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FILED
LOS ANGELES SUPERIOR COURT
JAN 09 2008
JOHN A. CLARKE, CLERK
V. SINO
BY VICTOR E. SINO-CRUZ, DEPUTY

ORIGINAL

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
CENTRAL DISTRICT

MARY NELSON,
Plaintiff,
v.
AMERICAN APPAREL, INC., a California
corporation; DOV CHARNEY, an individual;
MARTIN BAILEY, an individual; and DOES 1
TO 100, inclusive,
Defendants.

CASE NO. BC 333028
Date: January 9, 2008
Time: 8:30 a.m.
Location: 53
Judge: Honorable John P. Shook
**DEFENDANTS AMERICAN APPAREL,
INC., DOV CHARNEY AND MARTIN
BAILEY'S TRIAL BRIEF**
File Date: May 4, 2005
Trial Date: January 9, 2008

1 **I. INTRODUCTION**

2 Plaintiff Mary Nelson's ("Plaintiff" or "Nelson") case is a house of cards supported by
3 nothing more than a set of outlandish and exaggerated accusations, which Plaintiff repeats *ad*
4 *naseum*. Mere repetition, however, does not equal evidentiary proof, of which Plaintiff's case is
5 utterly lacking. As discussed in more detail below, Plaintiff will not prevail at trial on any of her
6 varied but equally baseless claims.

7 **II. PERTINENT FACTUAL AND PROCEDURAL BACKGROUND**

8 **A. American Apparel, Dov Charney, and Martin Bailey**

9 American Apparel is an apparel company based in Los Angeles, California, that provides
10 basics brands for young adults and people of all ages, with both wholesale and retail divisions
11 globally. The company is known for its cutting-edge, sexualized advertising and product
12 branding, which have contributed to significant brand awareness and a cult status worldwide. It
13 was founded by Dov Charney, who now serves as its Chief Executive Officer. Martin Bailey is
14 the Vice President of Operations.

15 American Apparel uses a vertically integrated business model. Knitting, dyeing, sewing,
16 photography, marketing, distribution, and design all happen in American Apparel's facilities in
17 Los Angeles. American Apparel has been lauded for its American-made clothes and "sweatshop
18 free" environment. Indeed, the average sewer with experience at American Apparel makes
19 approximately \$25,000/yr (i.e. \$12/hr, well over twice the federal minimum) and, its more skilled
20 sewers can make upwards of \$20 an hour. American Apparel also offers parking, subsidized
21 public transport, subsidized lunches, free onsite massages, a bike lending program, a program of
22 paid days off, ESL classes, subsidized, affordable health insurance (\$8/week, \$1-3/week for
23 children), as well as job security and full-time employment. Moreover, American Apparel
24 recently opened an on-site medical clinic, which offers primary care services along with pediatric,
25 urgent and preventative health care.

26 **B. Mary Nelson**

27 In or about November 2003, American Apparel retained Nelson as an independent
28 contractor to perform services as a sales representative. Prior to joining American Apparel,

1 Nelson had extensive experience as both an independent contractor and in the fashion industry.
2 Indeed, immediately prior to joining American Apparel, Nelson operated her own apparel
3 company, Wizdumb, which used sexualized advertising similar to the advertising about which (as
4 discussed below) Nelson now complains.

5 After approximately one year of service, in November 2004, Nelson demanded \$26,000 in
6 “unpaid” commissions and a salary of \$125,000 for the upcoming year – in other words,
7 **DOUBLE** her then current salary. Upon review of its sales figures, American Apparel determined
8 that Nelson did not make enough sales to earn a commission sufficient to cover the \$60,000 draw
9 that American Apparel had paid her throughout the course of the year, let alone justify just an
10 extraordinary increase in compensation. In addition to Nelson’s low sales, American Apparel was
11 also concerned that Nelson’s erratic behavior, including her tardiness, crying on the job, issues
12 with alcohol and appearing for events hung-over, was impacting negatively on the Company and
13 her performance. This was the apparent result of the turmoil in Plaintiff’s personal life in the fall
14 of 2004, including her break up with a long time boyfriend, the death of her cousin, her inability to
15 form or maintain long lasting friendships or relationships, her financial problems due to her
16 spendthrift ways, her difficulties in her relationship with her parents, her father’s prolonged
17 illness, and her lack of career success.

