Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically RECEIVED on 3/1/2021 at 7:17:24 PM

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 3/1/2021 by Tayuan Ma, Deputy Clerk

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'S OPENING BRIEF ON THE MERITS

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

ISSUES PRESENTED 7

INTRODUCTION AND SUMMARY OF ARGUMENT 8

CONSOLIDATED STATEMENT OF FACTS 14

I. Bailey's Position And Exemplary Work Record. 15

II. Co-Worker Larkin's January 22, 2015 Racial Slur 16

III. The DAO's And City's Allegedly "Immediate And Appropriate" Corrective Action. 18

IV. The DAO's Patently Inappropriate Response to Larkin's Slur And Bailey's Complaint. 20

ARGUMENT 27

I. Standard of Review 27

II. Under FEHA, Unlawful Harassment May Be Based On A One-Time Racial Slur By A Co-Worker, With Employer Liability Arising From Its Failure To Immediately And Appropriately Remedy The Harassment. 28

A. Governing FEHA and Federal Law Would Allow A Jury To Find That Co-Worker Larkin's One-Time "Scary N-r" Slur Created An Actionable Hostile Work Environment. 28

B. The CA Employed An Erroneously Limited Standard In Finding, Conclusively, That City/DAO Promptly and Appropriately Responded To Larkin's Racial Slur. 38

III. Retaliation: The Determination Of An Actionable Adverse Employment Action Must Consider The Collective Totality Of Circumstances, And May

Consist Of The Employer's Deliberate Obstruction Of An Employee's Harassment Claim. 45

IV. Reversal Of The CA's Decision On Bailey's Harassment Or Retaliation Claims Would Revive Her Claim For Failure To Prevent Discrimination. 49

CONCLUSION..50

CERTIFICATE OF COMPLIANCE...51

APPENDIX ATTACHMENT…………………………………….……Foll. 51

TABLE OF AUTHORITIES

Cases	Page
Agarwal v. Johnson (1979) 25 Cal.3d 923……………………………..	10, 33, 36
Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826………………..	15
Aguilar v. Avis Rent A Car (1999) 21 Cal.4th 121……..…………………..	14, 29, 32
Alcorn v. Anbro Engineering, Inc. (1970) 2 Cal.3d 493………………..	10, 33
Ayissi-Etoh v. Fannie Mae (D.C. Cir. 2013) 712 F.3d 572……………..	10, 21, 33, 43
Boyer-Liberto v. Fontainbleau Corp. (4th Cir 205) 786 F.3d 264……………………………………….....	31
Bradley v. California Dept. of Corrections (2008) 156 Cal.App.4th 1612…………………………………………	39, 42
Burns v. McGregor Electronic Industries, Inc. (8th Cir. 1992) 955 F.2d 559………………………………………….	29
Bynum v. District of Columbia (D.D.C. 2020) 424 F.Supp.3d 122…….	34
Castleberry v. STI Group (3d Cir. 2017) 863 F.3d 259……………..….	31
Castro-Ramirez v. Dependable Highway Express, Inc. (2016) 2 Cal.App.5th 1028……………………..…………………….	15
Christian v. Umpqua Bank, Inc. (9th Cir. 2020) 984 F.3d 801…………	14, 38-39, 41, 43
City of Moorpark v. Superior Court (1998) 18 Cal.4th 1143……….....	14
Clark County School District v. Breeden (2001) 532 U.S. 268………..	29

Commodore Home Systems, Inc. v. Superior Court (1982) 32 Cal.3d 211………………………………………………..... 13
Davis v. Team Electric Co. (9th Cir. 2008) 520 F.3d 1080……………. 37, 48
Dee v. Vintage Petroleum, Inc. (2003) 106 Cal.App.4th 30…………… 31
Earl v. Nielsen Media Research, Inc. (9th Cir. 2011) 658 F.3d 1108…. 28
Ellison v. Brady (9th Cir. 1991) 924 F.3d 872…………………...…….. 11, 21, 39, 41-43
Faragher v. City of Boca Raton (1998) 524 U.S. 775…………………. 9, 31, 35, 38, 40, 44
Flannery v. Prentice (2001) 26 Cal.4th 572 …………………………… 14
Fuller v. City of Oakland (9th Cir. 1995) 47 F.3d 1522……………….. 23, 39, 41, 42
Guz v. Bechtel National, *Inc*. (2000) 24 Cal.4th 317……………..……. 10
Harris v. Forklift Systems Inc. (1993) 510 U.S. 17…………………….. 29, 31
Harris v. Itzhaki (9th Cir. 1999) 183 F.3d 1043……………………… 28
Intlekofer v. Turnage (9th Cir. 1992) 973 F.2d 773……………………. 11, 23
Kelly-Zurian v. Wohl Shoe Co. (1994) 22 Cal.App.4th 397…………… 29
King v. Hillen (Fed. Cir. 1994) 21 F.3d 1572………………………….. 14, 43, 47
Lounds v. Lincare Inc. (10th Cir. 2015) 812 F.3d 1208……………….. 29-30 33, 37, 43
Mixon v. FEHC (1987) 192 Cal.App.3d 1306…………………………. 10
Molko v. Holy Spirit Assn. (1988) 46 Cal.3d 1092…………………….. 27
Nadaf-Rahrov v. Neiman Marcus Group (2008) 166 Cal.App.4th 952... 28
Nazir v. United Air Lines, Inc. (2009) 178 Cal.App.4th 243………….. 27-30, 32, 35, 37
Northrop Grumman Corp. v. Workers' Comp. Appeals Bd. (2002) 103 Cal.App.4th 1021…………………………………………... 49-50
Nunez v. Superior Court (5th Cir. 1978) 572 F.2d 1119………………. 28
Oncale v. Sundowner Offshore Services, Inc. (1998) 523 U.S. 75……. 30, 35, 37, 47
Patten v. Grant Joint Union High School District (2005) 134 Cal.App.4th 1378…………………………………………. 45, 46
Pineda v. Williams-Sonoma Stores, Inc. (2011) 51 Cal.4th 524……….. 34
Reitter v. City of Sacramento (E.D. Cal. 2000) 87 F.Supp.2d 1040…… 39
Rogers v. Western-Southern Life Ins. Co. (7th Cir. 1993) 12 F.3d 668... 31, 33
Spriggs v. Diamond Auto Glass (4th Cir. 2001) 242 F.3d 179…………

State Dept. of Health Services v. Superior Court (2003) 31 Cal.4th 1026……………………………………………….. 10, 33

Swenson v. Potter (9th Cir. 2001) 271 F.3d 1184…………………..…… 39, 42, 43

Whitehall v. County of San Bernardino (2017) 17 Cal.App.5th 352…... 46

Williams v. City of Philadelphia Office of Fleet Mgmt. (E.D. Pa. 2020) 2020 WL 1677667………………………………….. 34

Yamaguchi v. U.S. Dept. of the Air Force (9th Cir. 1997) 109 F.3d 1475………………………………………... 41

Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028……………….. Passim

Constitution, Statutes and Rules

California Constitution
Art. 1, §16…………………………………………………….. 27

Government Code
§12920…………………………..…………………………………… 11
§12921(a)…...………………………………………………….. 11
§12923(a)..……………………………………………………… 16, 30, 31, 36
§12923(b)…………………………………………………….. 9, 31, 34
§12923(c)…………………………………………………….. 14, 17, 27, 29, 32, 37
§12923(e)…………………………………………………….. 27, 28, 32, 37
§12923(a)-(e)………..………………………………………… 7, 9, 14, 44
§12926(t)……………………………………………………... 47
§12940(a)………………………………………………......... 7, 28
§12940(h)…………………………………………………….. 7
§12940(i)……………………………………………………... 44
§12940(j)(1)………………………………………………….. Passim
§12940(k)…………………………………………………….. 7, 49
§12964.5(a)(2) and (b)……………………………………….. 23
§12993(a)……………………..………………………………... 11

