim for unlawful discharge in  
19 violation of public policy. McKinzy alleges that she was  
20 discharged because of her complaints about sexual harassment and  
21 discrimination. Compl. at ¶ 11. Amtrak argues that it is  
22 entitled to summary judgment because McKinzy's underlying claims  
23 of sexual harassment and discrimination are unsupported. However,  
24 as noted above, McKinzy has provided sufficient evidence of  
25 Amtrak's liability for sexual harassment by a supervisor.  
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1           Nevertheless, summary judgment is warranted on this claim  
2 because McKinzy admits that she did not complain about the  
3 harassment to Sturken, Herndon and the Human Resources Department  
4 until after she received notice of her termination. Therefore,  
5 Amtrak could not have decided to terminate McKinzy based on her  
6 complaints.

7           E. Breach of Covenant of Good Faith and Fair Dealing

8           McKinzy's second cause of action is for breach of the  
9 covenant of and good faith and fair dealing based on Amtrak's  
10 permitting and failing to prevent sexual harassment. The terms  
11 and conditions of employment create a species of contract between  
12 an employer and employee, such that a covenant of good faith and  
13 fair dealing is implied. Foley v. Interactive Data Corp., 47 Cal.  
14 3d 654, 683-84 (1988).  
15

16           Defendants rely upon Smith v. City and County of San  
17 Francisco, 225 Cal. App. 3d 38 (1990), to argue that a claim for  
18 breach of the implied covenant of good faith and fair dealing may  
19 not be stated where there is no implied-in-fact contract.  
20 However, McKinzy was employed by Amtrak and the employee handbook  
21 Amtrak provided to her includes a provision stating Amtrak's  
22 policy barring sexual harassment. This evidence supports the  
23 existence of an agreement by Amtrak to provide McKinzy with a  
24 harassment-free workplace. Foley, 47 Cal. 3d at 680 ("In the  
25 employment context, factors apart from consideration and express  
26 terms may be used to ascertain the existence and content of an  
27  
28

1 employment agreement, including the personnel policies or  
2 practices of the employer.”).

3           Nevertheless, McKinzy's claim fails because she lacks  
4 evidence of a breach of the covenant. The obligation imposed by  
5 the covenant of good faith and fair dealing "is measured by the  
6 provisions of the particular agreement at issue." Kuhn v.  
7 Department of General Services, 22 Cal. App. 4th 1627, 1637  
8 (1994). "In essence, it is an implied promise that neither party  
9 will take any action extraneous to the defined relationship  
10 between them that would frustrate the other from enjoying the  
11 benefits under the agreement to which the other is entitled." Id.  
12 at 1637-38. McKinzy admits that Amtrak informed her in training  
13 about several avenues for reporting sexual harassment.  
14 Furthermore, McKinzy admits that she never actually complained to  
15 Amtrak authorities about the harassment prior to her termination.  
16 Thus, McKinzy has insufficient evidence to show that Amtrak took  
17 action to interfere with her enjoyment of a harassment-free  
18 workplace.  
19

20  
21           Summary judgment as to McKinzy's claim for breach of the  
22 covenant of good faith and fair dealing is granted in favor of  
23 Amtrak.

24           F. Negligent Infliction of Emotional Distress

25           Amtrak argues that McKinzy's claims for negligent and  
26 intentional infliction of emotional distress should be summarily  
27  
28

1 dismissed because they are preempted by the Federal Employers'  
2 Liability Act, 45 U.S.C. § 51, et seq.

3 The FELA makes a railroad common carrier in interstate  
4 commerce liable in damages to any person suffering injury while  
5 that person is employed by such carrier in such commerce.<sup>8</sup> "In  
6 1906, Congress enacted the FELA to provide a federal remedy for  
7 railroad workers who suffer personal injuries as a result of the  
8 negligence of their employer or their fellow employees."