18 Based on all these factors, American Apparel decided to transition Nelson out of her role
19 as Sales Manager. On or about January 20, 2005, Charney met with Nelson to discuss the
20 specifics of this transition. Nelson, assuming that she was being terminated, refused to discuss
21 any possible transition and immediately ceased performing services for American Apparel.
22 Significantly, prior to leaving American Apparel, Nelson *never* complained about the work place
23 environment at American Apparel, or that she believed she had been sexually harassed.

24 **C. Nelson’s Lawsuit.**

25 Plaintiff initiated this case in May 2005. It was the first time she complained about the
26 conduct she alleges was harassing. She amended her complaint in September, 2005 to assert two
27 defamation claims, which were dismissed on summary adjudication. Plaintiff is trying eleven
28 claims that can be reduced to the following categories: (1) Plaintiff’s claim of a hostile work

1 environment; (2) Plaintiff's claim of discrimination; (3) Plaintiff's claim for retaliatory
2 termination; (4) Plaintiff's wage and hour claims, including failure to pay overtime or provide
3 meal or rest breaks; and (5) Plaintiff's claim for unfair trade practices and injunctive relief.

4 In short, Nelson alleges that certain conduct constituted a hostile work environment giving
5 rise to sexual harassment, and that she was fired for complaining about the same. Specifically:

- 6 • In or about September 2003, Nelson met with Charney and Tony Augustine,
7 a male American Apparel employee, at Charney's home in Eagle Rock,
8 during which Charney left the room to change into the now infamous "cock
9 sock."
- 10 • Nelson and Augustine attended an additional meeting with Charney at his
11 home at which Charney wore only his underwear.
- 12 • A videotape of Charney in his underwear at the workplace in the presence
13 of both male and female employees was displayed on the American Apparel
14 website.
- 15 • As a fit model for American Apparel clothing, including the Company's
16 underwear, Charney wears underwear in the workplace while meeting with
17 employees in the product development and marketing departments.
- 18 • Nelson read an interview of Charney in the June/July 2004 issue of "Jane"
19 magazine.
- 20 • Charney appeared nude from the waist down in an American Apparel
21 advertisement which appeared in the Autumn 2004 issue of "Butt
22 Magazine," a German magazine.
- 23 • Photographs from vintage issues of adult magazines such as "Playgirl" and
24 "Oui" were posted in plain view in the American Apparel stores.
- 25 • Dov Charney purportedly uses the terms "cunt," "slut" and "bitch" in
26 reference to and in the presence of both men and women. Charney also
27 uses the terms "pussy," "whore," "cock" and "fuck" in the presence of both
28 men and women. Charney has used the expression "grow a dick."

- 1 • Nelson alleges that the Company did not adequately respond to the alleged
2 rape of an American Apparel employee by another employee, an accusation
3 later withdrawn by the alleged victim.

4 Nelson never complained about any of this conduct during the time period she was
5 performing services for American Apparel. Furthermore, Nelson herself used the terms “cunt,”
6 “slut” and “bitch” in the workplace and in the presence of Charney, regularly engaged in sexual
7 conversations and banter in the American Apparel workplace with American Apparel employees,
8 received a photograph of a penis from her boyfriend on her American Apparel computer, and sent
9 nude photos of herself to an American Apparel employee.

