SUPREME COURT OF THE STATE OF CALIFORNIA

TWANDA BAILEY, Bailey/Appellant, vs. SAN FRANCISCO DISTRICT ATTORNEY'S OFFICE, GEORGE GASCON, CITY AND COUNTY OF SAN FRANCISCO, Respondents/Appellees	Case No. S265223 First Appellate District, Division One; No. A153520 San Francisco Superior Court No. CGC 15-549675

RESPONDENTS SAN FRANCISCO DISTRICT ATTORNEY'S OFFICE, GEORGE GASCON, CITY AND COUNTY OF SAN FRANCISCO'S ANSWER TO AMICI LEGAL AID AT WORK, ET AL.'S BRIEF

Appeal from the Summary Judgment
San Francisco Superior Court, No. CGC 15-549675

The Honorable Harold Kahn

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Sean Price, Learningforjustice.org, *Straight Talk About the N-Word* (Fall, 2011), available at https://www.learningforjustice.org /magazine/fall-2011/straight-talk-about-the-nword 8

The Atlantic, *That Word*, (January 2002), available at https://www.theatlantic.com/magazine/archive/2002/01/that-word/303059/..... 8

INTRODUCTION

The trial court properly granted summary judgment in this case. Amici Legal Aid at Work, *et al*. ("Legal Aid") argue that Larkin's use of the n-word was profoundly hurtful and offensive, and that Bailey should have a legal remedy for the injuries Larkin caused. But Bailey did not sue Larkin, and any potential remedies against Larkin are not before this Court. To prevail in *this action*, Bailey must show that *the City caused Bailey harm through its own negligence*. (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1041.) Legal Aid offers nothing to support such a conclusion. Legal Aid does not and cannot dispute that the City took corrective action almost immediately upon learning of Larkin's conduct and succeeded in protecting Bailey from experiencing any further racial harassment. Based on those undisputed facts, the City is entitled to summary judgment. (*Mathieu v. Norrell Corporation* (2004) 115 Cal.App.4th 1174, 1185 [affirming summary judgment where the employer took prompt corrective action in response to complaint of harassment; and therefore, the employer is not liable under FEHA]; *Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184, 1197-98 [holding employer entitled to judgment where employer took prompt corrective action that stopped harassment].)

Legal Aid fares no better with its claim that Larkin's one statement constitutes "severe or pervasive" harassment within the meaning of FEHA. Legal Aid suggests that all uses of the n-word in the workplace should be deemed severe, and that summary judgment is not appropriate in cases involving the n-word. The Court should decline Legal Aid's invitation to adopt such categorical rules. Even Legal Aid's sources recognize that the meaning and effect of the n-word varies greatly with context. The use of the n-word might be objectively severe in some employment circumstances,

such as when used by a supervisor, but might not be in others, such as when used by a coworker. Courts need to assess FEHA's severe or pervasive standard within the context of each case—not based on inflexible rules or preconceptions that ignore the meaning of language in context. Legal Aid notes that the n-word is offensive as a general matter, but Legal Aid does not and cannot show that Larkin's use of the n-word was severe harassment based on the facts of this case.

The Court should also reject Legal Aid's proposed rules because they are inconsistent with FEHA's purposes, as well as the longstanding, settled authority interpreting FEHA. FEHA does not—and was not intended to—provide a remedy for all hurt feelings in the workplace. (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1054.) FEHA provides a remedy only for conduct that is "severe or pervasive enough to create an objectively hostile or abusive work environment." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 130 (*Aguilar*)). An environment that a reasonable person would not find hostile or abusive "is beyond Title VII's [and FEHA's] purview." (*Ibid*, quoting *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 21). For that reason, it is well established that "a single use of a racial epithet, standing alone, would not create a hostile work environment[.]" (*Aguilar, supra,* 21 Cal.4th at p. 147 fn. 9). FEHA does not provide a remedy for the one-time use of a racial epithet in a conversation between friends that is the subject of this case.