2 California Code of Regulations
§11006………………………………………………………... 13, 49
§11009………………………………………………………... 49
§11019(b)(1).……………………………………………….... 32
§11020………………………………………………………... 23, 43

§11021……………………………………………………………... 23
§11023(a)…...………………………………………………….... 11, 38
§11023(b)(1)…………………………………………………….. 23

Stats 2018, ch. 955 (SB 1300 (Jackson))……………………………….. 9, 14, 30

Supplemental Authorities

Chin et al., California Practice Guide: Employment Litigation (Rutter Group 2017)
§10:164………………………………………………………….. 37
§10.326………………………………………………………….. 47
§10:395-10:397…………………………………………………. 38, 40, 44
§10.420 et seq………………………………………………….. 39
§10:422-10:423…………………………………………………. 43
§10:423………………………………………………………….. 21

EEOC Compliance Manual (CCH 2018)
Section 15, Race and Color Discrimination §15-VII(A)…………..… 9, 31, 32, 34

ISSUES PRESENTED

Plaintiff-appellant Twanda Bailey contests the decision ("Decision") of the First Appellate District, Division One ("CA") (Benke, J.), affirming the summary judgment for defendants City and County of San Francisco ("City") and its District Attorney's Office ("DAO") (collectively "City" or "City/DAO") on her race discrimination, harassment, retaliation and other claims arising under California's Fair Employment and Housing Act (FEHA). (Gov. Code §12940(a), (h), (j)(1), (k).)[1] Bailey presents the following issues:

1. Whether the CA, ignoring and misapplying California's standards governing unlawful harassment claims, erroneously affirmed the summary judgment on Bailey's hostile work environment/unlawful harassment claim?

(a) Whether Bailey, who was called a "scary n---r" (literally "you 'n—rs' are so scary") by her co-worker is nonetheless barred from taking her hostile work environment claim to a trial jury solely because the one-time racial slur did not come from a supervisor? (§§12923(a)-(e), 12940(j)(1).)

(b) Whether the City/DAO's failure to take immediate and appropriate corrective action in response to the racial slur (§12940(j)(1)) is a triable issue for the jury where the record shows, among other things, that the DAO Human Resources Department Manager (i) deliberately obstructed and undermined Bailey's harassment complaint, ultimately destroying her

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

personnel file; (ii) repeatedly threatened and harassed Bailey for pursuing her complaint; and (iii) refused for nine months to separate Bailey from her harasser, instead forcing Bailey to work closely with her?

2. Whether the CA erroneously affirmed the summary judgment on Bailey's unlawful retaliation claim where, in direct conflict with the standards governing retaliation claims this Court articulated in *Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1052 and fn. 11, 1053-1056, the CA held that none of the misconduct comprising the City/DAO's response to her harassment complaint, including the DAO HR Department Manager's malfeasance referenced above, could constitute an actionable adverse employment action?

Additionally, in its answer to the petition for review, City/DAO framed the following issues:

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?

INTRODUCTION AND SUMMARY OF ARGUMENT

Names can be powerful, for good and ill. At its core, this case presents a question whether FEHA, one of California's foundational civil rights laws, recognizes that truth, and will protect employees from racial abuse by names that are used to destroy their dignity and deny their worth as human beings, the essential value underlying that law.

By affirming the summary judgment against Bailey on her unlawful harassment claim, the CA said no, so long as the name was used but once by a co-worker rather than by a supervisor. Persisting in the same

constricted view of FEHA's protections – which ignores FEHA's mandate that they be broadly construed and assessed in each case in light of the "totality of circumstances" the victims experienced – the CA also independently found that City/DAO could not be held liable for harassment arising from her co-worker's one-time racial slur or for its campaign of retaliation against Bailey for seeking redress for that racial harassment. The Legislature, however, has implicitly rejected the CA's approach by its recent reaffirmation of FEHA's broad reach in the specific context of unlawful harassment. (See §12923(a)-(e); Stats 2018, ch. 55 (SB 1300 (Jackson)).) This Court here has the opportunity to do the same.

1A. Co-Worker Harassment. Affirming the summary judgment, the CA held on Bailey's hostile work environment/unlawful harassment claim that a co-worker's, as opposed to a supervisor's, one-time racial slur – telling Bailey "You n---rs are so scary," which Bailey heard and experienced as "scary n---r" – could not create a hostile work environment as a matter of law. (Slip Op. 5-12, esp. 9-12.) California and Federal law, however, affirm that a single instance of verbal harassment, may be actionable. (See, e.g., §12923(b); *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 788; EEOC Compliance Manual (CCH 2018) Section 15, Race and Color Discrimination §15-VII(A) at 7221-7223 (see Appendix).)

Indeed, among all ethnic slurs, "n---r" is universally recognized as the most serious derogation of the victim's humanity. (See EEOC Compliance Manual, §15-VII(A) at 7222 ("[A] single, extremely serious incident of harassment may be sufficient to constitute a Title VII violation…. 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…"); *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 used by a supervisor or if the victim is especially susceptible);[2] see also *Ayissi-Etoh v. Fannie Mae* (D.C. 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*");[3] see also Letter of Legal Aid at Work as Amicus Curiae in Support of Petition for Review at pp. 3-6, 4 (2020-12-18) (slurs "such as the n-word cannot be understood simply in

---

[2] *Alcorn* and *Agarwal* were not FEHA cases. But their similar fact-intensive analyses of the slur's destructive power fully apply to a FEHA harassment claim, especially under FEHA's recent clarifying amendments. (See §12923(a)-(e); *Agarwal*, 25 Cal.3d at 941-943; *Alcorn*, 2 Cal.3d at 498 n. 4, 499 ("it is for the jury…to determine whether in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability").)

[3] Because California and federal anti-discrimination laws are similar, California courts look to federal law when interpreting similar FEHA provisions. (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 354, 358, 360-361; *Mixon v. FEHC* (1987) 192 Cal.App.3d 1306, 1316-1317.) The CA recognizes this principle, but offers no reason for refusing to follow federal Title VII standards here.

isolation, as 'merely offensive' terms, because they are powerfully freighted with long histories of subjugation and violence").)

The CA's categorical distinction between a co-worker's and supervisor's use of this racial slur is irreconcilably inconsistent with the n-word's long-recognized destructive power, as well as with the letter and spirit of FEHA's guarantees and protections, particularly FEHA's recent amendments specifically addressing unlawful harassment, all embodying fundamental state policy.

1B. Employer Liability for Co-worker Harassment. FEHA requires employers to respond "immediately and appropriately" to co-worker harassment in order to avoid liability for such harassment. (§12940(j)(1); 2 Cal. Code Regs. ("CCR") §11023(a).) Consistent with its focus on the workplace realities of unlawful discrimination, FEHA's mandate that the employer's response be "appropriate" demands a holistic, "totality of circumstances" assessment of the employer's response focused not just on the perpetrator's conduct, but on whether the response "appropriately" serves to show that such harassment will be taken seriously and to eliminate or prevent such harassment in the workplace as a whole. (See, e.g., *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 881, 882 (discipline must be both "proportionat[e] to the seriousness of the offense" and employer's condemnation sufficiently strong to "persuade potential harassers to refrain from unlawful conduct" in order to "maintain a harassment-free working environment"); *Intlekofer v. Turnage* (9th Cir. 1992) 973 F.2d 773, 779 ("the appropriateness of the remedy depends on … 'the remedy's ability to persuade potential harassers to refrain from unlawful conduct'"); *id.* at 784 ("the benchmark of an adequate employer

response … must be its effectiveness in preventing and eliminating sexual harassment in the workplace").)