10 Realizing the frivolity of her claims, Plaintiff’s hyperbole in this case has risen in equal
11 measure with her desperation. Indeed, Plaintiff now contends that she will prove at trial that
12 women employees at American Apparel, Inc. are “openly” and “regularly” called “cunts,”
13 “bitches,” and “whores,” that Defendant Dov Charney is a “despot” who “wears only underwear in
14 front of his employees,” that Charney “can fuck whomever he wants at work, which he does when
15 the mood strikes him,” that Charney “masturbates at work,” and has sex at work. While these
16 statements certainly evoke a strong emotional reaction, they are have no basis in **fact**, and
17 Defendants will prove the same at trial.

18 **D. Plaintiff and Her Counsel’s Obstructionist and Unethical Litigation Tactics.**

19 Plaintiff understands that her case is baseless. As such, since the outset of this case,
20 Plaintiff has engaged in obstructionist tactics to prevent Defendants from obtaining the evidence
21 necessary to defend themselves against Plaintiff’s claims. Plaintiff has also consistently ignored
22 the orders of this Court. This conduct has continued to the eve of trial. While a full catalogue of
23 their egregious actions is impossible to assemble, the more severe misconduct, as the Court’s
24 orders make apparent, include:

- 25 • Arguing that the “lion’s share” of her damages in this case are emotional
26 distress, but refusing to permit *any* discovery relating to the other traumatic
27 events occurring in her life during the fall of 2004 which may have caused
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her purported emotional distress for which she is seeking to hold American Apparel responsible;

- Obstructing Defendants efforts to conduct a meaningful independent mental exam of Plaintiff by refusing to answer any questions concerning her social, family, or relationship history; despite being ordered twice to do so;
- Refusing to produce Plaintiff for a physical exam despite being ordered to do so;
- Instructing Plaintiff’s key third-party witnesses (such as Oscar Rodriguez) not to attend their depositions and improperly instructing them not to answer relevant questions;
- Committing perjury and suborning perjury by attempting to hide evidence concerning subsequent income received by Plaintiff after she left American Apparel; and
- Refusing to allow her experts to testify and unilaterally terminating their depositions without cause.

III. NELSON’S CLAIMS ARE MERITLESS

A. Plaintiff’s Sexual Harassment Claim

Plaintiff citation to what has now become her predictable litany of charges will not support a hostile work environment claim. Under California law, *only* harassment that constitutes disparate treatment that is based on Plaintiff’s sex is actionable:

“To plead a cause of action for [hostile work environment] sexual harassment, it is ‘only necessary to show that gender is a substantial factor in the discrimination, and that if the plaintiff “had been a man she would not have been treated in the same manner.”’ [Citations] Accordingly, it is the disparate treatment of an employee on the basis of sex – *not the mere discussion of sex or use of vulgar language* – that is the essence of a sexual harassment claim.”

Lyle v. Warner Brothers Television Productions (2006) 30 Cal. 4th 264, 280. Plaintiff completely ignores this disparate treatment element of her sex harassment cause of action. To prevail on a hostile work environment claim under FEHA, Nelson must show she was subjected to sexual advances, conduct or comments that were (1) unwelcome; (2) *because of her sex*; and (3)

1 sufficiently severe or pervasive to alter the conditions of her employment and create an abusive
2 work environment. *Id.* at 279. Plaintiff cannot meet any of these factors:

3 **1. The conduct and comments were not unwelcome.**

4 The evidence will prove that Nelson knew about the environment at American Apparel
5 before she entered into a working relationship with the company. She worked with American
6 Apparel in the past and several of the meetings about which she now complains occurred in the
7 context of her negotiating the terms of her independent contractor relationship. Indeed, Nelson
8 elected to provide services to American Apparel *after* she interviewed with Charney allegedly in a
9 cock sock and in his underwear, but now claims his conduct offended her. If indeed she found this
10 behavior so troubling, then why did she agree to work with American Apparel in the first place?

