v

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

REPLY TO CITY'S ANWER TO PETITION FOR REVIEW

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

DANIEL RAY BACON, No. 103866
Law Offices of Daniel Ray Bacon
234 Van Ness Avenue
San Francisco, CA 94102
Telephone (415) 864-0907
Facsimile: (415) 864-0989

ROBERT L. RUSKY – No. 84989
159 Beaver Street
San Francisco, CA 94114
Tel: (415) 823-9356
Fax: (775) 310-0610

Attorneys for Plaintiff, Appellant and Petitioner
TWANDA BAILEY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Constitution, Statutes and Rules

Supplemental Authorities

INTRODUCTION TO REPLY TO ANSWER TO PETITION FOR REVIEW

In response to petitioner Twanda Bailey's Petition for Review City and County of San Francisco ("City") and its District Attorney's Office ("DAO") (collectively "City" or "City/DAO") centrally that Bailey has not presented any legal issue of sufficient importance on any of her claims to justify review, and that, in any event, the Court of Appeal ("CA") decision correctly stated and applied established California law in affirming the trial court's summary judgment for City/DAO.

As discussed below, the City is wrong on both counts for both of Bailey's FEHA claims. Contrary to the City's contention, Bailey has presented important issues as to the scope and meaning of California's FEHA, particularly as applied to the question whether a co-worker's one-time racial slur against another co-worker is properly covered by FEHA. And for none of these issues did the CA consistently state or apply so-called "well-established" law in making its own inferences, almost all taken in favor of the City/DAO, from the evidence in taking the case from the jury, and rejecting Bailey's claims as matters of law on summary judgment.

REPLY TO CITY'S SUMMARY OF FACTS

The City's Answer Brief accepts the facts as stated in the CA Decision, thereby ignoring the additional facts and evidence Bailey presented through her petition for rehearing that is relevant and material to the ultimate issues comprising Bailey's harassment and retaliation claims against the City. As this Court's rules contemplate, when the CA decision omits or erroneously presents relevant facts, parties may bring that factual matter to the CA's attention through a petition for rehearing, and hence to

this Court's attention through the Petition for Review. (Cal. Rules of Court 8.500(c)(2).)

This is exactly what Bailey did. In response to the CA decision, Bailey presented a petition for rehearing specifying the relevant evidence and facts the CA left out of the decision for the purpose of being able to present and have these facts and evidence to this Court considered on a petition for review. Bailey will not repeat this discussion here, but refers this Court to the factual discussion in the Petition for Review 11-20 and Petition for Rehearing 11-20.

Since a jury would be entitled to consider that fuller context, i.e., the totality of circumstances (Gov. Code §12923(c); (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1055-1056), in assessing Bailey's harassment and retaliation claims, the courts on summary judgment must assume the jury would find in Bailey's favor on all material facts and relevant inferences, and must liberally construe the evidence in her favor, resolve all ambiguities, doubts and credibility issues in her favor, and accept her evidence and all reasonable inferences therefrom as true. (*Id.* at 1037; *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 857; *Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1036.)

ARGUMENT

I. BAILEY'S HARASSMENT CLAIM PRESENTS IMPORTANT ISSUES OF FEHA LAW, PARTICULARLY UNDER ITS RECENT AMENDMENTS.

A. Whether Liability For Unlawful Harassment May Be Based On A One-Time Racial Slur By A Co-Worker Presents An Issue Of Statewide Importance Under California's FEHA.

Responding to Bailey's showing that whether her co-worker Larkin's racial slur against her potentially created an actionable hostile work environment to be assessed by a jury, the City first argues that the CA Decision drew no such categorical distinction between a one-time slur from a supervisor or co-worker, and then argues for most of the balance of its discussion defending that very categorization. The City's contentions lack merit.

First, the CA did issue a categorical rule whether or not it was so labeled. The CA Decision accepted many of the premises of Bailey's position – including that a single-word slur, even if by a "non-decisionmaker, may be sufficient in its full context ("totality of circumstances") to create a hostile work environment. (CA Decision 6-9.) Nonetheless, the CA rejected Bailey's claim solely because Larkin was not a DAO supervisor – no other basis for taking the issue from the jury and affirming summary judgment on the hostile environment factual issue was discussed or given. (*Id.* at 9-12.) Indeed, the City's Answering Brief adds none either other than the presumed greater immediate impact when the slur comes from a supervisor. (Answ.Br. at 7-8.)

