SUPREME COURT OF THE STATE OF CALIFORNIA

TWANDA BAILEY, Petitioner/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' ANSWER TO PETITION FOR REVIEW

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

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INTRODUCTION

This Court limits its review to those cases where it is "necessary to secure uniformity of decision or to settle an important question of law," not to address claimed error arising from a lower court's application of well-established law to the facts of a case. Cal. Rules of Court, Rule 8.500-(b)(1),. But that is exactly what Petitioner Twanda Bailey seeks. Petitioner does not cite any authority that conflicts with the unanimous, unpublished decision below. Nor does Petitioner show that this case presents an important, unsettled question of law, or one that is likely to arise in many future cases. Instead, Petitioner simply asks this Court to undertake a fact-bound review of her claims, with the hope that this Court would reach a different result. But there is no error here, because the Court of Appeal correctly applied existing precedent. And even if there were, error correction is not a legitimate basis for this Court's review.

The Court should deny the petition.

ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeal's application of existing case law regarding hostile work environments warrants this Court's review?

2. Whether the Court of Appeal's application of existing case law regarding unlawful retaliation warrants this Court's review?

BACKGROUND

The Petition arises from an unpublished, unanimous opinion by the First District Court of Appeal (Division 1) affirming summary judgment in favor of the City on Petitioner's complaint for race harassment,

discrimination and retaliation in violation of the Fair Employment and Housing Act ("FEHA"). (Gov. Code § 12940, *et seq*.)[1]

Bailey worked in the records room of District Attorney's Office ("DA's Office") as an investigative assistant. Saras Larkin, also an investigative assistant, worked next to Bailey. (Opn. at 1-2.)

According to Bailey, in January 2015, a mouse ran through the records room and startled her. In response, Larkin stated "you niggers is so scary." Offended by that comment, Bailey left the records room and, when encountered by three co-workers, told them about the incident. Bailey, however, did not report the incident to human resources. And, as Bailey concedes, Larkin's slur was the only racially motivated conduct at issue. (Opn. at 2.)

The following day, Bailey's supervisor Alexandra Lopes learned of the incident and, when Bailey told Lopes that she had not reported it to human resources, Lopes told Bailey that she would notify human resources. Shortly thereafter, Assistant Chief of Finance Sheila Arcelona and Human Resources Director Evette Taylor-Monachino met with Bailey to take a statement regarding the incident. Arcelona and Taylor-Monachino then met with Larkin. Larkin denied making the statement, but Arcelona nonetheless told Larkin "that word or any iteration of that word is not acceptable in the workplace." Arcelona provided a written summary of the meetings with Bailey and Larkin to Eugene Clendinen, the Chief Administrative and Financial Officer in the DA's Office. (Opn. at 2.)

[1] The factual statements are taken from the District Court of Appeals opinion, *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.").

Approximately two months later, Bailey approached Taylor-Monachino asking for a copy of the report Bailey believed was being prepared about the incident. When Taylor-Monachino told Bailey that there was no report, Bailey asked to file a complaint. According to Bailey, Taylor-Monachino refused her request and told her not to discuss the incident with others as it would create a hostile working environment for Larkin. Bailey then went on leave for a few weeks. (Opn. at 2-3.)

In April, Bailey received a letter from the City's Department of Human Resources stating it had received notice of the incident and would be reviewing it. The Department of Human Resources had been alerted to the incident by an employee of the San Francisco Police Department employee who had heard of the incident. In July, the Department of Human Resources sent Bailey a letter summarizing her allegations, acknowledging the extremely offensive nature of the slur, and stating that, if true, the incident violated the City's Harassment-Free Workplace Policy, and that the DA's Office would take corrective action. The letter advised that the Department of Human Resources would not investigate the incident, based on the Department's conclusion that to the allegations failed to raise an inference of harassment or retaliation. In response to the letter, Clendinen required Larkin to sign an Acknowledgment of Receipt and Review of the City's Harassment-Free Workplace Policy and placed the Acknowledgment in Larkin's personnel file. (Opn. at 3.)