11 In addition, Nelson herself freely used curse words and foul language while performing
12 services for American Apparel. For example, Nelson used words like “cock,” “dick,” “fuck,”
13 “shit,” “asshole,” “bitch,” “cunt” (which she used “a lot”), “slut,” “mother fucker” and “niggers,”
14 including in emails and to refer to American Apparel employees and individuals with whom she
15 worked or who oversaw and monitored her work. Witnesses at trial will testify that Nelson called
16 Pat Honda, the department head for American Apparel’s customer service representatives, a
17 “cunt.” Nelson referred to her assistant, Camme Hatchett, as a “hot girl” or “really hot,” made
18 comments about how she liked her assistant’s “tits,” Nelson exposed and fondled her own breasts
19 in front of numerous American Apparel employees, and hit her assistant on the buttocks once or
20 twice. Nelson’s then-boyfriend also sent her a photograph of a penis via email to her American
21 Apparel email account. Another American employee will testify that she saw nude photographs of
22 Ms. Nelson in an email communication that Ms. Nelson sent to another American Apparel
23 employee, Oscar Rodriguez. Further, Osvaldo Arrendondo testified that Nelson touched him on
24 several occasions including once giving him a massage, twice leaning on him, two or three times
25 rubbing his arms, and once giving him a hug from behind, while he was working at American
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1 Apparel. This evidence will prove that the speech and conduct alleged by Nelson to be so
2 offensive was not at all unwelcome to her.¹

3 **2. The conduct was not “because of” Nelson’s sex.**

4 Nelson will not be able to prove that any of the conduct about which she complains was
5 directed at her because of her sex. American Apparel is a workplace where employees of both
6 genders deal with sexually charged imagery, conduct, speech and photographs as part of their jobs
7 – in creating the products sold, the advertisements and marketing campaigns depicting the
8 products, and the brand image that American Apparel cultivates and disseminates to its targeted
9 demographic – young, urban, hipster individuals in their twenties and early thirties. Nelson cannot
10 prove that any of the conduct or speech which she now contends constituted harassment was
11 directed at her or other female employees *because of* her gender. For example:

12 1. Charney did not wear a cock sock in Nelson’s presence because she was a woman.
13 Nelson admits that Charney was modeling the item in order to decide whether or not to include the
14 cock sock in American Apparel’s product line. and that he showed the product to *everyone* at the
15 meeting to solicit *all* of their opinions, including both men and women.

16 2. Nor did Charney wear his underwear in the presence of employees, including
17 Nelson, because they were women. While Charney has occasionally appeared in his underwear in
18 the workplace, it has been for a variety of reasons: product development, testing product fit,
19 marketing, promotion, sales, and even just humor. Indeed, Charney is American Apparel’s fit
20 model for male undergarments, which means Charney must model underwear for the purpose of
21 product design and development. None of these reasons have anything to do with the sex of his
22 employees.

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25 ¹ See *Hocevar v. Purdue Frederick Co.* (8th Cir. 2000) 223 F.3d 721, 736-737 (supervisor’s
26 conduct not unwelcome when plaintiff used the same banter as supervisor); *McNair v. County of*
27 *Maricopa*, (D. Ariz. 2005) 2005 U.S. Dist. LEXIS 28231, at *8 (no evidence that conduct was
28 unwelcome where employee sought alleged harasser’s company at work and frequently went to
lunch together); *Easton v. Crossland Mortgage Corp.* (C.D. Cal. 1995) 905 F. Supp. 1368, 1374,
1381 (plaintiff’s participation in allegedly offensive banter “undercut[s] plaintiffs’ claims that all
of the offensive conduct alleged was ... unwelcome”).

1 3. The “Jane” magazine articles so prominently discussed by Nelson were not written
2 or published because Nelson is a woman, nor was the article made available at American Apparel,
3 shown to or read by Nelson because she is a woman. Nelson was not interviewed for or
4 mentioned in the article, nor was she present during the interview of Charney or any other
5 American Apparel employee, nor did she witness any of the alleged sexual acts described in the
6 article.

7 4. American Apparel’s advertising and marketing was not directed at any particular
8 employee because of their sex. The *public* advertisements were published to market and further
9 American Apparel’s image and brand and the fact that these items were posted in plain view
10 means that both male and female employees were exposed to these images.