Second, the City ignores entirely Bailey's analysis that, by its terms, poses the question presented here. (Pet. for Review at 20-25.) Bailey will

not repeat that discussion, but notes the following: (1) Although most of the federal cases addressing the use of the "n-word" involved racial harassment by supervisors, these cases turned far more on the seriousness of the racial slur – the same one used here – rather than strictly on the perpetrator's position. (See, e.g., *Alcorn v. Anbro Engineering, Inc*. (1970) 2 Cal.3d 493, 496-499, fns. 2–4, esp. fn. 4 (the "epithet 'n---r'…has become particularly abusive and insulting in light of recent developments in the civil rights' movement as it pertains to the American Negro"); *Agarwal v. Johnson* (1979) 25 Cal.3d 923, 941, 946-949 ("n-word" may constitute actionable outrageous conduct when said by supervisor or if the victim is especially susceptible); *Ayissi-Etoh v. Fannie Mae* (DC Cir. 2013) 712 F.3d 572, 580 (Kavanaugh, J., concurring) ("That epithet has been labeled, variously, a term that 'sums up…all the bitter years of insult and struggle in America'"); *Spriggs v. Diamond Auto Glass* (4th Cir. 2001) 242 F.3d 179, 185, emphasis added ("Far more than a 'mere offensive utterance,' *the word 'nigger' is pure anathema to African Americans…*"; "*it is degrading and humiliating in the extreme*").)[1] (2) An employer's failure to deal "immediately and appropriately" with the co-worker harassment (Gov. Code §12940(j)(1)), especially one involving actual management malfeasance rather than mere

[1] And, contrary to the CA's and the City's assertions, Bailey did cite cases to the CA prior to oral argument involving only co-worker harassment. See *Williams v. City of Philadelphia Office of Fleet Mgmt.* (E.D. Pa. 2020) 2020 WL 7677665 at *4-5 (triable issue of harassment where co-worker called African American employee "n-word"; plaintiff complained but management instead suspended him and transferred him to a less desirable job); *Bynum v. District of Columbia* (D.D.C. 2020) 424 F.Supp.3d 122, 134-138, esp. 136-138 (co-worker's one-time "you need to go back to the South where you came from" epithet to African American employee sufficiently racially-tinged to create hostile work environment).

negligence against Bailey, also provides the vehicle for finding that employer authority effectively adopted or ratified the underlying conduct (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 789; Chin, Employment Litigation (Rutter Group 2017) §10.395-10.397). (3) In ignoring Bailey's analysis, the City also ignores the threshold importance of the recent amendments to FEHA (Stats 2018, ch. 955 (SB 111300)) that strongly clarified (a) the breadth of conduct and employee response that could give rise to a hostile work environment (§12923(a)); (b) that a single serious incident could give rise to a hostile work environment (§12923(b); EEOC Compliance Manual (CCH 2018), Section 15, Race and Color Discrimination §15-VII(A)); and (c) whether a hostile work environment is created depends upon the totality of the circumstances (§12923(c)); and (d) "Harassment cases are rarely appropriate for disposition on summary judgment," affirming. *Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243 "and its observation that hostile working environment cases involve issues 'not determinable on paper'" (§12923(e)).

As an issue potentially implicating the civil rights of millions of employees across the state, the question of co-worker harassment even by a single use of a racial slur, and especially one like the "n-word," presents an issue of statewide importance requiring clarification in light of the governing state and federal principles. The CA's affirmance of the summary judgment should be reversed, where the assessment and inference of an actionable hostile work environment should properly be by the jury after trial, not by the courts on summary judgment.

B. Review Is Necessary To Clarify The Standards Governing FEHA's Mandate That Employers Respond Immediately and Appropriately To Instances Of Co-Worker Harassment Presents A Question Of Statewide Importance On Matters Of Fundamental State Policy.

In her petition for review, Bailey showed that the CA improperly affirmed summary judgment on this issue based solely on its factual inference that DAO counseling prevented further racial slurs by Larkin, thereby violating not just core summary standards, but ignoring legal doctrine informing the "immediate and appropriate" standard requiring the jury's consideration of the totality of the employer's response. (Gov. Code §12940(j)(1); Pet. for Review 25-30.) This is critical because Bailey's evidence would allow a jury to find that City/DAO not only negligently failed to immediately and appropriately respond to Larkin's slur, but deliberately tried to obstruct and sabotage Bailey's racial harassment complaint. (*Id*.) City/DAO's response to Bailey's petition lacks merit.

First, review remains necessary even though *Bradley v. Department of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1612, the case the CA Decision relied on to affirm the summary judgment on the unlawful harassment claim, incorporates some aspects of the broader doctrine based in federal law requiring the employer's response to be appropriate to the workplace as a whole, not just narrowly to the perpetrator. While a positive step toward fuller employee protections, *Bradley*'s discussion is still sketchy (*id*. at 1630-1631, 1633-1634) – indeed, less substantive than Bailey's (pet. for review 26-30), and needs further explication to give sufficient direction to the courts and parties in applying this standard.