9 Atchison, Topeka and Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 561  
10 (1987). "A primary purpose of the Act was to eliminate a number  
11 of traditional defenses to tort liability and to facilitate  
12 recovery in meritorious cases." Id. Under the FELA, "an action  
13 may be brought in a district court of the United States, in the  
14 district of the residence of the defendant, or in which the cause  
15 of action arose, or in which the defendant shall be doing business  
16  
17

18 \_\_\_\_\_  
19 <sup>8</sup> The FELA, 45 U.S.C. § 51, states in relevant part

20 Every common carrier by railroad while engaging  
21 in commerce between any of the several States or  
22 Territories . . . shall be liable in damages to  
23 any person suffering injury while he is employed  
24 by such carrier in such commerce, or, in case of  
25 the death of such employee, to his or her  
26 personal representative, for the benefit of the  
27 surviving widow or husband and children of such  
28 employee . . . for such injury or death  
resulting in whole or in part from the  
negligence of any of the officers, agents, or  
employees of such carrier, or by reason of any  
defect or insufficiency, due to its negligence,  
in its cars, engines, appliances, machinery,  
track, roadbed, works, boats, wharves, or other  
equipment.

1 at the time of commencing such action." 45 U.S.C. § 56. The  
2 "FELA provides the sole and exclusive remedy for injured employees  
3 of railroad carriers engaged in interstate commerce. . . 'such  
4 liability can neither be extended nor abridged by common or  
5 statutory laws of the State.'" Wildman v. Burlington Northern R.  
6 Co., 825 F.2d 1392, 1395 (9th Cir. 1987).

7  
8 Supreme Court authority cited by Amtrak holds that claims for  
9 negligent infliction of emotional distress are cognizable under  
10 the FELA. Consolidated Rail Corporation v. Gottshall, 512 U.S.  
11 532, 549-50 (1994) (holding that "claims for damages for negligent  
12 infliction of emotional distress are cognizable under FELA").  
13 Defendants do not argue that McKinzy's claim cannot be pursued  
14 under the FELA. Accordingly, McKinzy may pursue her claim for  
15 negligent infliction of emotional distress, although the claim  
16 will be governed by the FELA, not California law.<sup>9</sup>  
17  
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19  
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21 <sup>9</sup> The Ninth Circuit has stated that, under the FELA, an  
22 employer may be liable for the intentional misconduct of an  
23 employee on a theory of direct negligence. Taylor v.  
24 Burlington Northern R. Co., 787 F.2d 1309, 1314 (9th Cir.  
25 1986). That is, "an employer is liable if it fails to  
26 prevent reasonably foreseeable danger to an employee from  
27 intentional or criminal misconduct." Id. at 1315 (citing  
28 Harrison v. Missouri Pacific Railroad, 372 U.S. 248 (1963)  
(per curiam)). However, Defendants have not argued that  
McKinzy will be unable to meet this standard. Nor have they  
addressed whether, under the FELA, harassment by a purported  
supervisor is imputed to the employer in a claim for  
negligent infliction of emotional distress.

1 G. Intentional Infliction of Emotional Distress

2 Amtrak argues that the FELA precludes McKinzy's claim for  
3 intentional infliction of emotional distress. In Abate v.  
4 Southern Pacific Transp. Co., 993 F.2d 107, 112 (5th Cir. 1993),  
5 the case upon which Amtrak relies, the Fifth Circuit held that the  
6 FELA preempted the plaintiff's state law claim for "infliction of  
7 emotional distress by outrageous conduct." Abate does not hold  
8 that a claim for intentional infliction of emotional distress is  
9 not actionable under the FELA. The parties do not point to any  
10 controlling authority addressing this issue. However, in Higgin  
11 v. Metro-North R.R. Co., 318 F.3d 422, 425 (2nd Cir. 2003), a  
12 sexual harassment case, the Second Circuit held that claims of  
13 intentional infliction of emotional distress are actionable under  
14 the FELA. Defendants do not argue that Plaintiff cannot pursue  
15 this claim under the FELA, although the claim will be governed by  
16 the FELA, not California law.<sup>10</sup>

17  
18  
19 Therefore, summary judgment in favor on Amtrak on this claim  
20 is denied.