11 5. Nelson herself alleges that Charney used swear words, allegedly including the
12 terms “cunt,” “pussy,” “whore,” “slut,” “bitch,” “cock,” and “fuck,” in the presence of and in
13 reference to both male and female employees, not solely Nelson.

14 In short, Nelson’s complaint is not that she was treated differently than male employees at
15 American Apparel, but rather that she was generally offended by anything and everything that
16 occurred at American Apparel that dealt with sex or vulgarity. Even if true, which it is not, such
17 conduct and speech does not constitute sexual harassment.²

18 **3. The conduct or comments were not severe or pervasive.**

19 Even if Nelson could somehow establish that she was subjected to conduct because of her
20 gender (which she cannot do), her claims will still fail because the conduct about which she
21 complains is not sufficiently severe or pervasive to be actionable. To satisfy this element of her
22 harassment claims, Nelson “must show that she was subjected to sexual advances, conduct or
23 comments that were *severe enough or sufficiently pervasive to alter the conditions of her*
24 *employment and create a hostile or abusive work environment.*”³

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26 ² *Lyle*, 30 Cal.4th at 280 (“Accordingly, it is the disparate treatment of an employee on the basis of
27 sex—*not the mere discussion of sex or use of vulgar language*—that is the essence of a sexual
28 harassment claim.”) (emphasis added).

³ *Lyle*, 38 Cal.4th at 283 (emphasis in original).

1 Here, Nelson was not subjected to a severe and pervasive hostile work environment.
2 Nelson was not physically threatened, touched, or even propositioned. Further, other than
3 allegedly calling Nelson a “whiny bitch,” a phrase Nelson admits Charney used to refer to both
4 men and women, and supposedly telling Nelson her that he could masturbate with her without it
5 affecting their business relationship, Charney never referred to Nelson using demeaning gender or
6 racially based terms, or otherwise direct such an epithet at her while she was performing services
7 for American Apparel. Instead, Nelson complains that Charney used crude and vulgar language,
8 conducted business in his underwear and that American Apparel used sexually suggestive
9 advertising to sell its products. The courts have routinely rejected harassment claims based solely
10 on crude jokes, stories, vulgar gestures and remarks of the sort alleged by Nelson, particularly
11 where such conduct is not directed at the plaintiff as is the case here.⁴

12 Indeed, the frivolousness of Nelson’s harassment claims is even more apparent when her
13 allegations are viewed in the context of the environment in which she selected to work — an
14 apparel manufacturer that openly uses a sexually suggestive marketing campaign to advertise its
15 products. *See also Fisher*, 214 Cal. App. 3d at 610 (in determining the existence of a hostile work
16 environment, California courts consider the “context in which the sexually harassing conduct
17 occurred.”). Moreover, in *Lyle*, the California Supreme Court pointed out:

18 “In determining the severity of harassment, ‘[t]he United States Supreme Court has
19 warned that evidence in a hostile environment sexual harassment case should not be
20 viewed too narrowly: ‘[T]he objective severity of harassment should be judged from the
21 perspective of a reasonable person in the plaintiff’s position, considering “all the
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23 ⁴ *See, e.g., DeAngelis v. El Paso Mun. Police Officers Ass’n*, (5th Cir.) 51 F.3d 591, 595 (“Title
24 VII cannot remedy every tasteless joke or groundless rumor that confronts [employees] in the
25 workplace”), cert. denied, (1995) 516 U.S. 974; *Baskerville v. Culligan Int’l Co.*, (7th Cir. 1995)
26 50 F.3d 428, 430 (sexual harassment laws are not intended to “purge the workplace of
27 vulgarity”); *Shepherd v. Comptroller of Public Accounts of Texas*, (5th Cir.) 168 F.3d 871 , cert
28 denied , (1999) 528 U.S. 963 (affirming summary judgment against plaintiff on her sexual
harassment claim alleging that her supervisor commented on the color of her nipples, commented
on her thighs as he simulated looking up her dress, standing on a desk several times in an effort to
look down the plaintiff’s dress, patting his lap while saying to the plaintiff “here’s your seat,” and
touching her on her back and arm. The court stated “We agree with [plaintiff] that the comments
made by [her supervisor] were boorish and offensive. The comments, however, were not severe.”).