Here, the City/DAO's haphazard responses – ranging from negligence at best to the DAO Human Resources Manager's deliberately obstructive and abusive malfeasance, including, among other things, her refusal to file or otherwise pursue Bailey's harassment complaint based on her co-worker's racial slur (see *infra* at 22-23) – demanded such a comprehensive assessment. Ignoring this broader standard, however, and again narrowly reading FEHA, the CA looked to only one aspect of the City/DAO's response, and held that the mere fact that the DAO advised the perpetrator that racial slurs were unacceptable and the slur wasn't repeated, was sufficient to avoid liability as a matter of law. (Slip Op. 12-17.) But in so ruling, the CA not only ignored the obvious deficiencies of the counseling that did occur,[4] but subverted the core purpose of FEHA's employer liability standard, to ensure that the profound injuries such discriminatory harassment – here, involving a singularly virulent racial slur – caused to the victim and the workplace as a whole are properly remediated.

2. Retaliation. Lastly, the CA rejected Bailey's retaliation claim, reasoning that, as a matter of law, none of the City/DAO's misconduct, including the triggering racial slur and its HR Manager's malfeasance in

---

[4] As discussed below, neither the perpetrator nor anyone else involved saw or experienced the "counseling" as discipline at all, let alone discipline either immediate or appropriate to the offense. (2.AA.243:22-23 ¶7 (Bailey); 2.AA.468:19-469:25, 475:16-17, 476:18-478:12, 482:6-17 (Larkin); 4.AA.750-751 (Arcelona).)

responding to Bailey's harassment complaint, could either materially change the terms and conditions of Bailey's employment or constitute an actionable adverse employment action supporting a retaliation claim. (Slip Op. 17-20.)

The CA's Decision, however, ignores this Court's recognition that the creation of a hostile work environment itself constitutes an actionable adverse employment action. (*Yanowitz*, 36 Cal.4th at 1053 fn. 12, 1056 fn. 16.) The Decision further conflicts with the basic standards this Court articulated governing retaliation claims, notably: (a) the retaliatory actions must be assessed "collectively" as an integrated whole (*id*. at 1052 and fn. 11, 1053-1056); and (b) in all cases "[FEHA] protects an employee against unlawful discrimination with respect…to…the *entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance* or opportunity for advancement"; and that "the phrase 'terms, conditions or privileges' of employment must be *interpreted liberally and with a reasonable appreciation of the realities of the workplace* in order to afford employees the *appropriate and generous protection* against employment discrimination that FEHA was intended to provide" (*id*. at 1052-1055 and fns. 11-14, emphasis added).

3. Conclusion. The seriousness of the CA Decision's defects is best measured against FEHA's salutary goals. FEHA's guarantees and protections against workplace discrimination, harassment and retaliation embody fundamental state policy that must be liberally construed in furtherance of their remedial goals. (§§12920, 12921(a), 12993(a); 2 CCR §11006; *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 220 ("The policy that promotes the right to seek and hold

employment free of prejudice is fundamental. …[FEHA's] aim is to provide effective remedies against the evil"); see also *Yanowitz*, 36 Cal.4th at 1053-1054 and fn. 14; *Flannery v. Prentice* (2001) 26 Cal.4th 572, 584; *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1157; *Aguilar v. Avis Rent A Car* (1999) 21 Cal.4th 121, 129; compare *Christian v. Umpqua Bank, Inc*. (9th Cir. 2020) 984 F.3d 801, 809-810, quoting *King v. Hillen* (Fed. Cir. 1994) 21 F.3d 1572, 1582 ("The purpose of Title VII is ... to liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment").)

The CA's ruling here is fundamentally inconsistent with these principles and the governing standards on each of Bailey's identified claims. Further, the CA's inexplicably unfair ruling, rendering FEHA's protections a near nullity for Bailey, contradict both the letter and spirit of the Legislature's recent clarification of California anti-harassment law. (§12923(a)–(e), codifying Stats 2018, ch. 955 (SB 1300).) Protections against workplace harassment are among FEHA's most important guarantees. The CA Decision, which compromises those protections and guarantees at every turn, must be reversed.

CONSOLIDATED STATEMENT OF FACTS

As previously noted, the CA sketches only an outline of the facts material to Bailey's claims, omitting important evidence providing necessary context for the racial slur against Bailey and the following City/DAO response. Because a jury would be entitled to consider that full context, i.e., the totality of circumstances (§12923(c); *Yanowitz*, 36 Cal.4th

at 1055-1056), in assessing her harassment and retaliation claims, Bailey will present a consolidated summary of the relevant evidence and facts.

Because this review arises on summary judgment, the Court 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 while strictly construing the City/DAO's evidence. Further, the Court must resolve all ambiguities, doubts and credibility issues in Bailey's favor, and accept her evidence and all reasonable inferences therefrom as true. (*Yanowitz*, 36 Cal.4th 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.) Bailey will summarize the operative facts consistent with these settled standards.

I. BAILEY'S POSITION AND EXEMPLARY WORK RECORD.

Bailey was hired by City/DAO on Apri1 16, 2001 as a Clerk in the DAO's records department. (2.AA.241 ¶2.) Because she performed her job well, receiving excellent performance reviews, without any noted criticisms throughout her employment, Bailey was promoted in August 2011 to Investigative Assistant [Classification 8132]. (2.AA.241 ¶3.)

Bailey continued to perform well, in particular, being consistently courteous with the public, cooperative and punctual within the department. (2.AA.241 ¶3.) Bailey received written compliments and accolades from attorneys she worked with in the DAO as well as the San Francisco Police Department, including recognitions of her: "conscientiousness," her "utmost professionalism," her "attention to detail," her "pleasant and courteous demeanor," her "commitment and dedication to her work," her "high moral character," and her "organizational skills and her strong work ethic."

(AA.241:18-26 ¶3.) Bailey also received letters of appreciation from the communities she served. (2.AA.241:24-25 ¶3.)[5]

II. CO-WORKER LARKIN'S JANUARY 22, 2015 RACIAL SLUR

On Thursday, January 22, 2015, while Bailey was working at her desk, a co-worker, Saras Larkin, a Fijian/East Indian, told Bailey that she saw a mouse run under Bailey's desk. Bailey screamed, jumped out of her chair and ran to the doorway. Larkin got up from her desk, walked past Bailey, then walked back to Bailey and told her: "You niggers is so scary." (2.AA.241-242 ¶4; 2.AA.389-391.)

Up to this point, Bailey felt she had a "working friendship" with Larkin, and had not had personal problems with her. (2.AA.393:13-17.) Bailey nonetheless had observed that Larkin could be harsh toward other African American women. The previous week, Larkin had mocked Tiffany Mathis-Ward, an African American woman, for her reaction to a similar mouse sighting. (2.AA.391:23-393:12.) More systemically, Bailey also knew that Larkin had used her close relationship to the DAO's Human Resources ("HR") Manager, Evette Taylor-Monachino, to make false

[5] Although acknowledging these historically favorable performance reviews, the CA misses their potential significance to a jury: (a) not only were Bailey's evaluations criticism-free, but her previously recognized strengths were starkly at odds with the attendance and attitude problems her June 2015 Performance Review later noted; and (b) these criticisms both reflected and amplified the emotional trauma, and adverse effect on her job performance caused by her co-worker's racial slur and from City/DAO's failure to take appropriate corrective action. (§12923(a); 2.AA.272-273.) While the Performance Review's overall performance rating stayed the same, which the CA improperly construed against Bailey (Slip Op. 19), a jury could reasonably see the noted deficiencies as evidence of Bailey's work-related trauma.

allegations against other African-American women who were subsequently removed from the office. (2.AA.242:2-6 ¶4, 243:19-24 ¶7; 1.AA.99-101; 2.AA.399:9-400:17.)

Shaken and offended by Larkin's racial slur, Bailey immediately left the records office to calm down. (2.AA.242:6-9 ¶4; 2.AA.394-397, 396:24-25 ("I just needed to cool off").) Bailey ran into several of her co-workers (Lisa Ortiz, DaVonne Mark and Lee-Ann Collins), who saw she was upset and asked her what was wrong, after which Bailey told them that Larkin had just called her a "scary nigger." (*Id.*; 2.AA.282 ¶3, 285 ¶3, 288 ¶3.)