ARGUMENT

I. SUMMARY JUDGMENT IS APPROPRIATE BECAUSE RESPONDENTS TOOK CORRECTIVE ACTION.

The n-word is complex. Legal Aid asserts that the n-word is the "most odious epithet," a word that "humiliates and subordinates Black persons," particularly when used along with physical violence in racist

incidents. (Legal Aid Br. at pp. 21-26.) But even Legal Aid's sources explain that the n-word is far from static in meaning or impact.[1] The n-word "can connote vitriol," but "it can also connote camaraderie."[2] "It can be said angrily, but it can also be said with irony."[3] It is a word perhaps "unique in the English language" in that it can be "the ultimate insult—a word that has tormented generations of African Americans. Yet overtime, it has become a popular term of endearment by the descendants of the very people who once had to endure it. Among many young people today—Black and white—the n-word can mean *friend*."[4] Thus, while the use of the n-word "when directed with ill-intent by a person of European descent who harbors racial animus against black people" "carr[ies] the force of generations of racial tyranny,"[5] the word can also have a benign meaning when spoken between two people of color and long-time friends, as in this case.[6] (AA 11; 90:8-12, 97:13-99:6, 104:5-21, 134:7-12.)

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[1] Randall Kennedy, Nigger: The Strange Career of a Troublesome Word (Knopf Doubleday Pub. Group, 2002).

[2] The Atlantic, That Word, (January 2002), available at https://www.theatlantic.com/magazine/archive/2002/01/that-word/303059/; see also Randall Kennedy, Nigger: The Strange Career of a Troublesome Word at pp. 27-44, 138-139.

[3] https://www.theatlantic.com/magazine/archive/2002/01/that-word/303059/; see also Randall Kennedy, *Nigger: The Strange Career of a Troublesome Word* at pp. 27-44, 138-139.

[4] Sean Price, Learningforjustice.org, *Straight Talk About the N-Word* (Fall, 2011), available at https://www.learningforjustice.org /magazine/fall-2011/straight-talk-about-the-nword.

[5] Kindaka J. Sanders, *Defending the Spirit: The Right to Self-Defense Against Psychological Assault* (2018) 19 Nev. L.J. 227, 240; see also *State v. Liebenguth* (2020) 336 Conn. 685, 704-705 [explaining the highly offensive nature of the n-word "when used by a white person as an assertion of the racial inferiority of an African-American person"].

[6] Leora F. Eisenstadt, *The N-Word at Work: Contextualizing Language in the Workplace* (2012) 33 Berkeley J. Emp. & Lab. L. 299, 351 [explaining that the n-word is "[f]ar from being restricted solely as a derogation that maintains racial subordination;" it can mean "close friend" or "any cool, down person who is deeply rooted in hip hop culture."].

In any event, this case does not require the Court to grapple with the nuances and conflicting meanings of the n-word. The City assumed for purposes of summary judgment that Larkin called Bailey the n-word and did so with racial animus.[7] Further, the City has always agreed that the n-word has no place at work. The City's Harassment-Free Workplace Policy prohibits the use of the n-word and other slurs. The Policy requires supervisors who learn of uses of the n-word or other types of harassment to immediately report that harassment to the appropriate personnel. Supervisory employees are required to take corrective action to address slurs against City employees.[8] The use of the n-word by any City employee is unacceptable and warrants a prompt and effective response.

That is exactly what happened here. The Office's Assistant Chief of Finance and Administration, Sheila Arcelona, took corrective action as soon as she learned of the incident from Bailey's supervisor who overheard Bailey discussing the matter. Even though Bailey did not report the incident and Larkin denied making the remark, Arcelona counseled Larkin about the City's Harassment-Free Workplace Policy and informed her that using the n-word is unacceptable. The City's Department of Human Resources ("DHR") also examined the incident, issued a four-page analysis of its findings, and required that Larkin receive additional counseling. The Office's Chief of Finance and Administration, Eugene Clendinen, then counseled Larkin again, and required her to execute an Acknowledgement

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[7] Legal Aid asserts that a trial is necessary to determine if Larkin was motivated to use the n-word to create a hierarchy among herself and Ms. Bailey (Legal Aid at 44 n.43, 47), but Larkin's motives are not in dispute. Bailey's claim fails because Larkin's single use of the n-word is not actionable under the facts of this case regardless of any motive Larkin may have had.