1 circumstances.” [Citation] . . . [T]hat inquiry requires *careful consideration* of the social
2 context in which particular behavior occurs and is experienced by its target. . . . “
3 (*Lyle, supra.* 30 Cal. 4th at 283.)

4 **4. Nelson Cannot Prevail on Her Claims For Harassment Because They**
5 **Are Predicated on Speech Protected under the First Amendment of the**
6 **United States Constitution And Under the California Constitution.**

7 Defendants will prove at trial that Nelson’s harassment claims are based largely on verbal
8 discussions, expressive gestures and advertising that occurred in connection with the marketing of
9 American Apparel product and the development of it’s brand identity. As such, Nelson’s claims
10 seek to invoke state law to punish American Apparel for exercising its First Amendment right of
11 free speech.⁵

12 The California Department of Fair and Housing (“DFEH”) has recognized that although
13 the DFEH’s regulations provide that certain forms of verbal and visual conduct can constitute
14 unlawful harassment, the regulations go on to provide that “the rights of free speech and
15 association shall be accommodated consistently with the intent of this subsection.” Title 2,
16 California Code of Regulations § 7287.6. Similarly, the courts have recognized that civil rights
17 statutes, like Title VII and the FEHA, have constitutional limits as applied to speech. *See*
18 *DeAngelis v. El Paso Municipal Police Officers Ass’n* (5th Cir.) 51 F.3d 591, 596-97, *cert. denied*,
19 (1995) 516 U.S. 974 (“Where pure expression is involved, Title VII steers into the territory of the
20 First Amendment. It is no use to deny or minimize this problem because, when Title VII is
21 applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter,
22 the statute imposes content-based, viewpoint-discriminatory restrictions on speech.”); *Saxe v.*
23 *State College Area School District* (3rd Cir. 2001) 240 F.3d 200, 204 and 206 (Ruling that “There
24 is no categorical ‘harassment exception’ to the First Amendment’s free speech clause” and
25 “[T]here is also no question that the free speech clause protects a wide variety of speech that

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27 ⁵ Nelson’s claims also implicate Article I, section 2, subdivision (a) of the California
28 Constitution which provides that “Every person may freely speak, write and publish his or her
sentiments on all subjects, being responsible for an abuse of this right. A law may not restrain or
abridge liberty of speech or press.”

1 listeners may consider deeply offensive, including statements that impugn another's race or
2 national origin or that denigrate religious beliefs.")

3 Here, there will be no question that the marketing and branding of American Apparel's
4 product, as well as the accompanying advertising images and Charney's role as the "face" of
5 American Apparel, falls squarely within the protection of the First Amendment. *See e.g., U.S. v.*
6 *X-citement Video Inc.* (1994) 513 U.S. 64, 72, 115 S. Ct. 464 (non-obscene, sexually explicit
7 materials involving adults are constitutionally protected). As applied to the instant matter, the
8 State of California's interest in eliminating egregious acts of harassment – i.e., sexual demands,
9 physical battery, gender or race hostile conduct and severe and offensive speech directed at a
10 victim because of her gender or race — would not be furthered by punishing the marketing
11 images, comments and gestures about which Nelson complains. Accordingly, Nelson's claims
12 violate the First Amendment rights of Defendants and Defendants' affirmative defense based on
13 the First Amendment will be sustained.⁶

14 **B. Plaintiff's Discrimination Claim**

15 Nelson will not be able to prove a prima facie case for employment discrimination based
16 on sex because she was not performing her job in a satisfactory manner, she did not suffer an
17 adverse employment action; and her termination occurred under circumstances giving rise to an
18 inference of discrimination.