Despite being deeply hurt by Larkin's slur, Bailey did not immediately complain to the DAO Human Resources because she continued to fear retaliation stemming from Larkin's close relationship with the HR Manager, Evette Taylor-Monachino, who would be responsible for any EEO complaint. (2.AA.242:2-6 ¶4, 243:19-24 ¶7; 1.AA.99-101; 2.AA.399:9-400:7.)[6]

[6] The CA's discussion of the January 22, 2015, racial slur incident fails to recognize or appreciate significant factors favoring Bailey revealed by a consideration of the statutorily mandated "totality of circumstances." (§12923(c).) The CA fails to appreciate that Larkin amplified the unadorned slur by effectively calling Bailey a "scary n---r." (See Slip Op. 2; 2.AA.241-242 ¶4, 389-391, 394-397; 2.AA.282 ¶3, 285 ¶3, 288 ¶3.) That even the unadorned slur is universally recognized as the worst possible slur against African Americans in light of our nation's ongoing history of their slavery and oppression (*supra* at 9-10; *infra* at 32-35), would allow a jury to reasonably find that Larkin's slur even more strongly evoked the virulent image of African Americans as inherently violent and dangerous.

The CA also fails to acknowledge that Bailey legitimately feared retaliation if she pursued a complaint against Larkin. Very much like a slur from a supervisor, Bailey experienced the slur as both a devastating racial insult, and one that posed a concrete threat to her position in the DAO.

III. THE DAO'S AND CITY'S ALLEGEDLY "IMMEDIATE AND APPROPRIATE" CORRECTIVE ACTION.

The CA found that the DAO's two meetings with Larkin, wherein she was told that using racial slurs was unacceptable, constituted a sufficient "immediate and appropriate" response as a matter of law, entitling City/DAO to summary judgment. The CA's ruling, however, not only ignores that City/DAO's response to Larkin's slur and Bailey's workplace trauma was deficient on its own terms, but it also disregards the full adverse scope of their response.

Bailey's supervisor, Alexandra Lopes, learned of the slur incident the following day, Friday, January 23, 2015, when she overheard Bailey's co-workers talking about it at the office's holiday gathering. (2.AA.242 ¶5.) When Bailey confirmed for her that Larkin had called her a "scary nigger," Lopes said she would notify the DAO Human Resources Office the following Monday. (2.AA.404:9-19; see generally 2.AA.242 ¶5; 2.AA.404-405; 2.AA.282 ¶4; 285 ¶4.)

The next Thursday, January 29, 2015, Bailey met with Lopes' supervisor, Sheila Arcelona, Assistant Chief of Finance, and HR Director Taylor-Monachino. (2.AA.242-243 ¶6; 2.AA.400:21-403:12.) Bailey told them about the racial slur incident, with Arcelona taking her statement. (*Id.*, 2.AA.243 ¶6; 2.AA.401.) Arcelona said that they wished that Bailey had come to them first before discussing the incident with her co-workers. (2.AA.401:12-14, 403:9-12.) Taylor-Monachino said nothing during the meeting. (2.AA.401:15-23.) Bailey did not state that she did not want to file a formal complaint or "make a big deal" out of the incident. (2.AA.400:8-15.)

Shortly thereafter, Arcelona met with Larkin, advising her that racial slurs were unacceptable. (2.AA.307-308, 334.) Larkin denied making the slur, however, whereupon Eugene Clendinen, Arcelona's supervisor and chief assistant to DA Gascon, closed the matter. (2.AA.336:7-21 (Clendinen advised City HR Department that Larkin "denied using the N-word and no further action was going to be taken").) As a result, DAO never interviewed Bailey's witnesses (2.AA.333), all of whom have confirmed Bailey's testimony, including about Larkin's close relationship with Taylor-Monachino, and impeached Larkin's denials. (2.AA.242:6-9 ¶4; 2.AA.282 ¶¶3-4 (Collins); 2.AA.285 ¶¶3-4 (Mathis-Ward); 2.AA.288 ¶¶3, 6 (Mark); 2.AA.394:11-398:17, 396:24-25 (Bailey Depo.).)

DAO's second meeting with Larkin, where Clendinen merely had her sign for receipt of the City's Harassment-Free Workplace Policy, did not take place until ***six months later***. (2.AA.307-308, 334; 2.AA.542-543.) No discipline was ever imposed on Larkin for her racial slur to Bailey. (2.AA.468:19-469:25, 476:18-478:12; see also 2.AA.336:7-21 (Clendinen advises City HR Department that Larkin "denied using the N-word and no further action was going to be taken").)

Neither Arcelona nor Bailey regarded these meetings as an adequate response to Larkin's racial slur. (4.AA.750-751; 2.AA.243:22-23 ¶7.) Indeed, Larkin's testimony makes clear that she was barely aware of Bailey's complaint and was essentially untouched by the entire episode. (2.AA.468:19-469:25, 475:16-17, 476:18-478:12, 482:6-17.)

The City HR Department did even less. Its April 24, 2015 letter to Bailey stated only that it had "received" her complaint[7] and would see if her charges were timely and fell within the City's EEO "jurisdiction." (2.AA.250.) The City HR Department's subsequent July 22, 2015 letter-decision (2.AA.252-255) declared that the City would not conduct any investigation, stating that: (1) despite the "n-word's "extreme offensiveness" "unlawful[ly] violating the City's Harassment-Free Workplace Policy," it wasn't severe enough to "create an abusive working environment" (2.AA.253; see 2.AA.594 (Policy)), and (2) Taylor-Monachino's refusal to file Bailey's complaint and workplace "slights" were not adverse employment actions constituting unlawful retaliation (2.AA.252-254; see *infra* at 22-24). Although the letter asserted that Larkin and Taylor-Monachino would be disciplined (*id.*), Larkin was never disciplined at all, and Taylor-Monachino was not "disciplined" until two years later, when she was finally separated pursuant to a settlement reached while under investigation for malfeasance involving the misappropriation and destruction of personnel records, including Bailey's (2.AA.243:24-28 ¶7; 4.AA.720:6-8, 720:13-722:13 (Clendinen Depo 9:13-11:13 SEALED; 2.AA.303-306 (same redacted)).

IV. THE DAO'S PATENTLY INAPPROPRIATE RESPONSE TO LARKIN'S SLUR AND BAILEY'S COMPLAINT.

In narrowly finding that the two meetings with Larkin summarized above constituted a conclusively sufficient "immediate and appropriate"

[7] In fact, the City HR Department first learned of the incident from an SFPD officer who had heard that DOA was not properly handling Bailey's complaint. (2.AA.338:18-21; 2.AA.252.)

response to her racial slur, the CA substantially ignores the City/DAO's far broader and more hostile response to the slur and Bailey's complaint, particularly including Taylor-Monachino's refusal as DAO HR Manager to fairly respond to the workplace issues presented by Larkin's racial slur. A jury, however, could find that DAO's response, taken as an interrelated whole, as it must be, was neither immediate nor appropriate, that it effectively condoned or ratified Larkin's racial slur, and so altered a critical term and condition of Bailey's employment – her right to be free of a hostile workplace environment and to have violations of FEHA's remedial civil rights protections be treated seriously, fairly and objectively – as to support her retaliation claim.

(1) Failure to Separate. Through Taylor-Monachino, the City/DAO refused from the start and for almost ten months thereafter to implement one of the most commonly effective remedial measures, separating the parties both to protect Bailey from Larkin and to prevent the workplace environment from festering. (Chin, Employment Litigation (Rutter Group 2017) §10:423; see *Ellison*, 924 F.3d at 883 (keeping the victim and perpetrator together may itself create or exacerbate the hostile environment); *Ayissi-Etoh*, 712 F.3d at 577.)

