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Supreme Court of California
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Supreme Court of the State of California

TWANDA BAILEY,

Plaintiff, Appellant and Petitioner,

vs.

SAN FRANCISO DISTRICT ATTORNEY'S OFFICE, GEORGE GASCON, CITY & COUNTY OF SAN FRANCISCO,

Defendants and Respondents.

S265223

First Appellate District, Division One
No. A153520

San Francisco Superior Court
No. CGC 15-549675

PLAINTIFF-APPELLANT BAILEY'S COMBINED ANSWER TO BRIEFS OF AMICUS CURIAE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND AMICI CURIAE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIORNIA CITIES

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

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INTRODUCTION

The two amici curiae briefs filed by the Association of Southern California Defense Counsel ("ASCDC") and by the California State Association of Counties and the League of California Cities (collectively "CSAC") in support of respondents City and County of San Francisco and the San Francisco District Attorney's Office ("City/DAO") in material respects misunderstand, and certainly misstate, plaintiff-appellant Twanda Bailey's positions on a number of material issues this case presents. By this Answer Brief Bailey presents a combined response to these amici showing that none of the issues they raise have merit.

First, Bailey will show that, contrary to ASCDC's contentions (1) SB 1300, codified as relevant here as Government Code §12923,[1] is fully applicable to Bailey's FEHA claims and should be given full force and effect in assessing her charges; (2) Bailey did not ignore, but expressly recognized and applied the principle that a FEHA harassment plaintiff must satisfy both an objective and personal standard, i.e., that Bailey actually experienced the offending conduct as harassment and that a reasonable, similarly situated African American woman could also find that conduct harassing; (3) FEHA §12923(b) is not limited to harassment based only on physical conduct, but broadly permits a harassment finding based on a co-worker's single infliction of the n-word racial slur; and (4) especially given its affirmation of *Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 286, the Legislature's enactment of §12923(e), declaring that summary

[1] Statutory references are to the Government Code unless otherwise indicated. All emphases in statutory or regulatory quotes are added.

judgment is rarely justified in unlawful harassment cases, should be given full force and effect in assessing Bailey's claims.

Second, CSAC erroneously contends that Bailey's analysis and discussion of the issues presented improperly conflates the harassment and employer liability elements of an unlawful harassment claim, and further improperly seeks to impose strict liability on an employer for a co-worker's harassing conduct, here the one-time use of the n-word racial slur. CSAC is wrong on both counts: (1) Consistent with §12940(j)(1), Bailey clearly distinguished between the determination of co-worker harassment and employer liability based on such harassment. (2) Whether City/DAO sufficiently responded promptly and appropriately to Bailey's racial harassment charge, including by the flawed and delayed counseling of Larkin, is fundamentally disputed. (3) Nothing in Bailey's analysis either explicitly or implicitly sought to impose strict liability on employers for co-worker harassment. To the contrary, not only did Bailey explicitly reject this assertion, but her entire argument has consistently maintained that both the harassment and employer liability prongs of her harassment claim based on a co-worker's brutal one-time use of the n-word can survive summary judgment, with the distinct issues of harassment and employer liability assessed and determined by a jury.

ARGUMENT

I. THE CONTENTIONS OF AMICUS CURIAE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL LACK MERIT.

ASCDC focuses almost exclusively on its attempt to discredit any reliance on the Legislature's enactment of SB 1300 (2018), which synthesized and explicated the substance and applicability of FEHA

harassment law. ASCDC does not contend that SB 1300 effected any relevant material substantive change in FEHA harassment law.