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21 **1. Nelson Was Not Performing Her Job Satisfactorily**

22 Defendants will prove at trial that Nelson was not meeting the sales goals and targets that
23 American Apparel expected her to reach. Indeed, as of November 2004, Nelson's anticipated
24 commission payments on the sales she had made were less than the draw that she had already been

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28 ⁶ Furthermore, Nelson's state law harassment claims, which seek to punish Defendants for Charney's speech, implicate content based regulation and are subject to the "most exacting scrutiny." *See Boos v. Barry* (1988) 485 U.S. 312, 321, 108 S. Ct. 1157. To survive such strict scrutiny, the regulation must be "necessary to serve a compelling state interest and narrowly drawn to achieve that end." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, (1991) 502 U.S. 105, 118, 118 S. Ct. 501.

1 paid. In addition, Charney was dissatisfied with Nelson's personal skills as a salesperson as she
2 was unable to integrate herself into the company as an independent contractor; control her
3 emotional state and not cry in the workplace; convince management that she was representing the
4 company well; and focus and engage the market in a similar fashion to other sales representatives.
5 She spent much of her time in the American Apparel workplace during the critical period in the
6 fall of 2004 focused on her personal love life rather than her sales efforts for American Apparel.
7 Witnesses will testify that Nelson frequently talked about her difficult personal situation during
8 this time frame-- that her long time boyfriend had cheated on her with the actress Lara Flynn
9 Boyle, that the boyfriend had broken up with her which was causing her financial problems and
10 distress because he was no longer willing to support her, and that she intended to blackmail Boyle
11 by revealing communications that she had tape recorded of Boyle leaving messages to the tabloid.

12 Furthermore, Nelson failed to bring in an estimate \$10 million dollars worth of sales to the
13 military which was the "hook" that she had used to lure American Apparel into entering into an
14 independent contractor sales representative relationship in the first place. She had represented that
15 she had extensive contacts with the military and also with the entertainment industry, and that she
16 could mine those contacts successfully to generate sales for the company. It never happened. Her
17 much vaunted contacts yielded little to no results for the company. All of this evidence plainly
18 reveals that Defendants were justified in seeking an end to their business relationship with Nelson
19 because she simply was not performing.

20 **2. Nelson's Termination Did Not Occur Under Circumstances Giving Rise**
21 **To An Inference Of Sex Discrimination**

22 Nelson will also be unable to prove that her termination occurred under circumstances
23 giving rise to an inference of sex discrimination. Plaintiff has no probative evidence that similarly
24 situated employees outside of the protected class were treated more favorably, or at least that her
25 termination occurred under circumstances giving rise to an inference of race discrimination.

26 **3. Defendants Have Articulated Legitimate And Nondiscriminatory**
27 **Reasons For Plaintiff's Alleged Discriminatory Conduct**

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1 Even were Nelson able to establish a prima facie case (which she will not), Defendants will
2 prove that legitimate and nondiscriminatory reasons explain Nelson's employment termination.
3 *See supra.*, § B(1). Moreover, Plaintiff will not be able to provide "specific, substantial evidence
4 of pretext" to rebut this legitimate reason. *Horn v. Cushman & Wakefield W.*, (1999) 72 Cal. App.
5 4th 798, 807.

6 Indeed, Nelson has no specific, substantial evidence of pretext to uphold her unlawful sex
7 discrimination claim. Nelson may try to rely on evidence that she was not given any write-ups
8 regarding her performance during the course of her employment and when American Apparel
9 ended its business relationship with her, her transition letter politely stated that the company "had
10 respect for her and her abilities" to show that Defendants reasons for terminating her were
11 pretextual. While Nelson may have, in fact, avoided any direct criticism (and for that matter,
12 direct praise) during her business relationship with American Apparel, Nelson's reviews and the
13 Company's attempt to end the relationship amicably are irrelevant to the analysis. Indeed,
14 Defendants identified problems with Nelson's sales and job performance as early as November
15 2004, if not earlier, more than a month before she contends Charney learned she had seen an
16 attorney. Nelson offers no evidence which suggests the termination was based on pretext.