Bailey asserts that after she returned from leave, Taylor-Monachino treated her differently, making faces and chuckling at her and refusing to speak to her. Bailey later learned Taylor-Monachino had vetoed separating Bailey and Larkin at work. Bailey also felt her supervisors asked her to perform tasks she believed were outside her job description and were

normally Larkin's responsibility. Bailey's supervisors, however, perceived that she seemed annoyed and irritated by standard work requests. (Opn. at 3.)

In June, Bailey's new supervisor, Irene Bohannon, gave Bailey a performance plan and appraisal report that identified two areas for improvement: "regular attendance, and responsiveness to supervisory requests." Notwithstanding those concerns, Bohannon gave Bailey an overall performance rating of "Met Expectations," the same rating Bailey had received the prior two years. (Opn. at 3.)

In August, after Taylor-Monachino, according to Bailey, silently mouthed the words, "You are going to get it," Bailey filed a harassment complaint with Clendinen. (Opn. at 3.)

Three months later, in November, Bailey told Clendinen she was not comfortable covering for Larkin or performing tasks that she believed were Larkin's duties. Clendinen promptly separated Bailey and Larkin, transferring Larkin out of the records room. (Opn. at 4.)

The following month, Bailey requested and was granted a six-week medical leave. She subsequently filed this action, alleging causes of action under FEHA for racial discrimination and harassment, retaliation for having made a complaint, and failure to prevent discrimination. (Opn. at 4.)[2]

Reviewing the case *de novo*, the Court of Appeal determined that there were no triable issues of fact on which a jury could find for Petitioner on her claim for hostile work environment harassment. The Court held that the single alleged racial epithet by Bailey's co-worker was not, under the circumstances, so egregious as to be sufficiently severe or pervasive to alter

[2] The City terminated Taylor-Monachino's employment in May 2017. (Opn. at 4.)

the conditions of Petitioner's employment. (Opn. at 9-12.) The Court noted that "[i]n many cases, a single offensive act by a coemployee is not enough to establish employer liability for a hostile work environment," but the outcome may be different where the act is committed by a supervisor. (Opn. at 10, quoting *Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, 36.) The Court noted that Petitioner failed to make "any other factual showing that the conditions of her employment were so altered by the one slur by her coworker as to constitute actionable harassment." (Opn. at 12.)

The Court of Appeal also held that Petitioner failed to raise any triable issues related to her contention that the City failed to take prompt and immediate corrective action in response to her coworker's racial slur. (Opn. at 15.) The Court rejected Petitioner's reliance on *Bradley v. Department of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1612, in arguing that the remedial measures taken by the DA's Office were not sufficient. (Opn. at 14-16.) The Court noted that the "circumstances here are not comparable to those in *Bradley*." (Opn. at 16.) The DA's Office promptly investigated Bailey's claim that her co-worker used a racial epithet. And notwithstanding the co-worker's denial of using the slur, the DA's Office orally advised her that "any use of the alleged language was unacceptable," required that she meet on two separate occasions with high-level managers, was given a copy of the City's Harassment Free Workplace Policy and required to sign an acknowledgment of receipt of the policy. A copy of the signed acknowledgement was placed in the co-worker's personnel file and sent to the human resources department. (Opn. at 16.) Moreover, the Court noted that Petitioner did not offer any evidence that

these remedial measures failed to prevent further "unacceptable behavior." (Opn. at 16-17.)

Finally, the Court held that Petitioner failed to show she suffered an adverse employment action in retaliation for reporting her co-worker's racial slur. (Opn. at 17-20.) The Court of Appeals determined that Taylor-Monachino's "course of conduct" did not rise to the level of an adverse action and neither did the comments made by Petitioner's new supervisor on her performance review. The Court found these actions to be "mere offensive utterances," social slights, and work-related criticism. Petitioner also failed to tie them to any retaliatory motive connected to her complaint regarding her co-worker's racial epithet. (Opn. at 18-19.)

Petitioner sought and the Court of Appeal denied rehearing. (Pet. at Appendix, *Bailey v. San Francisco District Attorney's Office, et al,* A153520, Order dated October 6, 2020.)

ARGUMENT

I. THE COURT OF APPEAL APPLIED WELL-ESTABLISHED LAW IN AFFIRMING THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT ON PETITIONER'S HOSTILE WORK ENVIRONMENT CLAIM.