[8] https://sfdhr.org/equal-employment-opportunity-policy.

of the City's Harassment-Free Workplace Policy, a copy of which was placed in her personnel file and also sent to DHR. It is undisputed that Bailey did not experience any additional incidents of racial harassment at work. Measured by the employer's "ability to stop harassment by the person who engaged in harassment," the City's corrective action here was effective and appropriate. *Bradley v. Dept. of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1612, 1630; *Swenson, supra*, 271 F.3d at p. 1198; *Star v. West* (9th Cir. 2001) 237 F.3d 1036, 1039; *Intlekofer v. Turnage* (9th Cir. 1992) 973 F.2d 773, 779 [explaining that "an oral rebuke may be very effective in stopping the unlawful conduct."]; *Adler v. Wal-Mart Stores, Inc*. (10th Cir. 1998) 144 F.3d 664, 676 ["[S]toppage of the harassment by the disciplined perpetrator evidences effectiveness".])

The City's corrective action precludes liability in this case. Under FEHA, the City may only be held liable for racial harassment by a coworker where the City, "or its agents or supervisors, knows or should have known" of the harassment and "fails to take immediate and appropriate corrective action." (Cal. Gov. Code, § 12940, subd. (j)(1); see also *State Dept. of Health Services*, *supra,* 31 Cal.4th at p. 1041.) In other words, the City is only liable for its own negligence. (*Ibid.*) Where, as here, the City took prompt and appropriate corrective action, "there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136.)[9]

[9] Legal Aid asks the Court to remand so that Bailey can "testify before a jury about the human impact of hearing" the n-word (Legal Aid Br. at 31), but summary judgment was appropriate in this case regardless of the human impact on Bailey of hearing the n-word because the City's prompt and effective corrective action precludes liability. (*Mathieu v. Norrell Corporation* (2004) 115 Cal.App.4th 1174, 1185; see also *Knabe v. Boury Corporation* (3d Cir. 1997) 114 F.3d 407, 413 (*Knabe*) [holding counseling employee that harassing conduct was unacceptable was

Legal Aid faults the Court of Appeal for "overlook[ing]" the issue of whether the City should have immediately reassigned Larkin to a different position to remove her from Bailey's proximity, yet Legal Aid concedes that that the question of whether the City should have separated the employees is "[p]erhaps . . . insignificant." (Legal Aid Br. at p. 42.) In doing so, Legal Aid reveals its misunderstanding of the law. FEHA does not require the City to separate employees; FEHA requires the City to take action to end racial harassment and it is undeniable that the City did so. (AA 100:20-22; 171:18-20; 627:17-629:16; 630:3-14; 631:6-20; *Swenson, supra,* 271 F.3d at pp. 1192–1193). An employer has "wide discretion" in deciding whether employees must continue to work together "so long as it acts to stop the harassment." (*Bradley, supra*, 158 Cal.App.4th at p. 1630.) Given that it is undisputed that the City stopped Bailey from experiencing any further racial harassment, the City's corrective action complies with the law. (*Knabe, supra*, 114 F.3d at p. 414 [explaining that "if the remedy chosen by the employer is adequate [to end the harassment], an aggrieved employee cannot object to that selected action. Concomitantly, an employee cannot dictate that the employer select a certain remedial action."]) Moreover, by arguing that a jury should consider the "[p]erhaps . . . insignificant" question of whether the City should have separated the employees, Legal Aid betrays its misunderstanding of a jury's role to resolve *material* questions of fact. (Legal Aid Br. at p. 42.) Juries are not impaneled to resolve questions of fact that are "insignificant" and make no legal difference to the outcome the litigation. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843.)

"adequate as a matter of law because it was reasonably calculated to prevent further harassment"].)