17 **C. Plaintiff's Retaliation Claim**

18 Nelson will also be unable to prevail on her retaliation claim. She simply cannot prove
19 that there was a causal link exists between her seeing an attorney and being terminated. *See*
20 *Morgan v. Regents of the Univ. of California*, (2001) 88 Cal. App. 4th 52, 69 ; Cal. Gov't Code §
21 12940(h). Plaintiff must prove that "there was a causal link between the [protected activity and
22 adverse employment action]. ... *Essential to a causal link is evidence that the employer was*
23 *aware that the plaintiff had engaged in the protected activity.*" *Morgan*, 88 Cal. App. 4th at 70
24 (emphasis added).

25 Here, Nelson has no evidence to establish that Charney knew that Nelson had seen a
26 lawyer at the time Charney approached her about transitioning out of the company. She cannot
27 present any evidence to meet her burden of establishing that Defendants knew she engaged in a
28 protected activity. Instead, the evidence at trial will prove that Charney was not aware that Nelson

1 had seen an attorney. The evidence will show only that Charney learned, only *after* he discussed a
2 transition period with Nelson, that there was a rumor circulating that Nelson, apparently while
3 drunk, was trying to get other women together to sue the company. Bailey was not aware that
4 Nelson had seen an attorney at all. Indeed, as discussed in § B above, Nelson was terminated (if
5 that is how the discussions with Nelson in January 2005 can be characterized), for her inability to
6 generate sales and her workplace demeanor – incessant emotional outbursts and crying,
7 complaining about her personal life -- her boyfriend “cheating” on her with Lara Flynn Boyle, her
8 break up with the boyfriend, her resulting financial problems, and her inappropriate behavior at
9 trade shows and other events in which she was representing the company.

10 **D. Plaintiff’s Wage and Hour Claims**

11 All of Plaintiff’s wage and hour claims are easily disposed of: Plaintiff *was not an*
12 *employee of American Apparel*. Plaintiff’s wage and hour claims depend on her having been an
13 employee of American Apparel, not an independent contractor. Defendants will prove at trial, not
14 only that Plaintiff was an independent contractor, but that she knew and believed herself to be an
15 independent contractor. *See, e.g., S. G. Borello & Sons, Inc. v Dept. of Industrial Relations*, 48
16 Cal. 3d 341 (1989) (setting forth the elements necessary to establish an independent contractor
17 relationship, including the parties’ belief and the special skills that the independent contractor
18 brings). Indeed, it will be shown that Plaintiff had considerable experience in the apparel industry,
19 including owning and operating her own apparel company, in which she used independent
20 contractors. In addition, Defendants will also introduce evidence that Plaintiff had experience
21 being self-employed and as an independent contractor. Moreover, Plaintiff’s job duties resembled
22 those of an independent contractor, she was paid through expense checks after submission of an
23 invoice, not via weekly or bi-weekly paycheck, and she was treated as a non-employee for tax
24 purposes. She was an independent contractor and cannot deny the same.

25 **E. Plaintiff’s Unfair Trade Practices and Request for Injunctive Relief**

26 The frivolity of Plaintiff’s claim of statutory unfair competition under Business &
27 Professions Code § 17200 is evidenced by the absolute lack of attention Plaintiff has paid to this
28

1 claim. In the first instance, this claim is properly decided by the judge, not the jury. Moreover, no
2 different from the rest of her claims and will be utterly refuted at trial.

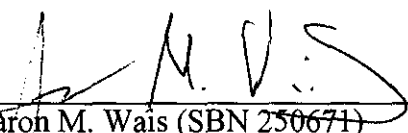
3 **IV. CONCLUSION**

4 Nelson's claims are frivolous and will be shown to be at trial.

5 DATED: January 8, 2008

MITCHELL SILBERBERG & KNUPP LLP

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