Petitioner contends that the Court should grant review because the Court of Appeal's determination that the one-time use of the "n word" by Bailey's co-worker was not actionable as creating a hostile work environment in violation of FEHA conflicts with state and federal law. Petitioner claims the Court of Appeal held that such conduct is never actionable as a matter of law. She maintains the Court made a "categorical ruling that a one-time co-worker racial slur could not create a hostile work environment." (Pet. at 24.) But Petitioner misconstrues the Court of Appeal's decision.

The Court of Appeal did not issue a categorical ruling that such conduct was never actionable. To the contrary, the Court of Appeal expressly acknowledged that the use of "a single racial epithet can be so offensive it gives rise to a triable issue of actionable harassment," citing both *Boyer-Liberto v. Fontainebleau Corp.* (4th Cir. 2015) 786 F.3d 264, *Ayissi-Etoh v. Fannie Mae* (D.C. Cir. 2013) 712 F.3d 572, and the Legislature's recent amendments to FEHA, Gov. Code § 12923(b),(c). (Opn. at 7-9.) The Court of Appeal also noted that FEHA requires a court to consider the conduct in the "totality of the circumstances." (*Id*.)

With those fundamentals in mind, the DCA correctly concluded that "the question is not whether a single, particularly egregious epithet can create a hostile work environment – under certain circumstances, it can. Rather, the pertinent question is whether the single alleged racial epithet made by Bailey's co-worker was, in context, so egregious in import and consequences as to be 'sufficiently severe or pervasive to alter the conditions of [Bailey's] employment.'" (Opn. at 9-10.)

The Court of Appeal examined the facts against this well-established standard and correctly determined that no reasonable trier of fact could conclude that the single racial slur by Petitioner's co-worker, in the absence of any other race-related conduct, constituted severe or pervasive harassment. (Opn. at 11.) In reaching that conclusion, the DCA noted that the case law recognizes the "significant difference" between the use of a racial slur by a co-worker as compared to a supervisor, because a supervisor's use of such language "impacts the work environment far more severely than use by co-equals" because they are more threatening because of a supervisor's authority. (Opn. at 10-11, citing *Boyer-Liberto, supra*,

786 F.3d at 278; *Rodgers v. Western-Southern Life Ins. Co.* (7th Cir. 1993) 12 F.3d 668, 675.)

The Court of Appeal emphasized that all of the cases Petitioner relied on below involved a supervisor's use of a highly offensive racial slur. (See, *e.g.*, *Boyer-Liberto*, *supra*, 786 F.3d at 264, *Ayissi-Etoh*, *supra*, 712 F.3d at 572; *Dee*, *supra*, 106 Cal.App.4th 30.) As the Court of Appeal noted, Petitioner did not identify a single case holding that a "single, albeit egregious racial epithet by a co-worker, without more, created a hostile work environment." (Opn. at 11.) Her arguments in the Petition are more of the same: she does not point to any other case so holding, and therefore fails to identify any conflict in decisions that could support the need for Supreme Court review.

Indeed, Petitioner conceded below that Larkin's racial slur was the only racially motivated conduct at-issue in this case. She also acknowledged that the actions taken by Taylor-Monachino, conduct she now attempts to rely upon in support of her racial harassment claims, were not motivated by her race. (Opn. at 7, n. 3.) The Court of Appeal's holding considered these facts in the totality of the circumstance against the well-established legal standard. It did not reach a categorical ruling or one in conflict with existing state or federal authority. Instead, it adhered to the case law demonstrating that the one-time use of an epithet by a non-supervisor generally does not, standing alone, create a hostile work environment. There is no error for the Court to correct, or conflict in the case law for the Court to resolve.

II. THE COURT OF APPEAL APPLIED WELL-ESTABLISHED LAW IN FINDING THAT THERE WAS NO TRIABLE ISSUE THAT THE CITY FAILED TO TAKE CORRECTIVE ACTION.