Instead, to the contrary, Bailey was inexplicably directed to begin covering Larkin's duties, thereby actually increasing their ongoing contacts and exacerbating Bailey's emotional trauma, even though DAO had for two years been generally using specially-hired floaters instead of coworkers to provide such supplemental coverage. (2.AA.245 ¶12; 1.AA.88-89; cf. 1.AA.106:5-114:4; 2.AA.246-247 ¶¶12-14, 272, 275, 277; see 2.AA.363.)

The CA also ignores that Bailey repeatedly complained to Arcelona about the emotional trauma stemming from being directed to cover for Larkin (2.AA.249-251; 2.AA.550:10-553:18, 571:6-23, 575:13-576:19 (Arcelona)), which was noticeably affecting her job performance (2.AA.246:11-26 ¶13, 267, 269; 272-273 (Bailey); 2.AA.562-571 (Arcelona); 2.AA.275 (Dr. Savon, Bailey's psychiatrist).) Arcelona repeatedly asked Taylor-Monachino and Clendinen to separate Bailey and Larkin, but they refused to do so. (2.AA.243:4-5 ¶6; 2.AA.546-547, 547-551, 561-562, 577 (Arcelona); 2.AA.320-321, 322-323, 323-325, 364-367 (Clendinen).)[8] Not until November 2015, ***almost ten months after the slur***, did Clendinen finally transfer Larkin. (2.AA.325-326, 364-367). Arcelona knew no reason why Larkin could not have been transferred earlier. (2.AA.577:5-18.)[9]

(2) Taylor-Monachino's Obstruction of Bailey's EEO Complaint. Although Bailey recounted the January 22 encounter with Larkin in her January 29 meeting with Taylor-Monachino and Arcelona (2.AA.242-243

---

[8] Taylor-Monachino's asserted rationale – that to separate the parties would imply that Bailey's charge was valid (AA.546:16-547:15) – is absurd. By parity of reasoning a decision *not* to separate the two would imply that Bailey's claim was *invalid*. Moreover, the "problem" could have been simply avoided by making clear to the parties that separating them pending investigation did not imply any prejudgment on the merits. A jury could consider these factors, with Taylor-Monachino's other actions, in assessing her retaliatory intent.

[9] Clendinen claimed Bailey had never before complained about having to work with Larkin. (2.AA.364.) But Bailey had so told Clendinen as early as April (1.AA.122), and Bailey's psychiatrist, whom Clendinen ignored (2.AA.328), had informed DAO months earlier of Bailey's traumatized emotional condition stemming from a "very hostile work environment" (2.AA.247:2-6 ¶14, 275).

¶6; 2.AA.400:21-403:12), Taylor-Monachino chose not to record it as a formal complaint or provide the required notice to the City's HR Department (2.AA.243 ¶¶6-7; 2.AA.413:11-414:7, 416:13-15 (Bailey); 2.AA.252 (July 22 City HR letter); 2.AA.338:18-21, 340, 357-358 (Clendinen).

On March 23, when Bailey asked for a copy of the complaint submitted to the City HR Department, Taylor-Monachino told her no complaint had been prepared and that no complaint or investigation would be allowed. (AA.243 ¶¶6-7; AA.413:11-414:7, 416; 1.AA.171 ¶8 (Clendinen).) Instead, Taylor-Monachino threatened Bailey with liability for creating a hostile work environment for Larkin if she continued to talk with her coworkers about Larkin's slur. (2.AA.243 ¶6, 244:13-16 ¶8; 2.AA.412:5-415:12.)[10] Overwhelmed by this encounter, Bailey sought refuge with a co-worker. (2.AA.415-416.)

Taylor-Monachino's conduct violated the professional standards her managerial position demanded (see 2 CCR §11023(b)(1), esp. subd. (1)(B)-(1)(E)), and amounted both to an aiding and abetting of Larkin's racial slur as well as retaliation for Bailey's attempt to pursue a harassment complaint against Larkin (2 CCR §11020, 11021).

---

[10] "Remedial" actions targeting the victim are improper. (*Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522, 1529 ("[H]arassment is to be remedied through action targeted at the harasser, not the victim"), quoting *Intlekofer*, 973 F.2d at 780 n. 9 ("the victim of the sexual harassment should not be punished for the conduct of the harasser").) Moreover, the threat to silence Bailey violates the recent FEHA amendments: a "condition of…continued employment" turning on the employee's agreement not to disclose information about "unlawful acts in the workplace" is "contrary to public policy and is unenforceable." (§12964.5(a)(2), (b).)

(3) Taylor-Monachino's Harassment/Ostracism of Bailey. While Bailey's EEO complaint was still pending, and despite being in charge of EEO matters, including Bailey's, as DAO HR Manager, Taylor-Monachino began ostracizing, slighting and criticizing Bailey during in-office encounters. Taylor-Monachino's interpersonal harassment of Bailey culminated on August 12, 2015, when she intentionally confronted and threatened Bailey outside the DAO offices, telling her "you're going to get it!" (2.AA.243:13-17 ¶6, 244 ¶9, 245-246, 247 ¶¶12-13, 15; 2.AA.257-258.) Despite sustaining another employee's complaint against Taylor-Monachino for a similar out-of-control incident the next day (2.AA.288 ¶¶4-5, 291-292, 294 (Mark); 2.AA.244:23-27 ¶9), DAO rejected Bailey's complaint about this latter incident (2.AA.245 ¶11, 263). This last straw resulted in Bailey's near-emotional breakdown. (2.AA.245-247 ¶¶12-14, 246:8-14 ¶13; see 2.AA.550-553, 571, 575-576 (Arcelona); 2.AA.318-319, 327-332, 382-384 (Clendinen)); 1.AA.131:11-24; 2.AA.425:13-416:4 (Bailey).)

(4) June 2015 Performance Report. On June 30, 2015, Bailey's Performance Report, prepared by a new supervisor, raised criticisms of Bailey's work performance for the first time ever (2.AA.241 ¶3), specifically criticizing her for allegedly excessive absences, and insufficient co-worker courtesy and cooperation with supervisors (2.AA.265-271, esp. 267 nos. 10-11, 269; 2.AA.246:15-16). As already noted, these criticisms are starkly inconsistent with Bailey's earlier noted strengths for these same qualities. (2.AA.241 ¶3.) Bailey's July 6 written rebuttal explained that any performance issues she may have had stemmed from her ongoing emotional distress following Larkin's racial slur and DAO's decision forcing her to

work with Larkin. (2.AA.272-273; 2.AA.246:15-26 ¶13; 1.AA.113-114; see 2.AA.423:17-424:11, 425:4-11, 427:1-12, 448:8-451:22, 452:18-453:13, 456:4-461:11.) Still, DAO did nothing, failing to address the issues Bailey raised in her rebuttal until November, five months later, when Clendinen finally transferred Larkin to another DAO department. (2.AA.325:16-326:15 (Clendinen); 2.AA.549-551, 577 (Arcelona).)

(5) DAO's Open Tolerance of Taylor-Monachino. On October 16, 2015, instead of discharging Taylor-Monachino for her malfeasance and derelictions of duty, DAO chose to keep her as its fulltime HR Manager, but to transfer many of her major duties, notably including EEO matters, to a new fulltime "Senior Personnel Analyst." (2.AA.244-245 ¶10, 260; 2.AA.353, 4.AA.730-732 (Clendinen).) By this decision to retain Taylor-Monachino, despite her tacitly acknowledged professional misconduct, DAO plainly signaled to staff who DAO would and would not protect. (2.AA.244-245 ¶10.) As discussed, Taylor-Monachino was not forced out until May 2017, when she was finally separated pursuant to a settlement reached while being investigated for malfeasance involving the misappropriation and destruction of personnel records, including Bailey's. (2.AA.243:24-28 ¶7; 4.AA.720:6-8, 720:13-722:13 (Clendinen Depo 9:13-11:13 SEALED; 2.AA.303-306 (same redacted).)