Second, this need is exacerbated because both *Bradley* and the CA Decision here unfortunately distort the broader standard. In *Bradley*, faced with a perpetrator who refused to follow directions or comply with expected norms in dealing with interpersonal relationships within the employee context, the Court focused on the employer's failures to stop the perpetrator's immediate harassment. (158 Cal.App.4th at 1633-1634.) And the CA Decision here ignores this larger duty to the workplace as well as to Bailey herself, plucking the minimal counseling given to Larkin from all other aspects of the City/DAO's response to Larkin's slur, and holding it as categorically sufficient as a matter of law to satisfy City/DAO's duty to respond immediately and appropriately to Larkin's slur. (CA Decision 14-17, esp. 17 ("Measured by the employer's '"'ability to stop harassment by the person engaged in the harassment,'"' the remedial action by the DA's Office and the County was effective").)

Lastly, review is necessary because the narrower doctrine may lead to more decisions like that here, where the victim is subjected to egregious misconduct and retaliation, all stemming from Larkin's original slur and Bailey's decision to pursue her complaint against Larkin, but all of which the CA Decision regards as irrelevant. As *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872 and *Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184, and other cases have made clear, this other evidence is not irrelevant because it comprises an integral part of the employer's response to the harassment and the persons involved.

Bailey will not repeat her discussion of the deficiencies of that approach again here. (See Pet. for Review 27-30.) Suffice it to say that any doctrine that allows a decision to regard the official abuse, threats,

obstruction and sabotage of an employee-victim's anti-harassment complaint as irrelevant, as happened here, desperately needs correction.

II. BAILEY PRESENTS IMPORTANT ISSUES AS TO THE PROPER STANDARDS GOVERNING RETALIATION CLAIMS UNDER FEHA. THE CA IGNORED AND FAILED TO APPLY GOVERNING LAW TO BAILEY'S FEHA RETALIATION CLAIMS.

Once again the City charges that Bailey has failed to raise any issue worthy of review and that in any case the CA correctly applied established law in affirming the summary judgment. Once again, the City is wrong.

First, as Bailey's petition here makes clear, Bailey does object to the legal standard the CA applied, which essentially ignored the standards governing FEHA retaliation cases this Court comprehensively established in its seminal decision in *Yanowitz*, 36 Cal.4th 1028. Other than a reference to the elements of a retaliation claim (CA Decision at 17), the CA ignores *Yanowitz*, turning to other cases in order to argue, as the City does, that often instances of alleged retaliation, taken by themselves, will not support an actionable retaliation claim based on the creation of a hostile or adverse employment context (*id*. at 17-20).

In so doing, however, the CA ignores one of Yanowitz's keystone principles, that FEHA broadly includes all alleged retaliatory conduct creating an actionable hostile work environment, which conduct our juries have the right and need to assess as a "collective" whole, the way the employee would experience the conduct in context as part of the realities of the workplace. (Pet. for Review at 30-32; *Yanowitz*, 36 Cal.4th at 1052-1056; CA Decision at 17-19.) The CA Decision also ignores Yanowitz's two related principles supporting a collective view of the allegations and

evidence of retaliation: (1) that the harassment concept itself broadly includes all manner of conduct that individually or collectively may create an actionable hostile work environment, and (2) that retaliation is a highly fact-based inquiry ill-suited for summary judgment, and the jury's right and need to assess the alleged retaliatory conduct as a collective whole, the way the employee would experience the conduct in context as part of the realities of the workplace. (*Id*.)

Instead, the CA here did the opposite, citing *Light v. Dept. of Parks & Recreation* (2017) 14 Cal.App.5th 75, 92, and relying on its catalogue of alleged retaliatory actions, like "mere" in-office slights, that in its view would not individually constitute an adverse employment action.

Here, however, Bailey has alleged, and has adduced ample supporting evidence, that she was retaliated against as a result of her harassment complaint in the host of ways described that "collectively" – and even individually in Taylor-Manochino's several attempts to obstruct or sabotage Bailey's discrimination/harassment complaint – would comfortably support a finding of unlawful retaliation under *Yanowitz*'s standards. (Pet. for Review at 31-33.)

Clarification of the standards governing FEHA retaliation claims and the Court's own enforcement of its own decisions, if their terms and standards are being violated, is vital to the integrity of the judicial system and administration of justice. As Bailey's discussion in her Petition for Review shows, the CA decision here violated *Yanowitz*'s comprehensive standards governing FEHA discrimination claims, and the errors it thereby introduced into the analysis should be reviewed and reversed.

CONCLUSION

The City's Answer to the Petition for Review lacks merit: Bailey has presented important issues arising from FEHA, California's statement of civil rights embodying fundamental state policy prohibiting discrimination in employment. These issues, affecting employees statewide, deserve clarification and correction, especially where the CA Decision here repeatedly misstates or conflicts with governing law and operative facts in reaching a profoundly unjust decision rejecting Bailey's claims. Bailey's claims may not be resolved on summary judgment, and she is therefore entitled to present her case to a jury on its merits.