Petitioner further contends that the Court should review because the Court of Appeal incorrectly affirmed the superior court's grant of summary judgment on Petitioner's remedial-action claim. Petitioner claims the City failed to satisfy its duty under FEHA to promptly and effectively take corrective action in response to her complaint of racial harassment. According to Petitioner, the Court of Appeal misapplied the governing standard and also ignored evidence related to Taylor-Monachino's processing of Petitioner's harassment complaint. (Pet. at 7-8.) Both of these arguments are wrong.

The Court of Appeal discussed and applied the well-established law regarding an employer's obligations to promptly investigate and take remedial action, and applied that standard to the record in this case. Moreover, to the extent Petitioner seeks a reconsideration of the evidence, she does not present an issue appropriate for review by this Court. Again, Petitioner's chief complaint is not that the Court of Appeal's decision conflicts with existing law or presents an important unresolved legal issue. It is that she disagrees with the factual inferences the Court of Appeal drew and the conclusions it reached. These are not bases for Supreme Court review.

Relying on *Bradley, supra,* 158 Cal.App.4th 1612, the Court of Appeal identified the corrective action standard as follows: an employer is obligated to take measures reasonably calculated to end the current harassment and to deter harassment in the future. (Opn. at 15.) Significantly, the *Bradley* court found support for its framing of this standard in *Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184, 1192, and

Ellison v. Brady, (9th Cir. 1991) 924 F.2d 872, 822—the very cases Petitioner urges this Court to look to for the appropriate legal standard. (See, *Bradley*, *supra*, 158 Cal.App.4th at 1630.) Petitioner omits that the Court of Appeal discussed the *Bradley* decision at length, and considered the arguments she made relying on *Bradley*. (Opn. at 14-16.) Instead, Petitioner consigns her discussion to a short footnote, claiming that the Court of Appeal's discussion "misses the point" and arguing that *Bradley* simply establishes that "mere counseling of a perpetrator may not be sufficient, as there where it plainly did not stop the perpetrator." (Pet. at 27, n.9.) But Petitioner does not—and could not—meaningfully argue that the Court of Appeal misapplied *Bradley* or diverged from existing case law regarding corrective action. Once again, Petitioner does not identify any error, let alone one creating a conflict in the courts.

Unable to point to any error or conflict that the Court of Appeal's decision created, Petitioner invents an additional requirement that she claims the DCA did not address. Petitioner contends that the appropriateness of an employer's response requires more "than merely addressing the perpetrator, but extends to ensuring *that the workplace as a whole sees and understands* that the offending conduct will be taken seriously and not tolerated." (Pet. at 26 (emphasis added).) She asserts that the employer's response must constitute discipline, and also require the alleged harasser to acknowledge her misconduct. Petitioner also contends that the workplace as a whole must be made aware of the remedial measures and view them as discipline. (Pet. at 26, 28.)

There is no support for this purported standard in the case law. In fact, the very case Petitioner relies on, *Ellison*, *supra*, 924 F.2d at 822, does not support her invented requirements. Instead, *Ellison* states that an

employer's remedial measures need to be "proportionat[e] to the seriousness of the offense," and sufficient to ensure a harassment free workplace. But, *Ellison* holds that "the reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment." (924 F.2d at 882.) The Ninth Circuit in *Ellison* describes this as the essence of an employer's corrective action. The *Ellison* court further noted that a court "may also take into account the remedy's ability to persuade potential harassers to refrain from unlawful conduct." (*Id.*; see also *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522, 1528-29; *Bradley*, *supra*, 158 Cal.App.4th 1612, quoting *Ellison*, *supra*, 924 F.2d at 882 ["the reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment"].). But none of the cases Petitioner cites imposes an obligation to broadcast to the workplace as a whole the specific remedial steps taken in response to an isolated incident involving two co-workers.

The facts here show that the City's actions stopped the harassing conduct of Bailey's co-worker. The DA's Office promptly interviewed Bailey and Larkin when it learned of the incident from Bailey's supervisor. Even though Larkin denied using the epithet, she was still advised by the Assistant Chief of Finance that use of such language is unacceptable. And later, the DA's Office required her to meet with the Chief Administrative and Finance Officer and to sign an acknowledgement of receipt for the City's anti-harassment policy. That acknowledgement was placed in Larkin's personnel file and transmitted to the department of human resources.