Bailey asserts that the City's corrective action was insufficient because the City did not "punish" Larkin, but Bailey is mistaken. "Failure to punish the accused harasser only matters if it casts doubt on the employer's commitment to maintaining a harassment-free workplace. . . . But, where the proof of harassment is weak and disputed, as it was in this case, the employer need not take formal disciplinary action simply to prove that it is serious about stopping sexual harassment in the workplace." (*Swenson, supra*, 271 F.3d at pp. 1197–1198.) That is true here, given the lack of evidence that Larkin engaged in wrongdoing, and the legal protections afforded to permanent civil service employees. As Amici California County Counsels' Association and the California League of Cities correctly explain, Larkin is protected by collective bargaining agreements and other legal protections that prevent the City from suspending or terminating her without a sufficient basis. (Amicus Brief of Amici California County Counsels' Association and the California League of Cities at pp. 25-30.) Here, City could "properly take into account that [Larkin] was covered by a collective bargaining agreement, and so had the right to grieve any discipline imposed on [her]. Having concluded that it had insufficient evidence to sustain a charge of harassment, the [City] had an entirely legitimate reason" for using non-punitive means to ensure that Bailey did not experience any further harassment. (*Swenson, supra*, 271 F.3d at 1196.)

In short, Legal Aid offers nothing to call into question the Court of Appeal's conclusion that the City is entitled to summary judgment. Because the City promptly, appropriately, and effectively prevented Bailey from experiencing any further racial harassment, the City is not liable in this case.

II. THE COURT OF APPEAL PROPERLY EVALUATED THE RECORD AND LAW.

Legal Aid does not dispute that a single use of the n-word by a co-worker—without more—has never been held to violate FEHA's "severe or pervasive" standard. Indeed, Legal Aid admits, as it must, that this Court has already recognized that "a single use of a racial epithet, standing alone, would not create a hostile work environment[.]" (Legal Aid Br. at p. 51 fn. 51, quoting *Aguilar, supra*, 21 Cal.4th 121, 146 fn. 9.) "[O]ffhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" (*Faragher*, *supra*, 524 U.S. at p. 788.) Nor will the "'mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' … affect the conditions of employment to a sufficiently significant degree." (*Meritor Savings Bank, FSB v. Vinson* (1986) 477 U.S. 57, 67, quoting *Rogers v. EEOC* (5th Cir. 1971) 454 F.2d 234, 238; accord, *Harris*, *supra*, 510 U.S. at p. 21; *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283 [holding "'merely offensive' comments in the workplace are not actionable"].) Even the case on which Legal Aid relies holds that "causing an employee offense based on an isolated comment is not sufficient to create actionable harassment" under the law. (*McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1113.)

Ignoring those well-established standards, Legal Aid argues that this case should proceed to trial nonetheless. Legal Aid asserts that, by affirming summary judgment, the Court of Appeal "trivializes the magnitude and heinousness of the n-word slur," and renders it legally "insignificant." (Legal Aid Br. at p. 21). Legal Aid also accuses the Court of Appeal of adopting a categorical rule that would preclude liability unless

it was a supervisor—rather than a co-worker—that used the n-word. Legal Aid is mistaken on both counts. The Court of Appeal did not trivialize the use of the n-word but instead recognized that the n-word is highly offensive. (Opn. at p. 1-2.)[10] The Court of Appeal also did not conclude that use of the n-word is legally insignificant. To the contrary, the Court of Appeal recognized that "a single racial epithet can be so offensive it gives rise to a triable issue of actionable harassment" under some circumstances. (Opn. at p. 7.) But the Court of Appeal also recognized that FEHA does not create a remedy for every offensive utterance or racial slur used in the workplace. "[N]ot every utterance of a racial slur in the workplace violates the FEHA." (*Aguilar, supra,* 21 Cal.4th at p. 130.) Instead, FEHA is violated only by conduct that is severe or pervasive. (*Ibid*.) "[W]hen the harassing conduct is not severe in the extreme, more than a few isolated incidents must have occurred to prove a claim based on working conditions." (*Lyle, supra,* 38 Cal.4th at p. 284.)