21 H. Negligent Hiring, Supervision and Training

22 Summary judgment in favor of Amtrak on McKinzy's claim for  
23 negligent hiring, training and supervision is warranted because  
24

25  
26 <sup>10</sup> As noted earlier, the Ninth Circuit has indicated that in  
27 certain circumstances, under the FELA, an employer may be liable  
28 for the intentional misconduct of an employee. Taylor, 787 F.2d at  
1309.

1 McKinzy has not pointed to evidence that Amtrak was negligent in  
2 its training, hiring or supervision of Hubbard.

3 II. Claims Against Hubbard

4 Defendants assert that the FELA preempts McKinzy's common law  
5 claims for infliction of emotional distress, assault and battery  
6 against Hubbard. However, none of the authorities cited by  
7 Defendants demonstrates that the FELA precludes an employee's  
8 individual liability for common law tort claims. The FELA states,  
9 "Every common carrier by railroad while engaging in  
10 commerce . . . shall be liable in damages" for negligence.  
11 45 U.S.C. § 51. It does not provide the exclusive remedy against  
12 individuals who are employees of railroad companies.

14 A. Intentional Infliction of Emotional Distress

15 Defendants argue that McKinzy lacks evidence sufficient to  
16 proceed on her claim against Hubbard for intentional infliction of  
17 emotional distress. "A cause of action for intentional infliction  
18 of emotional distress exists when there is (1) extreme and  
19 outrageous conduct by the defendant with the intention of causing,  
20 or reckless disregard of the probability of causing, emotional  
21 distress; (2) the plaintiff's suffering severe or extreme  
22 emotional distress; and (3) actual and proximate causation of the  
23 emotional distress by the defendant's outrageous conduct." Kelley  
24 v. Conoco Cos., 196 Cal. App. 4th 191, 215 (2011). "A defendant's  
25 conduct is outrageous when it is so extreme as to exceed all  
26  
27  
28



1 bounds of that usually tolerated in a civilized community." Id.  
2 (internal quotation marks omitted).

3 Defendants' argument that Hubbard is entitled to summary  
4 judgment is limited to the first element of McKinzy's claim for  
5 intentional infliction of emotional distress. A jury could find  
6 that Hubbard's highly inappropriate comments, combined with the  
7 alleged offensive touching, rise to the level of extreme or  
8 outrageous conduct.  
9

10 Summary judgment in favor of Hubbard on McKinzy's claim for  
11 intentional infliction of emotional distress is denied.

12 B. Negligent Infliction of Emotional Distress

13 Defendants' sole argument that McKinzy cannot establish a  
14 claim against Hubbard for negligent infliction of emotional  
15 distress is that she cannot show "negligent conduct" by Hubbard  
16 because she cannot prove that he negligently touched her. Amtrak  
17 misunderstands the nature of the claim, which is that Hubbard's  
18 conduct was intentional but that he was negligent with respect to  
19 causing her emotional harm. Summary judgment as to this claim is  
20 denied.  
21

22 C. Assault

23 An assault is an act committed by a defendant with the intent  
24 to cause apprehension of an immediate injury coupled with a  
25 reasonable apprehension of an immediate touching. Defendants  
26 correctly point out that the evidence forecloses a claim for  
27 assault because McKinzy testified that she did not see Hubbard as  
28

1 he approached her. Summary judgment in favor of Hubbard as to the  
2 assault claim is granted.

3 D. Battery

4 "A battery is any intentional, unlawful and harmful contact  
5 by one person with the person of another . . . A harmful contact,  
6 intentionally done is the essence of a battery." Ashcraft v.  
7 King, 228 Cal. App. 3d 604, 611 (1991). "A contact is 'unlawful'  
8 if it is unconsented to." Id. Accordingly, the elements for a  
9 claim for battery are (1) the defendant touched the plaintiff or  
10 caused the plaintiff to be touched with the intent to harm or  
11 offend him or her; (2) that the plaintiff did not consent to the  
12 touching; (3) that the plaintiff was harmed or offended by the  
13 defendant's conduct; and (4) that a reasonable person in the  
14 plaintiff's situation would have been offended by the touching.  
15 Judicial Council of California Civil Jury Instructions (2012),  
16 CACI No. 1300.