A. SB 1300's Clarification Of The Applicability of FEHA's Harassment Standards Should Be Given Full Force And Effect.

ASCDC misapprehends SB 1300 in contending that because SB 1300 purports to interpret FEHA's original intent, a judicial not legislative function, SB 1300 deserves little or no weight in assessing whether FEHA recognizes that a co-worker's one-time racial slur, here the most virulent slur in the American language, may support a finding of unlawful harassment. SB 1300, however, does not purport to interpret FEHA's original intent, but rather provides a synthesis clarifying and explicating existing FEHA harassment law, particularly in its application, a uniquely legislative rather than judicial function. (See, e.g., Leg. Counsel's Digest, Sen. Bill No. 1300 (2017-2018 Reg. Sess.) Stats 2018, ch. 955 (Reg. Sess.) at 2 ("This bill would declare the intent of the Legislature about the application of FEHA in regard to harassment"); Sen. Comm. on Rules, analysis on Sen. Bill 1300 (2017-2018 Reg. Sess.) (Aug. 30, 2018) at 4 ("Declares the intent of the Legislature and provides guidance to California courts regarding the legal standard for application of laws regarding harassment in California's workplace").)

In interpreting and applying a statute, the courts are guided by a set of standards, starting with one bedrock principle: to ascertain and give effect to the statute's overarching purpose. (See, e.g., *Dr. Leevil LLC v. Westlake Health Care Center* (2018) 6 Cal.5th 474, 478 ("Our role in interpreting statutes is to ascertain and effectuate the intended legislative purpose"); *Goodman v. Lozzano* (2010) 47 Cal.4th 1327, 1332 ("In

interpreting a statute, our primary goal is to determine and give effect to the underlying purpose of the law"); *Dyna-Med, Inc. v. Fair Employment and Housing Comm*. (1987) 43 Cal.3d 1379, 1386-1387 ("our first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law"); *Moyer v. Workmen's Comp. Appeals Bd*. (1973) 10 Cal.3d 222, 230 ("We begin with the fundamental rule that a court 'should ascertain the intent of the Legislature so as to effectuate the purpose of the law"), quoting *Select Base Materials v. Board of Equal*. (1959) 51 Cal.2d 640, 645 ("The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law").)

Given the Legislature's repeated statement of purpose, Bailey suggests that this bedrock interpretative fundamental principle, which respects rather than disregards the actions of a coordinate branch of government, should govern this Court's interpretation and application of SB 1300, particularly as codified in §12923, just as the Legislature intended.

B. Bailey's Position Recognizes Both The Subjective and Objective Prongs Of the Severe Or Pervasive Standard.

Contrary to ASCDC's contention, Bailey neither ignored nor conflated the subjective and objective prongs of the harassment standard. Consistent with the Legislature's explicit intent underlying SB 1300, Bailey repeatedly referenced or applied the standard throughout the harassment discussions in Bailey's merits briefs (see, e.g., AOB Merits 29-31; ARB Merits 25-26, and her petition for review (20-21). Consistent with prior FEHA law, the Legislature explicitly recognized in enacting SB 1300 that a FEHA plaintiff must show that she actually experienced the harassing

conduct as severe or pervasive, and that a reasonable person sanding in her shoes could experience the same. (See Sen. Comm. on Rules, analysis on Sen. Bill 1300 (2017-2018 Reg. Sess.) (Aug. 30, 2018) at 4, quoting *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 25 (Ginsburg, J., concurring) ("SB 1300 declares the intent of the Legislature that harassment creates an environment that deprives workers of their statutory right to work in a place free of discrimination…. '…It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job'").)

Bailey's merits briefs detail her subjective response to the harassment, for three relevant reasons, but not because she ignored the objective prong: (1) since Bailey necessarily falls within the hypothetical class of reasonable African American woman against which the severe or pervasive standard is objectively measured, a jury could find her personal experience to be useful in assessing the objective standard; (2) discussing City/DAO's response to Bailey's subjective response to the harassment illuminates City/DAO's seriously deficient – both delayed and inappropriate (§12940(j)(1)) – to Bailey's experience; and (3) the discussion confirms what CITY/DAO conceded from the start, that Bailey in fact experienced Larkin's slur and its aftermath as unlawful racial harassment under FEHA.

In short, Bailey neither conflated the subjective-objective standard nor ignored the standard's objective prong. Just as Bailey's personal response to the harassment is undisputed, so too would the evidence support a jury finding that the objective prong was met, precluding summary judgment on Bailey's harassment claim on this ground also.