The question in this case is not whether the n-word is offensive when used as an insult—of course it is. The question is whether the one-time use of that word—by a friend and coworker—was so "severe in the extreme" to change the terms and conditions of Bailey's employment, both objectively and subjectively. (*Lyle, supra*, 38 Cal.4th at p. 284; see also *Aguilar, supra,* 21 Cal.4th at p. 130). Here it was not. As the Court of Appeal recognized, the use of the n-word can be actionable where the facts demonstrate that the harassment was severe, such as when the n-word is used by a supervisor because "a supervisor's power and authority invests

[10] *Bailey v. San Francisco District Attorney's Office, et al.*, First District Court of Appeals (Div. 1), A153520, filed September 16, 2020 ("Opinion or Opn.").

his or her harassing conduct with a particular threatening character." (Opn. at pp. 10-12; *Boyer-Liberto v. Fontainebleau Corporation* (4th Cir. 2015) 786 F.3d 264, 269-270, 278, quoting *Burlington Industries, supra,* 524 U.S. at p. 763].) Likewise, other factors could make a use of the n-word actionable, such as if the term is used along with violence or threats of violence, as part of public humiliation, or where other circumstances make the harassment severe or pervasive. As the United States Supreme Court has explained, the "severe or pervasive" standard encompasses "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." (*Harris*, *supra*, 510 U.S. at p. 23.)

In this case, Legal Aid has failed to identify any factors that could cause Larkin's statement to cross the line from an isolated and offensive racial epithet to actionable hostile work environment harassment. (*Aguilar, supra*, 21 Cal.4th at p. 130.) It is undisputed that Larkin's alleged slur was not combined with any physical threat directed at Bailey, any public humiliation, any express threat to Bailey's employment or any authority to exact it. As a coworker, Larkin had no authority to direct or supervise Bailey or affect the terms and conditions of her employment. Nor did anything else happen to Bailey that could make Larkin's single comment "severe" within the meaning of FEHA. Larkin's comment was one "offensive utterance" made in a private conversation between two coworkers who, until this point, had maintained a long friendship and had no prior animosity between them. (*Harris*, *supra*, 510 U.S. at p. 23; see also AA 90:8-12, 97:13-99:6,104:5-21, 134:7-12; 411:15-19.)

Legal Aid asserts that the Court of Appeal "ignored" that Larkin called Bailey a "scary n----r," thus making the use of the n-word more offensive. Legal Aid is wrong both factually and as a matter of law. First, the evidence in this case would not allow a reasonable person to conclude that Bailey was called a "scary n----r." Bailey alleges that Larkin told Bailey that she saw a mouse run under Bailey's desk, which caused Bailey to react in fear. In response, Bailey alleges that Larkin then stated: "You n----rs is so scary." (AA 626:24-627:4.) Bailey conceded that the use of the word "scary" referred to the fearful reaction Bailey and another African-American co-worker showed towards mice. (AA 391-92). Bailey explained that, the prior week, Larkin had been "chuckl[ing]" because Bailey and another African-American co-worker jumped out of their chairs and screamed when they saw mice in the office. (*Ibid.*) In context, Larkin's comments conveyed that Bailey was *scared* of mice—not "hostile, violent and potentially 'dangerous'" as Legal Aid asserts with no factual support. (Legal Aid Br. at p. 40.)

In any event, the outcome of this case does not turn on whether Larkin called Bailey the n-word or amplified that word in some way. The fact remains that Larkin's one statement—the only race-based incident Bailey experienced in her 14 years of employment—is not severe or pervasive harassment within the meaning of FEHA. (*Lyle, supra*, 38 Cal.4th at p. 284; *Aguilar, supra,* 21 Cal.4th at pp. 130, 147 fn. 9; see also *Faragher*, *supra*, 524 U.S. at p. 788; *Meritor, supra,* 477 U.S. at p. 67; *Harris*, *supra*, 510 U.S. at p. 21.) Legal Aid does not cite even a single case that suggests otherwise.