17  
18  
19 Contrary to Defendants' assertion, McKinzy's testimony that  
20 she did not see Hubbard touch her does not preclude her from  
21 proving that he intentionally touched her body. Defendants' brief  
22 acknowledges that the intent necessary to constitute battery is  
23 not intent to cause harm, but intent to do the act that causes  
24 harm. McKinzy also testified that when she asked why Hubbard  
25 touched her, he responded that he did it because he felt like it.  
26 That Hubbard denies having touched McKinzy in an improper manner  
27  
28

1 raises a material dispute as to whether a battery occurred.  
2 Summary judgment as to McKinzy's battery claim is denied.

3 E. Punitive Damages

4 Defendants point to no authority for the proposition that the  
5 FEELA shields Hubbard from a claim for punitive damages made  
6 against him as an individual. Defendants assert in a conclusory  
7 fashion that McKinzy will be unable to present evidence sufficient  
8 to recover punitive damages. Defendants have failed to  
9 demonstrate the absence of a material, factual dispute as to  
10 whether McKinzy is entitled to punitive damages.  
11

12 III. Motion to Continue Discovery

13 This Court's September 28, 2010 case management order set  
14 June 28, 2011 as the deadline for fact discovery. On June 28,  
15 2011 McKinzy moved to continue the discovery deadline based on a  
16 generalized assertion that her child has had health problems. An  
17 extension of the time period for discovery is unwarranted given  
18 the limited nature of the dispute presented in this case, the  
19 length of time allowed for discovery, McKinzy's lack of diligence  
20 in pursuing discovery, and her vague explanation for why she was  
21 unable to pursue discovery earlier. McKinzy's motion for an  
22 extension is denied.  
23

24 IV. Motion for Relief from Pretrial Scheduling Order

25  
26 Defendants request a sixty day continuance of the final  
27 pretrial conference and the trial date based on its recent  
28 substitution of counsel. The facts in dispute in this case are

1 limited, as are the legal issues involved. Furthermore,  
2 Defendants substituted counsel at a late date by their own  
3 volition, knowing the trial schedule. Accordingly, good cause for  
4 a continuance has not been established. Defendants' motion for  
5 relief is denied.

6 CONCLUSION

7  
8 Amtrak and Hubbard's joint motion for summary judgment is  
9 denied in part and granted in part. Docket No. 48. Summary  
10 judgment in favor of Amtrak is granted with respect to McKinzy's  
11 claims for sex discrimination, breach of the covenant of good  
12 faith and fair dealing, unlawful discharge in violation of public  
13 policy, and negligent hiring, training and supervision. McKinzy's  
14 claims against Amtrak for sexual harassment, and negligent and  
15 intentional infliction of emotional distress will proceed to  
16 trial. Summary judgment in favor of Hubbard is granted with  
17 respect to McKinzy's claim for assault. However, Hubbard's motion  
18 for summary judgment is denied as to the claims for intentional  
19 and negligent infliction of emotional distress, battery and  
20 punitive damages.

21  
22 McKinzy's motion to extend discovery is denied. Docket 56.  
23 Defendants' motion for relief from the pretrial scheduling order  
24 is denied. Docket No. 81.

25  
26 The parties shall appear for a final pretrial conference on  
27 January 11, 2012 at 2:00 pm. Trial shall begin on January 23,  
28 2012 at 8:30 am. It appears that a jury trial has been waived by

1 failure to demand jury timely. If either party disagrees, they  
2 must brief the issue as a motion in limine. Deadlines and  
3 requirements related to the pretrial conference are provided in  
4 the Court's standing order for pretrial preparation, attached to  
5 this Order.

6 The case is referred to Magistrate Judge Jacqueline Scott  
7 Corley to conduct a further settlement conference if she has any  
8 availability between now and the trial date. If she does, Judge  
9 Corley will inform the parties of the date and the parties must  
10 attend.

11  
12 IT IS SO ORDERED.

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15 Dated: 12/23/2011

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CLAUDIA WILKEN  
United States District Judge