Moreover, and as noted above, Petitioner does not argue that any other racially motivated conduct occurs. Petitioner focuses heavily on

human resource manager Taylor-Monachino's conduct in response to Larkin's harassment complaint. But she has conceded that whatever Taylor-Monachino's motivations, they were not founded on Petitioner's race and accordingly do not support either her racial harassment or her corrective action claims. (Opn. at 14.)

The Court of Appeal properly considered whether the City's corrective action stopped harassment by the alleged harasser, and correctly held and that there was no triable issue that the City failed to make a reasonable inquiry into the allegations and take prompt and effective corrective action. (Opn. at 16-17.) There is no reason for this Court to reconsider that fact bound determination.

III. THE COURT OF APPEAL APPLIED WELL-ESTABLISHED LAW IN AFFIRMING THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT ON PETITIONER'S RETALIATION CLAIM

With respect to her claim for retaliation in violation of FEHA, Petitioner attempts to frame the issue for review as an alleged conflict of law. She argues the Court of Appeal's ruling on her retaliation claim conflicts with this Court's holding in *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028. And the focus of her argument is that the Court of Appeal did not fully consider the alleged gravity of the underlying harassment, Taylor-Monachino's alleged hostility to Bailey's harassment complaint, and the negative comments in her performance evaluations in assessing the totality of circumstances supporting her retaliation claim. (Pet. at 8-9.)

But once again, Petitioner actually challenges not the legal standard the Court of Appeal applied, but instead argues that the Court of Appeal misapplied the facts to the controlling law. Petitioner is unhappy with the inferences and conclusions drawn based on the undisputed evidence, and

invites this Court to engage in a fact bound inquiry already conducted by the trial court and Court of Appeal.

There is no basis for this Court to review this claim. The Court of Appeal once again applied the well-established law to the conduct that Petitioner contends supported a triable issue that the DA's Office subjected her to an adverse action, an essential element of her retaliation claim. First, and as discussed above, the Court of Appeal determined that Petitioner was not the victim of racial harassment based on the single racial epithet by her co-worker. (Opn. at 7-12.) And the Court of Appeal found that the City took prompt and effective action to correct the alleged conduct of Bailey's co-worker. (Opn. at 12-17.) Petitioner contends that she suffered emotional upset as a result of her co-worker's alleged slur and, in turn, that emotional upset impacted her job performance. But, as the District Court noted, the alleged impact of her emotional upset on her job performance was not a consequence of any retaliatory action by her supervisor. (Opn. at 19.) Second, Petitioner did not suffer an adverse employment action from any allegedly critical comments in her performance review. (Opn. at 19-20.) This is particularly so when the performance review is viewed in context, and Petitioner received an overall positive review of "meets expectations," and any "criticism" concerned two areas for improved performance. Finally, the Court of Appeal determined that Taylor-Monachino's "course of conduct" towards Petitioner did not rise to the level of adverse employment action. Instead, Taylor-Monachino's actions amounted to a pattern of social slights and ostracism. (Opn. at 18-19.) Petitioner describes this as "deliberate obstruction of employee's harassment claim," when, of course, the City promptly and effectively took remedial actions in response to Bailey claim of racial harassment.

As is true of her other arguments in the Petition, Petitioner does not identify a ground for this Court's review. Petitioner does not point to any unsettled legal question, conflict among the courts of appeal, or other matter that might warrant review. Her disagreement with the Court of Appeal's decision—which is correct, in any event—is not a basis for Supreme Court review.

CONCLUSION

For these reasons, the Court should deny the petition for review.

Dated: November 30, 2020

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CERTIFICATE OF COMPLIANCE

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 3,726 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on November 30, 2020.

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PROOF OF SERVICE

I, DAVID BLUM, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Fifth Floor, San Francisco, CA 94102.

On November 30, 2020, I served the following document(s):

- **RESPONDENTS' ANSWER TO PETITION FOR REVIEW**

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Executed November 30, 2020, at San Francisco, California.

DAVID BLUM

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **BAILEY v. SAN FRANCISCO DISTRICT ATTORNEY'S OFFICE**
Case Number: **S265223**
Lower Court Case Number: **A153520**

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/s/David Blum
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San Francisco City Attorney's Office
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