(6) Bailey's Serious Emotional Condition. The Decision ignores or minimizes Bailey's serious emotional trauma stemming from Larkin's slur and the ensuing course of conduct summarized above, particularly Taylor-Monachino's hostile and disparaging campaign against her. Although DAO management was well aware of Bailey's emotional distress (2.AA.318-319, 328-332, 382-384 (Clendinen); 2.AA.551-552, 571, 575-576, Arcelona)),

and that her distress was manifesting in work performance issues (2.AA.267, 268, 272-273), DAO nonetheless failed to take any remedial action either in response to Bailey's explanatory rebuttal to the June 2015 Performance Report (2.AA.575-576), or to her psychiatrist's August 20 letter explaining her condition (2.AA.247:2-6 ¶14, 275,[11] 328), thereby again failing to "immediately and appropriately" address Bailey's distress (§12940(j)(1)); 2.AA.318-319, 382-384).

By year-end 2015, Bailey had been deeply emotionally harmed by Larkin's slur and the City/DAO's patently deficient "corrective" response, which included rejecting her charge as facially unworthy, while also protecting Larkin and Taylor-Monachino at her expense. (2.AA.247:6-10 ¶14, 277.) A reasonable African American woman standing in Bailey's

---

[11] Dr. S. Savon, who Bailey began seeing in July after the City rejected her complaint against Larkin, explained in her August 20, 2015 letter:

> [Ms. Bailey] is being treated for severe anxiety and depression that have developed as a result of recent events in her workplace which have created a very *hostile work environment*.
>
> Though the…personal attacks are not directly life-threatening, they have been very damaging to her emotional well-being and she exhibits many of the features of someone now suffering from Post-Traumatic Stress Disorder. She currently deals with a persistently negative emotional state including frequent episodes of debilitating fear and panic. The distress she feels has resulted in hypervigilance, exaggerated startle response and problems with concentration and sleep.
>
> She is currently on a medical regimen…. It is expected that her medical treatment will take several months in order to help her stabilize. *Resolution of the workplace stressors is clearly expected to play a major role in her recovery*.

(2.AA.275, emphases added.)

shoes could find this scenario hostile and abusive, as Bailey indisputably did. On December 4, 2015, Bailey's psychiatrist informed DAO that "Ms. Bailey requires immediate temporary relief from her on-site work duties due to severe workplace stress which is seriously impacting her mental and physical health," concluding: "[Bailey] cannot begin to regain her health until she has a period of rest and recuperation AWAY from her stressful work environment." (2.AA.277, original emphasis.)

The CA trivialized or entirely disregarded much of this evidence despite its duty on summary judgment to accept Bailey's evidence as true and the jury's right to consider the "totality of circumstances" in assessing Bailey's claims. (§12923(c).) The Legislature has underscored that harassment cases should only rarely be able to be resolved on summary judgment. (§12923(e); *Nazir v. United Air Lines, Inc*. (2009) 178 Cal.App.4th 243, 286.) This case is nowhere near one of them.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the grant of summary judgment *de novo*, using the same standards governing the lower court's decision. (*Yanowitz*, 36 Cal.4th at 1037; see *supra* at 14-15.) Consistent with the California Constitution's affirmation that "[t]rial by jury is an inviolate right and shall be secured to all…" (Cal. Const. art. 1, §16), summary judgment must be "used with caution" and cannot improperly "substitute for a full trial" (see *Molko v. Holy Spirit Assn*. (1988) 46 Cal.3d 1092, 1107).

The courts and more recently the California Legislature have emphasized that this caution applies with special force in civil rights/employment discrimination cases, because they commonly present

issues of motivation and intent that are rarely resolvable without a searching assessment of all the evidence. (§12923(e); *Nazir*, 178 Cal.App.4th at 283 ("Proof of discriminatory intent often depends on inferences rather than direct evidence. [Citation] And because it does, 'very little evidence of…[discriminatory] intent is necessary to defeat summary judgment'"), quoting *Nadaf-Rahrov v. Neiman Marcus Group* (2008) 166 Cal.App.4th 952, 991; see, e.g., *Earl v. Nielsen Media Research, Inc*. (9th Cir. 2011) 658 F.3d 1108, 1112 ("Summary judgment should be used prudently in [discrimination] cases involving motivation and intent"); *Harris v. Itzhaki* (9th Cir. 1999) 183 F.3d 1043, 1051 ("Issues of credibility, including issues of intent, should be left to the jury"); *Nunez v. Superior Court* (5th Cir. 1978) 572 F.2d 1119, 1126, citations omitted ("If the inference to be drawn requires 'experience with the mainsprings of human conduct' and reference to 'the data of practical human experience, we entrust the jury with that determination…. Hence, juries determine…issues turning on motive, purpose, design or intent").)

II. UNDER FEHA, UNLAWFUL HARASSMENT MAY BE BASED ON A ONE-TIME RACIAL SLUR BY A CO-WORKER, WITH EMPLOYER LIABILITY ARISING FROM ITS FAILURE TO IMMEDIATELY AND APPROPRIATELY REMEDY THE HARASSMENT.

A. Governing FEHA and Federal Law Would Allow A Jury To Find That Co-Worker Larkin's One-Time "Scary N-r" Slur Created An Actionable Hostile Work Environment.

FEHA provides comprehensive guarantees of equal employment opportunities and protections against unlawful discrimination, including because of race, ethnicity or national origin. (§12940(a).) Although unlawful harassment is recognized as a form of unlawful discrimination

(*Aguilar*, 21 Cal.4th at 129; *Clark County School District v. Breeden* (2001) 532 U.S. 268, 270), FEHA also explicitly prohibits harassment based on the protected categories, including race (§12940(j)(1)). Section 12940(j)(1) renders it unlawful:

> [f]or an employer…, because of race,…color, national origin, ancestry,…to harass an employee…. Harassment of an employee…, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. …An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.

Under this provision, unlawful workplace harassment occurs "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule and insult' that is 'sufficiently *severe or pervasive* to *alter the conditions of the victim's employment* and *create an abusive working environment*.'" (*Nazir*, 178 Cal.App.4th at 263-264, emphasis added, citations and inner quotes omitted, quoting *Kelly-Zurian v. Wohl Shoe Co*. (1994) 22 Cal.App.4th 397, 409, quoting *Harris v. Forklift Systems Inc*. (1993) 510 U.S. 17, 21.)

Whether harassment creates such an actionable "abusive working environment" because it is either "severe or pervasive," or a blend of the two, is a quintessential question of fact for the jury, which, among other things, "must be assessed from the perspective of a reasonable person belonging to the [plaintiff's] racial or ethnic group" (*Nazir*, 178 Cal.App.4th at 264) in light of the "totality of circumstances" (see §12923(c)), which cannot be understood by "carving the work environment into a series of discrete incidents" (*Burns v. McGregor Electronic Industries, Inc*. (8th Cir. 1992) 955 F.2d 559, 564; *Lounds v. Lincare, Inc*.

(10th Cir. 2015) 812 F.3d 1208, 1222, citations and inner quotations omitted ("[T]he totality of circumstances is the touchstone of a hostile work environment analysis. Courts consider a variety of factors in this holistic analysis").) "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." (*Oncale v. Sundowner Offshore Services, Inc*. (1998) 523 U.S. 75, 81-82).

As discussed, given its complex, fact-intensive character, the courts have recognized that whether alleged harassing conduct creates an actionably hostile work environment is "rarely appropriate for disposition of on summary judgment." (*Nazir*, 178 Cal.App.4th at 283, 286; *Lounds*, 812 F.3d at 1222, 1227-1228 ("'the severity and pervasiveness evaluation is particularly unsuited for summary judgment' because it is inherently fact-based by nature").)