C. SB 1300 Reaffirms That FEHA Recognizes That A Co-Worker Harasser's One-Time Use Of A Virulent Racial Slur May Support A Claim For Unlawful Racial Harassment.

ASCDC's contention that FEHA precludes harassment liability based only on a co-worker's one-time racial slur lacks any merit.

First, while the statute may have originally drawn much of its political energy from the MeToo and other sexual harassment movements, by the time of its enactment SB 1300 had expanded its scope to synthesize a comprehensive approach to application of its unlawful harassment provisions on any of its enumerated bases. (See *supra* at 7.) As this history makes clear, the Legislature's focus relevant to Bailey's case was not on the substance of harassment doctrine, but on existing doctrine's application. (See, e.g., Leg. Counsel's Digest, Sen. Bill No. 1300 (2017-2018 Reg. Sess.) Stats 2018, ch. 955 (Reg. Sess.) at 2 ("This bill would declare the intent of the Legislature about the application of FEHA in regard to harassment").)

Second, ASCDC's claim that the Legislature only wished to address one-time "conduct," not verbal harassment, ignores both the Legislature's own view on this point (Sen. Comm. on Rules, analysis on Sen. Bill 1300 (2017-2018 Reg. Sess.) (Aug. 30, 2018) at 5 ("the existence of a hostile work environment is based on the totality of factors, and may include a single discriminatory remark"), as well as the California's Department of Fair Employment and Housing regulation long-defining "conduct" to include verbal harassment (2 Cal. Code Regs. §11019(b)(2)(A) ("***Harassment includes but is not limited to: (A) Verbal harassment, e.g., epithets, derogatory comments or slurs on a basis enumerated in the Act***")). See also *Roby v. McKesson Corp*. (2009) 47 Cal.4th 686, 706

(harassment may be "verbal, physical or visual"); *Aguilar v. Avis Rent A Car System, Inc*. (1999) 21 Cal.4th 121, 129-130 (if sufficiently severe, verbal harassment, including racial slurs, may support harassment claims under FEHA and Title VII); see also EEOC Compliance Manual (CCH 2018) Section 15, Race and Color Discrimination §15-VII(A) at 7222 ("A single serious incident of harassment may be sufficient to constitute a Title VII violation, especially if the harassment is physical. ***Examples of the types of single incidents that can. create a hostile work environment based on race include…an unambiguous racial epithet such as the 'N-word'***").) Significantly, to support its contention that conduct and verbal harassment need to be kept distinct, ASCDC mistakenly cites to *Aguilar*'s First Amendment discussion, where the distinction between speech and conduct is basic doctrine (see ASCDC Amicus Brief at 13-14, citing to *Aguilar*, 21 Cal.4th at 134, 146 fn 9), while *Aguilar*'s harassment discussion makes no such categorical distinction so long as the verbal abuse satisfies statutory harassment standards (*Aguilar*, 21 Cal.4th at 129-131.)[2]

[2] The Legislature's rejection of the Ninth Circuit's non-binding decision in *Brooks v. City of San Mateo* (9th Cir. 2000) 229 F.3d 917, which had rejected the very principle the Legislature affirmed in §12923(b), that "[a] single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment." Under this standard, the fact that *Brooks* involved a one-time physical assault while Bailey suffered the infliction of a virulent racial slur is, and should be, irrelevant. The guiding principle – the nature of the harm created by a hostile workplace environment – is and should be the same.

In sum, SB 1300, and §12923(b) specifically, make explicit what was already implicit in longstanding FEHA jurisprudence, and the nature of the n-word racial slur in particular (AOB Merits 9-11, 17 fn 6, 32-35; ARB Merits 9-10, 26-29; Brief of Amici Curiae Legal Aid at Work et al. at 22-38, 38-44), that it may support of a finding that it created a hostile workplace environment constituting unlawful harassment. Amicus ASCDC presents nothing that would change that conclusion.