Likewise, the Court of Appeal did not "ignore" or "discount" evidence of Bailey's emotional distress or the evidence that she began to

have excessive absences and impolite responses to work requests. (Legal Aid Br. at pp. 41, 43). The effects of the slur on Bailey are not in dispute. As explained above, FEHA is only violated where harassment is sufficiently severe or pervasive to alter the conditions of employment, *both subjectively and objectively*. (*Etter v. Veriflo Corporation* (1998) 67 Cal.App.4th 457, 465; *McCoy v. Pacific Maritime Assn*. (2013) 216 Cal.App.4th 283, 293.) "That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception." (*Lyle*, *supra*, 38 Cal.4th at p. 284.) Here, Bailey's claim fails because she cannot show that Larkin's single statement was objectively "severe or pervasive" within the meaning of FEHA. The subjective portion of the test is not in dispute.

In short, the Court of Appeal did not ignore the evidence or adopt any categorical rules in this case. The question before the Court of Appeal was "whether the single alleged racial epithet made by Bailey's co-worker was, in context, so egregious in import and consequence as to be 'sufficiently severe or pervasive to alter the conditions of [Bailey's] employment.'" (Opn. at pp. 9-10, quoting *Etter, supra*, 67 Cal.App.4th at p. 465.) The Court of Appeal evaluated all the facts in this case in context and concluded that it was not. But that does not mean that the use of the n-word by a co-worker can never be actionable. The use of the n-word in many factual situations could satisfy the standard for severe or pervasive harassment and could be actionable where the employer fails to take prompt

and appropriate corrective action. But the key point is that none of those facts are presented in this case.[11]

III. THE COURT OF APPEAL'S DECISION IS CONSISTENT WITH GOVERNMENT CODE SECTION 12923 AND FEHA'S PURPOSES.

Finally, Legal Aid rests heavily on Government Code Section 12923, in which the Legislature recognized that one-time, extremely serious instances of harassment can be "severe" within the meaning of FEHA.[12] (Gov. Code, § 12923(b)). Legal Aid's argument is misplaced because no one—not Respondents or the Court of Appeal—disputes that one-time, extremely serious instances of harassment can satisfy the "severe or pervasive" standard. Indeed, the Court of Appeal expressly held that "a single racial epithet can be so offensive it gives rise to a triable issue of actionable harassment." (Opn. at p. 7.) The Court of Appeal recognized that the Legislature's statement of intent in Section 12923(b) did not break new ground, but instead "codified numerous opinions concluding a single racial slur can be so offensive it creates a triable issue as to the existence of a hostile work environment." (Opn. at p. 9.)

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[11] Legal Aid stretches to argue that "Respondents would have the Court establish a rule in which a coworker's one-time use of the n-word was only actionable if it was accompanied by actual physical violence, threats, or threatening conduct" (Legal Aid Br. at p. 26), but Respondents have not suggested any such rule. To resolve this case, the Court need not adopt any new or categorical rules for judging the severity or pervasiveness of harassment. It simply needs to apply the undisputed facts to the standards already set forth in existing, well-established case law. The Court need not attempt to define every set of facts that could make harassment severe. Instead, it is enough to recognize that a single stray remark between two co-workers and friends, without more, is insufficient to demonstrate severe or pervasive harassment.

[12] Specifically, the Legislature disapproved of the Ninth Circuit's opinion in *Brooks v. City of San Mateo* (9th. Cir. 2000) 229 F.3d 917, where the Ninth Circuit found that the severe and pervasive standard had not been satisfied even after a fellow employee physically assaulted the victim. (Gov. Code, § 12923(b)).

The Legislature's recognition that a single instance of harassment *can be* sufficiently severe to be actionable does not resolve the issues in this case. The question here is not whether a single extreme instance of racial harassment can be severe in the abstract. Instead, the question here is whether Larkin's statement was, in context, so egregious as to be "sufficiently severe or pervasive to alter the conditions of [Bailey's] employment.'" (Opn. at pp. 9-10, quoting *Etter, supra*, 67 Cal.App.4th at p. 465.) Bailey's claim fails because she cannot show that the one use of the n-word by her co-worker and longtime friend was objectively so severe that it would alter the conditions of employment for a reasonable person.[13]