Based on these judicially-developed standards, the California Legislature has recently amended FEHA to reaffirm and consolidate California's standards on unlawful workplace harassment. (Stats 2018, ch. 955 (SB 1300 (Jackson)).) First, FEHA now broadly specifies the conduct constituting unlawful harassment in terms of its effect on the victim:

> [H]arassment creates a hostile, offensive, oppressive, ***or*** intimidating work environment…when the harassing conduct sufficiently ***offends, humiliates, distresses, or intrudes*** upon its victim, so as to ***disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the*** job ***as usual,*** or otherwise ***interfere with and undermine the victim's personal sense of well-being***.

(§12923(a).) Because these standards are recited in the disjunctive, Bailey need only show she meets any one of them. In particular, Bailey need not

show a "[l]oss of tangible job benefits" or even "prove that…her tangible productivity has declined…." (12923(a); 12940(j)(1).) Rather, quoting Justice Ginsburg's concurrence in *Harris*, 510 U.S. at 26, the statutory amendment establishes that Bailey would only need to adduce evidence on which "a reasonable person subjected to the discriminatory conduct would find, as [Bailey] did, that the harassment ***so altered working conditions as to make it more difficult to do the job***." (§12923(a).)

Second, FEHA explicitly confirms 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," (§12923(b).) This is fully in keeping with established FEHA and Title VII jurisprudence. (*Castleberry v. STI Group* (3d Cir. 2017) 863 F.3d 259, 264-265, citing *Faragher*, 524 U.S. at 788 ("an isolated incident of discrimination (if severe) can suffice to state a claim for harassment"); *Boyer-Liberto v. Fontainbleau Corp*. (4th Cir. 2015) 786 F.3d 264, 268, 277 (observing that a serious "isolated incident of harassment…can create a hostile work environment" and "'amount to discriminatory changes in the terms and conditions of employment'"); see *Dee v. Vintage Petroleum, Inc*. (2003) 106 Cal.App.4th 30, 36, quoting *Rogers v. Western-Southern Life Ins. Co*. (7th Cir. 1993) 12 F.3d 668, 674 ("there is neither a threshold 'magic number' of harassing incidents that gives rise…to liability…nor a number of incidents below which a plaintiff fails as a matter of law to state a claim"); see also EEOC Compliance Manual, §15-VII(A)(2) at 7222 ("*a*

single extremely serious incident of harassment may be sufficient to constitute a Title VII violation").)

Third, FEHA now explicitly affirms that conduct creating a hostile work environment and constituting unlawful harassment may be verbal and constitute additional evidence of unlawful discrimination, even if occasional or made by a nondecisionmaker. (§12923(c); see *Aguilar*, 21 Cal.4th at 129-130 ("Verbal harassment…also may constitute employment discrimination under Title VII"); 2 CCR §11019(b)(1) ("e.g., epithets, derogatory comments or slurs").)

Coupled with FEHA's further affirmation that "[t]he existence of a hostile work environment depends upon the ***totality of the circumstances***" (§12923(c)), and that "[h]arassment cases are ***rarely appropriate for disposition on summary judgment***" (§12923(e),[12] these standards together confirm, indeed compel, a holding that the one-time use of a racial slur, ***particularly the n-word***, may be sufficient to support a jury finding that an actionable hostile work environment was created. Indeed, the EEOC specifically cites the one-time use of "an ***unambiguous racial epithet such as the 'N-word,'***" even by a co-worker, as a core example of such verbal harassment. (EEOC Compliance Manual §15-VII(A)(2) at 7222-7223, emphasis added.)

This Court and the federal courts have unanimously recognized the deeply injurious nature of this racial epithet as a form of verbal harassment

---

[12] Section 12923(e) explicitly approved of *Nazir*'s "observation that hostile working environment cases involve issues 'not determinable on paper.'" (*Nazir*, 178 Cal.App.4th at 286.)

targeting African Americans, which evokes our nation's centuries-long history of slavery, subjugation and brutal dehumanization to which they have been subjected. (*Alcorn*, 2 Cal.3d at 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*, 25 Cal.3d at 941, 946-949, 946 ("n-word" may constitute actionable outrageous conduct when used by supervisor or if the victim is especially "susceptible to injuries"); see also, e.g., *Ayissi-Etoh*, 712 F.3d at 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*, 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*"); *Lounds*, 812 F.3d at 1229-1230 (recognizing the "strong polluting power of this time-worn word, 'nigger'"); *Rogers*, 12 F.3d at 675 ("Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger'…")[13]

Given these principles and standards, which nether the CA nor the City dispute,[14] the CA's holding that a co-worker's, as opposed to a

---

[13] While this case involves the use of the "n-word" slur against an African American woman, Bailey does not lose sight of the reality that other ethnic, religious and gender groups have also been subjected to targeted workplace slurs for much the same reason, to demean, subjugate and oppress their human dignity. Any such analogous racial or other slur would have the same pernicious effect on its intended victim and his workplace, who should be entitled to the same remedies under FEHA.

(continued…)

supervisor's, one-time infliction of the slur is categorically non-actionable under FEHA (Slip Op. 7-12, 11-12) is neither compelled nor warranted. First, nothing in FEHA, its implementing regulations, Title VII or the EEOC Compliance Manual guidelines, requires this categorical distinction. Indeed, the recent FEHA amendments declare, without reference to the perpetrator's status: "A single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment…." (§12923(b).)[15] The EEOC Guidelines similarly declare: "a single extremely serious incident of harassment may be sufficient to constitute a Title VII violation." (EEOC Compliance Manual, §15-VII(A)(2) at 7222.) And the EEOC's first example of an actionable one-time racial slur involves a co-worker, not a supervisor. (*Id*. at 7223, Example 15; see also *Williams v. City of Philadelphia Office of Fleet Mgmt*. (E.D. Pa. 2020) 2020 WL 1677667 at *4-5 (triable issue of harassment where co-worker called African American employee "n-word"); *Bynum v. District of Columbia* (D.D.C. 2020) 424 F.Supp.3d 122, 134-138, esp. 136-138 (finding co-worker's one-time "you need to go back to the South where

---

(…continued)

[14] City "completely agrees" the "n-word" is "one of the ugliest words, if not the ugliest word, in the American language" (RT (9.15) 4:18-20), calling it "deplorable" (*id*. at 4:21) and "categorically unacceptable," which "violates San Francisco's Harassment Free Workplace Policy" (RB.9, 27).

[15] See *Pineda v. Williams-Sonoma Stores, Inc*. (2011) 51 Cal.4th 524, 529-530, internal citations omitted (In interpreting a statute, "we look first to the words of a statute, 'because they generally provide the most reliable indicator of legislative intent.' We give the words their usual and ordinary meaning, while construing them in light of the statute as a whole and the statute's purpose").)

you came from" epithet to African American employee sufficiently racially-tinged to create hostile work environment).)

Second, such a categorical distinction is doctrinally unjustified given the intensely factual nature of the hostile work environment question, and the complexity of workplace interrelationships involved in any given incident of alleged verbal harassment (see *Oncale*, 523 U.S. at 81-82 ("The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed").)

The main focus of the cases involving supervisorial use of racial slurs has been on the imposition of employer liability, based on the theory that a supervisor's actions carry with it the employer's authority. (See, e.g., *Faragher*, 524 U.S. at 788-789.) Others have opined that the supervisor's status amplifies the force of the harassing conduct, thereby directly contributing to the creation of a hostile work environment itself. (See, e.g., *Faragher*, 524 U.S. at 789-790, 807.) While these considerations may be relevant in many cases, they do not preclude the possibility that, given the unique character of any given workplace setting, even a one-time racial slur by a co-worker might likewise create a hostile work environment. Acknowledging that a harasser's supervisorial status may be relevant to this analysis is not at all inconsistent with the possibility that a co-worker's even one-time racial slur might be sufficiently pernicious in context to create an actionable hostile work environment. Consistent with FEHA's underlying policies, and guided by the standards summarized above, this

core issue can only be decided by a trier of fact based on the totality of circumstances in each case.