D. The Legislature's Caution That Summary Judgment Is Rarely Appropriate in Unlawful Harassment Cases Should Be Given Due Consideration and Full Force And Effect In Assessing Bailey's Claims.

Lastly, ASCDC argues that the Legislature's caution that summary judgment is rarely appropriate in FEHA harassment claims may be disregarded as irrelevant if the employer is entitled to summary judgment. ASCDC's contention, however, begs the question the Legislature actually addressed, the inherently subjective factors that the jury must consider in applying the objective prong of the subjective-objective harassment standard for which the caution is entirely appropriate.

Bailey's principal briefs noted the state and federal cases that have long recognized the need for such caution. (AOB Merits 27-28; ARB Merits 21-22.) Here, however, the Legislature explained at length the challenges and difficulties faced in that assessment. (Sen. Comm. on Judiciary, analysis on Sen. Bill 1300 (2017-2018 Reg. Sess.) April 17, 2018 at 12-13.) The Judiciary Committee's comprehensive analysis of these challenges, lacking in the relevant case law, should be considered in detail:

> In the context of workplace harassment lawsuits, defendants often seek summary judgment on the ground that, even if everything that the plaintiff alleges is true, what happened

may have been difficult, unpleasant, or even offensive, but it was not sufficiently "severe or pervasive" to constitute unlawful harassment. As discussed in Comment 3, whether or not any set of facts reaches the point of being "severe or pervasive" must be determined in light of the totality of the circumstances as viewed from the perspective of a reasonable person in the plaintiff's position. On summary judgment, this requires judges to put themselves in the shoes of the plaintiff, step into the circumstances the plaintiff faced, and try to decide how a reasonable plaintiff would have perceived things.

To complicate the task, at the summary judgment stage of a case, all the judge has to work with to assess the totality of the circumstances are "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." (Code Civ. Proc. Sec. 437c(b)(1)) – in other words, a lot of papers, with an occasional video deposition thrown in. The judge has to evaluate all the nuance and context that comprise "the totality of the circumstances" based on a limited universe of material and without the benefit of meeting or asking any questions of any of the people involved.

This would be a difficult task for any individual, but the economic and demographic gulf between most victims of harassment and most judges makes it even more challenging. All judges have a form of tenure – they cannot be fired from their jobs and denied the associated benefits arbitrarily. (Cal. Const., Art. VI, Secs. 8, 18, 18.1 and 18.5.) By contrast, many if not most Californians work as "at-will" employees, meaning they can be fired at any time for any lawful reason, including for no reason at all. (Lab. Code Sec. 2922.) The vast majority of victims of sexual harassment are women. 1 By contrast, most California judges are men. The vast majority of victims of racial harassment are people of color. By contrast, the California bench is mostly white. The vast majority of victims of homophobic harassment identify as lesbian or gay. The overwhelming majority of California judges identify as straight.

This bill would note the tremendous difficulty inherent in ruling on a summary judgment motion in the context of

> ***workplace harassment lawsuits. With that in mind, it would state the view of the Legislature that such cases are rarely appropriate for disposition on summary judgment***. Two additional points are implied: first, that a fact-finder informed by live testimony and exposed to all of the nuances of a case will be better situated to assess the totality of the circumstances than a fact finder informed only by affidavits, declarations, deposition transcripts and discovery; and second, that a jury of peers, composed of a diverse cross-section of the community, will be better able to appraise how a reasonable person in the plaintiff's position would have perceived the totality of the circumstances than any single individual, no matter how legally adept.

(*Id*. at 12-13, emphasis added; footnote omitted.)

In short, this cogent analysis illuminates the challenges and difficulties inherent in attempting to resolve workplace harassment claims on summary judgment. The judiciary would do well to accept the Legislature's statutory caution against the too-readily available summary judgments in the FEHA harassment and discrimination contexts. (§12923(e).) The courts should also take to heart the Legislature's insightful analysis of precisely why such summary adjudications should be rare, as Justice Richman noted in *Nazir*, 178 Cal.App.4th at 285-286 ("we… observe that many employment cases present issues of intent, and motive, ***and hostile working environment***, issues not determinable on paper. Such cases, we caution, are rarely appropriate for disposition on summary judgment….").