Dated: December 18, 2020

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.
S265223

As attorney of record on appeal for plaintiff and appellant Twanda Bailey, I hereby certify that the foregoing Reply to City's Answer to Petition for Review contains 2483 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: December 18, 2020

s/ *Robert L. Rusky*

DANIEL RAY BACON
ROBERT L. RUSKY

PROOF OF SERVICE (Court of Appeal)

[x] **Mail** [ ] **Personal Service**

Notice: This form may be used to provide proof that a document has been served in a proceeding in the Court of Appeal. Please read *Information Sheet for Proof of Service (Court of Appeal)* (form APP-009-INFO) before completing this form. Do not use this form for proof of electronic service. See form APP-009E.

Case Name: Bailey v. San Francisco District Attorney's Office et al.

Court of Appeal Case Number: A15352/S265223

Superior Court Case Number: CGC 15-549675

1. At the time of service I was at least 18 years of age and **not a party to this legal action.**
2. My [ ] residence [x] business address is *(specify)*:
   234 Van Ness Avenue, San Francisco, CA 94102
3. I mailed or personally delivered a copy of the following document as indicated below *(fill in the name of the document you mailed or delivered and complete either a or b):*

   Reply to Answer to Petition for Review

   a. [x] **Mail.** I mailed a copy of the document identified above as follows:

      (1) I enclosed a copy of the document identified above in an envelope or envelopes **and**

         (a) [x] **deposited** the sealed envelope(s) with the U.S. Postal Service, with the postage fully prepaid.

         (b) [ ] **placed** the envelope(s) for collection and mailing on the date and at the place shown in items below, following our ordinary business practices. I am readily familiar with this business's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope(s) with postage fully prepaid.

      (2) Date mailed: December 18, 2020

      (3) The envelope was or envelopes were addressed as follows:

         (a) Person served:
            (i) Name: Hon. Harold Kahn
            (ii) Address:
            San Francisco Superior Court,
            400 McAllister Street, San Francisco, CA 94102

         (b) Person served:
            (i) Name:
            (ii) Address:

         (c) Person served:
            (i) Name:
            (ii) Address:

         [ ] Additional persons served are listed on the attached page *(write "APP-009, Item 3a" at the top of the page).*

      (4) I am a resident of or employed in the county where the mailing occurred. The document was mailed from (city and state): San Francisco, CA

Case Name: Bailey v. San Francisco District Attorney's Office et al.	Court of Appeal Case Number: A15352/S265223
	Superior Court Case Number: CGC 15-549675

3. b. ☐ **Personal delivery.** I personally delivered a copy of the document identified above as follows:

(1) Person served:
(a) Name:
(b) Address where delivered:

(c) Date delivered:
(d) Time delivered:

(2) Person served:
(a) Name:
(b) Address where delivered:

(c) Date delivered:
(d) Time delivered:

(3) Person served:
(a) Name:
(b) Address where delivered:

(c) Date delivered:
(d) Time delivered:

☐ Names and addresses of additional persons served and delivery dates and times are listed on the attached page *(write "APP-009, Item 3b" at the top of the page).*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: December 18, 2020

Daniel Ray Bacon
(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

(SIGNATURE OF PERSON COMPLETING THIS FORM)

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**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **ruskykai@earthlink.net**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
REPLY TO ANSWER TO PETITION FOR REVIEW	Reply re Petition for Review - final w Cert and POS (2020-12-18)

Service Recipients:

Person Served	Email Address	Type	Date / Time
Jonathan Rolnick Office of the City Attorney 151814	jonathan.rolnick@sfcityatty.org	e-Serve	12/18/2020 6:36:20 PM
Daniel Bacon Law Offices of Daniel Ray Bacon 103866	bacondr@aol.com	e-Serve	12/18/2020 6:36:20 PM
Christopher Ho Legal Aid at Work 129845	cho@las-elc.org	e-Serve	12/18/2020 6:36:20 PM
Robert Rusky Law Office of Robert L. Rusky 84989	ruskykai@earthlink.net	e-Serve	12/18/2020 6:36:20 PM
Neha Gupta San Francisco City Attorney's Office 308864	neha.gupta@sfcityatty.org	e-Serve	12/18/2020 6:36:20 PM
Boris Reznikov Office of the City Attorney 261776	boris.reznikov@sfcityatty.org	e-Serve	12/18/2020 6:36:20 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

12/18/2020
Date

/s/Robert Rusky
Signature

Rusky, Robert (84989)

Last Name, First Name (PNum)

Law Offices of Robert L. Rusky

Law Firm