Ignoring that context matters, Legal Aid asks this Court to adopt a rule that "summary judgment is rarely if ever appropriate in cases involving the n-word." (Legal Aid Br. at 37.) That argument should be rejected. Neither FEHA nor the well-established summary judgment standard work differently in cases that involve any particular word. Instead, courts rightly apply FEHA and the summary judgment standard based on the facts of each case. Courts are not equipped to declare that any particular word always constitutes severe harassment. Such a rule would fail to acknowledge the "malleability of language,"[14] and risks "further victimization of subordinate

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[13] Given that the Legislature's statement of intent in Government Code Section 12923(b) does not make a difference to the outcome of this case, it hardly matters whether Government Code Section 12923(b) clarified, changed, or merely restated existing law. In any event, Legal Aid is simply wrong when it claims that this Court has not yet decided whether the use of a single racial epithet in the workplace is actionable without additional facts that make the harassment severe or pervasive within the meaning of FEHA. (*Aguilar, supra*, 21 Cal.4th 121, 147 n. 9 [holding that "a single use of a racial epithet, standing alone, would not create a hostile work environment[.]"]; *Lyle v. Warner Brothers Television Productions, supra*, 38 Cal.4th at p. 283 [holding "'merely offensive' comments in the workplace are not actionable"].)

[14] Kennedy, Nigger: The Strange Career of a Troublesome Word, at p. 126.

groups by misunderstanding their linguistic and cultural norms."[15] Likewise, courts are not equipped to declare that the n-word is necessarily, and in all contexts, more offensive than other words, as Legal Aid claims. Even the sources on which Legal Aid relies recognize that "[i]t is impossible to declare with confidence that when hurled as an insult, [n-word] necessarily inflicts more distress than other racial epithets."[16] Further, the exercise of ranking racial or gender-based epithets "necessarily involves comparing oppressions and prioritizing victim status," a fraught and unseemly exercise.[17]

Instead of adopting a rule that use of the n-word is always severe harassment, the Court should continue to recognize—as the Court of Appeal did in this case—that courts must evaluate severity and pervasiveness in context under the facts presented in each case when deciding whether to grant summary judgment. While use of the n-word can be severe harassment in some cases, such as when used by a supervisor, when combined with violence, threats or public humiliation, or when other facts render the conduct severe, use of the n-word is not always actionable under FEHA. A single instance of harassment must be "severe in the extreme" to be actionable. (*Lyle, supra*, 38 Cal.4th at p. 284.) Larkin's single comment—made in a conversation between two friends with no threats or violence—is simply not "severe in the extreme." (*Ibid.*)

Legal Aid does not cite even a single case that suggests otherwise. Nonetheless, Legal Aid contends the law should be different to effectuate FEHA's purposes. Legal Aid asserts that FEHA should provide a remedy

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[15] *Ibid.*

[16] *Id*. at p. 25.

[17] *Id*. at p at 23.

for even one-time comments between coworkers and friends in the workplace because no civil rights claims are "too trivial to remedy." (Legal Aid Br. at pp. 48-49.) But that argument has been repeatedly rejected. Courts have consistently construed FEHA and Title VII to take "middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." (*Harris, supra*, 510 U.S. at pp. 21–22; see also *Lyle, supra*, 38 Cal.4th at pp. 283-84.) FEHA does not provide a remedy for every workplace insult or harassing language. (*Yanowitz, supra,* 36 Cal.4th 1028 at p. 1054.) FEHA is not a "general civility code" that requires courts to weigh in on one-time, private conversations between friends in the workplace. (*Faragher, supra*, 524 U.S. at p. 788; see also *Aguilar, supra*, 21 Cal.4th at p. 130.)

In short, as Amicus Curiae Association of Southern California Defense Counsel ably explain, Government Code section 12923 "cannot bear the analytical weight" Bailey and Legal Aid place upon it. (Brief by Amicus Curiae Association of Southern California Defense Counsel, at p. 8). Neither Section 12923 nor FEHA's animating purposes provide any grounds for reversal of the Court of Appeal's decision in this case.

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CONCLUSION

The City respectfully requests that the Court affirm the decision of the Court of Appeal.

Dated: September 1, 2021

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I hereby certify that this brief has been prepared using proportionately double-spaced 13-point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 4,921 words.

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Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

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