II. THE CONTENTIONS OF AMICI CURIAE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES LACK MERIT.

CSAC either repeats contentions already advanced by respondent City/DAO (e.g., employer's response here, including its investigation and counseling to the harasser Larkin, were prompt and appropriate) or asserts and seeks to rebut claims Bailey never made (e.g., Bailey supposedly blurs the difference between supervisor and co-worker harassment liability under §12940(j)(1); and Bailey purports to impose a strict liability principle for employers for co-worker harassment). None of CSAC's contentions have merit.

A. Bailey's Analysis Of Employer Liability Consistently Accounts For The Distinction Between Supervisor and Co-Worker Harassment Under §12940(j)(1).

As Bailey noted in her principal merits briefs, FEHA explicitly distinguishes between harassment by a supervisor or by a co-worker in imposing liability for unlawful harassment, and throughout structured her discussion of both harassment and employer liability around that distinction. (AOB Merits 28-38, 38-44; ARB Merits 23-29, 29-33.) Bailey will not repeat those discussions here, but in essence, when co-worker harassment is charged, the employer may avoid liability only if it "knows or should have known of this conduct and fails to take immediate and appropriate corrective action." (§12940(j)(1).)

As relevant here, FEHA makes no other distinction in the harassment analysis between the harasser as supervisor or co-worker. Rather, as SB 1300 makes clear, whether actionable harassment occurred depends on the nature of the harassing conduct and its effect on the victim in creating a

hostile workplace, with which a reasonable person sharing the victim's essential characteristics could agree. (§12923(a).) In determining harassment, the harasser's station within the employing entity is largely irrelevant "although harassment by a high-level manager may be more injurious because of the prestige and authority that the manager enjoys." (See *Roby*, 47 Cal.4th at 706-707.)[3]

The question, therefore, is whether, once it learns of the harassing incident, the employer's response is both immediate and appropriate. As discussed below and at length in her principal briefs, whether City/DAO's response, assessed in the totality of its circumstances experienced by the victim, is immediate and appropriate is at the very least disputed, precluding summary judgment.

B. That A Co-Worker's One-Time Infliction of the N-Word Racial Slur Does Not, By Definition, Recur Does Not Conclusively Establish That An Employer's Response Is Sufficiently Prompt Or Appropriate, As The Seriously Flawed Response to Bailey's Racial Harassment Charge Aptly Illuminates.

By this contention – that the one-time infliction of a racial slur does not recur conclusively establishes the employer's prompt and appropriate response to the harassing conduct – CSAC essentially repeats City/DAO's

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[3] Section 12940(j)(1) largely draws a bright line between the harassment and employer liability determinations. However, just as Roby recognized that harassment by a high level employee may be experienced as "more injurious," so too an employer's response to the harassment may be so deficient as to "adopt the offending conduct and its results quite as f they had been authorized affirmatively as the employer' policy." (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 789; accord *Christian v. Umpqua Bank, Inc.* (9th Cir. 2020) 984 F.3d at 811 ("employer may be held liable for…harassment…, where he employer either ratifies or acquiesces in the harassment by no taking immediate and/or corrective actions").)

contention on the merits. Bailey has already discussed and refuted this contention at length in its principal briefs on the merits, and will not repeat her arguments again here. (AOB Merits 38-44; ARB Merits 29-33.) Bailey, however, notes the following three points:

First, CSAC, like City/DAO, contends that an exclusive focus on whether the employer has acted to stop the particular harassment in question should be the sole governing criterion as to the appropriateness of its corrective action. CSAC's contention, however, entirely ignores the other, broader aspect of its affirmative duty to promptly address and correct discriminatory and harassing conduct in order to assure a harassment-free work environment as a whole. (2 Cal. Code Regs §11023(a); see e.g., *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 881-882 (employer's remedial actions not only must be "proportionat[e] to the seriousness of the offense" and "reasonably calculated to the the harassment" but must also be focused on dissuading other potential harassers in order to assure harassment-free workplace.); *Christian*, 984 F.3d at 812 (effectiveness of corrective action "is measured not only by ending the current harassment but by 'deterring future harassment by the same offender or others'"); *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522, 1528-1529 (obligation to remedy "will not be discharged until action – prompt, effective action – has been taken. Effectiveness will e measured by the twin purposes of ending the current harassment and deterring future harassment – by the same offender or others").)

Second, FEHA mandates that the assessment of a hostile work environment supporting harassment claim be based on the "totality of circumstances" (§12923(c)), thereby precluding a focus on one isolated

aspect of the incidents comprising harassing conduct and ignoring the rest. Yet that is exactly what CSAC, and City/DAO in their merits brief, advocate. As this case underscores, employees experience the harassing conduct as a whole, and §12923(c) ensures that an assessment of the creation of a hostile work environment will reflect that reality.

Third, the DAO's and the City's "investigations" were abject failures despite CSAC's heavy reliance on their sufficiency and integrity. DAO interviewed only Larkin and Bailey, but no other witnesses, and terminated its investigation based on Larkin's supposed denial that used the n-word despite Arcelona's testimony that Larkin never denied making the slur. (Compare 2.AA.336:7-21 (Larkin "denied using the n-word and no further action was going to be taken"), with 2.AA.542:8-543:7 (in Arcelona's January 29, 2015 meeting with Larkin, only a week after the incident, Larkin never denied making the slur).) For its part, the City HR Department flatly stated that Bailey's charges were "insufficient" and that "DHR will not investigate your complaint." (2.AA.252.)

Lastly, since a co-worker's (or any employee's) one-time infliction of a racial slur against another employee is, by definition, not repeated, CSAC's contention that its non-recurrence conclusively establishes that an employer's response was appropriate amounts to a denial that harassment may be based on one severe incident and resurrection of the "one free grope" – or here "one free slur" – principle the Legislature emphatically rejected in its recent FEHA amendments. (See §12923(b).)[4]

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[4] Section 12923(b) provides: "A single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile (continued…)

In sum, the principle for which CSAC advocates is inconsistent with FEHA's governing principles, and should be rejected by this Court.

C. Bailey's Position Does Not Explicitly Or Implicitly Seek To Impose Strict Liability On Employers For Co-Worker Harassment Based On The One-Time Infliction Of The N-Word Racial Slur.

CSAC devotes over half of its argument to its assertion that Bailey seeks to impose strict liability on employers by arguing that "summary judgment is unavailable for employers seeking to show that they took immediate and appropriate corrective action in response to learning about allegations of harassment even when it is undisputed that the alleged comment in this case was never repeated." (CSAC Brief of Amici Curiae at 20.) CSAC, however, could hardly more fundamentally misconstrue Bailey's position, which advocates nothing of the kind.

Again, Bailey cannot, and will not, repeat the entirety of her discussion of the question of FEHA liability arising from the creation of a hostile work environment based on a co-worker's one-time use of the n-word racial slur. (See AOB Merits 28-44; ARB Merits 23-33; see also Brief of Amici Curiae Legal Aid at Work et al. at 22-38, 38-44.) Almost suffice it to say that nothing in Bailey's discussion supports CSAC's

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(…continued)
work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment. In that regard, the Legislature hereby declares its rejection of the United States Court of Appeals for the 9th Circuit's opinion in *Brooks v. City of San Mateo* (2000) 229 F.3d 917 and states that the opinion shall not be used in determining what kind of conduct is sufficiently severe or pervasive to constitute a violation of the California Fair Employment and Housing Act.

characterization of her contentions here. Nonetheless, Bailey emphasizes the following points:

First, the whole point of Bailey's contentions is to show that, given the egregious nature of racial slurs, and of the n-word in particular, unlawful harassment claims and claims of employer liability based on a co-worker's one-time infliction of the n-word racial slur should not be summarily dismissed, but should be submitted to a jury to assess in light of the totality of circumstances presented. This would be especially true if, as here, the slur is augmented by additional language (here, the word "scary"), and the victim's knowledge of her contextual vulnerability (here, Bailey's awareness that Larkin had previously used her relationship with Taylor Monachino, DAO Human Resources Department Manager, to retaliate against other African American women in the DAO. Nonetheless, that summary judgment on the harassment or employer liability elements may be inappropriate does not mean, guarantee or require that Bailey, or any plaintiff-employee, will prevail on this issue at trial, thereby precluding a "strict liability" mischaracterization of Bailey's claim.

Second, CSAC laments that such a rule ignores public employers' efforts "to promptly, effectively, and fairly respond to allegations of employee misconduct." (CSAC Amici Brief at 25.) Of course, not all public employers act properly in all cases. But if any such idealized public employer so responded to a co-worker harassment incident, without the patent deficiencies, much of it going well beyond mere negligence, presented here, that employer might well be able to secure summary judgment on the liability element or prevail on that element at trial. Again, that an employee subjected to a co-worker's racial slur may properly

survive summary judgment on that issue does not guarantee that she will prevail at trial on that issue, or on other elements either on summary judgment or trial.

Third, CSAC laments that under Bailey's rule, the courts will be flooded with meritless cases charging unlawful harassment based only on a one-time racial slur between co-workers. Of course, conclusively characterizing such claims as meritless from the start begs the basic question, whether the charges are in fact true and meritorious. Moreover, as a corollary, to categorically deny such claims from the start, as CSAC contends, would mean that many, perhaps thousands statewide, meritorious claims of co-worker racial harassment would be barred from redress, thereby undermining FEHA's remedial purposes and the fundamental state policies they embody. The courts are he forum for assessing and resolving such claims, thereby furthering FEHA's important goals in service of such fundamental state policies.

Lastly, the irony of CSAC's position deserves mention. CSAC charges that Bailey seeks to impose strict liability on employers in cases involving racial slurs between co-workers. Bailey's merits briefs, and summary discussion above, show that charge to be untrue. CSAC, however, plainly does argue for a strict liability standard in such cases, more specifically a strict non-liability standard, with the detrimental results just noted. CSAC's contention lacks merit and should be disregarded.

CONCLUSION

Neither amicus curiae brief undermines the merits of Bailey' appeal here. Again, at stake here is whether, in the face of the Court of Appeal's misconstruction and misapplication of FEHA's protections and guarantees,

ordinary non-supervisorial employees will have the protections they deserve and need to prevent and redress all forms of unlawful harassment in furtherance of FEHA's ultimate remedial goals. Viewed through a correct doctrinal framework, Bailey's evidence supports her FEHA claims, which may not be resolved on summary judgment. The CA's judgment should be reversed.

Dated: September 3, 2021

Respectfully submitted,

s/ *Robert L. Rusky*

DANIEL RAY BACON/ROBERT L. RUSKY
Attorneys for Plaintiff and Appellant
TWANDA BAILEY

CERTIFICATE OF COMPLIANCE

(Cal. Rules of Court rule 8.204(c))

Bailey v. City and County of San Francisco et al.
No. S265223

As attorney of record on appeal for plaintiff and appellant Twanda Bailey, I hereby certify that the foregoing Plaintiff-Appellant's combined Answer to Amicus Curiae Association of Southern California Defense Counsel and to Amici Curiae California State Association of Counties and League of California Cities contains 4,716 words, exclusive of the cover sheet, the tables of contents and authorities, and this certificate of compliance, as determined by the Microsoft Word 2016 word processing program used to prepare the brief. (Cal. Rules of Court rule 8.204(c).)

Dated: September 3, 2021

s/ *Robert L. Rusky*

DANIEL RAY BACON
ROBERT L. RUSKY

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Superior Court Case Number: CGC 15-549675

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