Here, the fact that Bailey was subjected to the “n-word” is sufficient to avoid summary judgment and to leave the assessment of whether it created a hostile work environment to the jury as trier of fact. What is more, in context, Bailey wasn’t just called a “n---r,” but was effectively called a “scary n---r,” thereby evoking one of the most perniciously injurious amplifications of the slur, that African Americans inherently pose, as part of their essential being, a threat to all others. Furthermore, Bailey knew that Larkin had previously used her close relationship with Taylor-Monachino, as Human Resources Department Manager, to retaliate against other African American women in the DAO, thereby instantly rendering Larkin’s slur that much more of a threat to Bailey’s position in the DAO. Importantly, this threat played out much as Bailey feared, both as to Taylor-Monachino’s aggressive obstruction of Bailey’s harassment complaint, and as to the DAO’s surrounding failures to appropriately respond to Larkin’s slur, including the repeated decisions not to separate the parties, but instead to increase their interaction by directing Bailey to periodically cover Larkin’s duties, all of which caused Bailey severe emotional distress directly affecting her work performance. (See *Agarwal*, 25 Cal.3d at 946, emphasis added ("Behavior may be considered outrageous if a defendant … *abuses a relation* or position which gives him power to damage the plaintiff's interest”); §12923(a) (declaring that harassing conduct “creates a hostile, offensive, oppressive, or intimidating work environment … when [it] sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim’s emotional tranquility in the workplace, affect

the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being").)

Thus, even assuming Larkin's co-worker status is relevant to whether her slur created a hostile work environment, FEHA's governing standards make that consideration one for the jury in light of the "totality of circumstances" (§12923(c)), i.e., the "*constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed*" (*Oncale*, 523 U.S. at 81-82), "assessed from the perspective of a reasonable person belonging to the [plaintiff's] racial or ethnic group" (*Nazir*, 178 Cal.App.4th at 264). This is, and should be, more than adequate to preclude categorical summary adjudication of Bailey's harassment claim and to allow her claim to go to a jury.

In sum, the CA's categorical ruling that a one-time co-worker racial slur could not create a hostile work environment, directly conflicts with FEHA's unqualified insistence that whether alleged conduct constitutes unlawful harassment is a factual question, "rarely appropriate for disposition on summary judgment." (§12923(e), affirming *Nazir*, 178 Cal.App.4th at 264, 283, 286; Chin, Employment Litigation, §10:164); see also *Lounds*, 812 F.3d at 1222, 1227-1228, emphasis added ("'the severity and pervasiveness evaluation is ***particularly unsuited*** for summary judgment' because it is ***inherently fact-based***").) In employment discrimination cases, the courts "have emphasized the importance of zealously guarding an employee's right to a full trial," and "[i]n close cases…it is more appropriate to leave the assessment to the fact-finder." (*Davis v. Team Electric Co*. (9th Cir. 2008) 520 F.3d 1080, 1089, 1096.)

This is not such a "close case." The Court should clarify these standards and the CA's contrary ruling should be reversed.

B. The CA Employed An Erroneously Limited Standard In Finding, Conclusively, That City/DAO Promptly and Appropriately Responded To Larkin's Racial Slur.

The CA concludes that Taylor-Monachino's actions, including her obstruction of Bailey's harassment complaint following Larkin's slur, cannot be deemed part of the unlawful harassment, and that DAO/City acted "immediately and appropriately" (§12940(j)(1)) to Larkin's slur, absolving it of liability. The Decision is wrong on both counts.

Under FEHA, "[e]mployers have an affirmative duty to take reasonable steps to prevent and *promptly correct discriminatory and harassing conduct*" (2 CCR §11023(a)), and, in the case of alleged co-worker harassment, may be held liable for "fail[ing] to take immediate and appropriate corrective action" (§12940(j)(1); *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th at 1040-1041). Significantly, an employer's failure to take such prompt and appropriate corrective action effectively becomes part of the co-worker's harassment by "*adopt[ing] the offending conduct and its results quite as if they had been authorized affirmatively as the employer's policy*" (*Faragher*, 524 U.S. at 789, emphasis added; accord *Christian*, 984 F.3d at 811 ("employer may be held liable for…harassment…, where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions"); Chin, Employment Litigation §§10:395-10:397 (quoting *Faragher*).)

An employer's affirmative duty goes beyond, and is meaningfully broader, than only preventing the perpetrator from repeating her own

harassing conduct, which the CA narrowly adopts as its governing criterion. (Slip Op. 17.) Rather, the employer's appropriate remedial actions must ensure a harassment-free workplace, which includes not just appropriate preventative/disciplinary measures directed to the perpetrator,[16] but also corrective actions designed to establish or maintain a harassment-free workplace as a value taken seriously. (*Ellison*, 924 F.3d at 881, 882 (discipline must be both "proportionat[e] to the seriousness of the offense" and employer's condemnation sufficiently strong to "persuade potential harassers to refrain from unlawful conduct" in order to "maintain a harassment-free working environment"); accord *Christian*, 984 F3d at 812; *Fuller*, 47 F.3d at 1528-1529.)

Whether the employer's response is adequately "immediate and appropriate" is a question of fact to be decided in light of all the circumstances. (*Reitter v. City of Sacramento* (E.D. Cal. 2000) 87 F.Supp.2d 1040, 1046 (stating it is for the jury to resolve "the adequacy of the employer's response under all the circumstances"); accord *Bradley v. California Dept. of Corrections* (2008) 158 Cal.App.4th 1612, 1630.) Liability arises from an employer's negligent response regardless of motivation. (*Swenson,* 271 F.3d at 1194; *State Department of Health Services*, 31 Cal.4th at 1041.) Accordingly, nothing in this liability

---

[16] For example, a sufficient response focused on the perpetrator may consist of: (1) initial temporary steps, including separating the employees and conducting a prompt and thorough investigation; and (2) appropriate permanent remedies, such as permanent separation. (*Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184, 1192-1196; Chin, Employment Litigation §§10.420 et seq.)

standard requires the employer's failure to properly address the harassing conduct to be itself motivated by race or other unlawful criteria.[17]

Here, by cherry-picking only one aspect of the City/DAO's response to Bailey's harassment charge the CA not only ignored the City/DAO's duty to ensure that any corrective steps taken achieve a harassment-free workplace generally, but also plainly ignored its own duty to assess Bailey's claim in light of the totality of the circumstances. This holistic assessment would have encompassed the full range of the City/DAO's failed responses already discussed, including, even as to Bailey herself, the repeated failures to separate the parties, the insistence that Bailey suddenly begin covering Larkin's duties, the unjustifiably critical June 2015 Performance Report, the failure to respond to Bailey's explanatory rebuttal to those criticisms, and most egregiously Taylor-Monachino's ongoing harassment, threats and intentional obstruction and attempted sabotage of Bailey's harassment complaint. (See *supra* at 20-27.) A jury could

---

[17] Echoing the trial court's misstatement of Bailey's testimony (3.AA.352:15-22; RB.33-35), the CA erroneously finds that Bailey testified that Taylor-Monachino's actions "had nothing to do with race." To the contrary, Bailey's actual testimony states only that she "could not say it [Taylor-Monachino's harassment] was because of my race" (1.AA.94:6-9) and her "yes" answer when asked: "And you do not believe that this retaliation [from Taylor-Monachino] is based on your race; is that correct?" (1.AA.95:21-23). Bailey, therefore, testified only that she didn't believe her race motivated Taylor-Monachino's actions, which is entirely different from saying her actions had *nothing to do* with race. In fact, Taylor-Monachino's obstructive malfeasance was inextricably linked to Larkin's racial slur and her desire to protect Larkin from consequences, rendering her malfeasance part of the unlawful harassment, "adopting the offending conduct and its results quite as if they had been authorized as the employer's policy" lying at the heart of DAO's "[in]appropriate" response. (*Faragher*, 524 U.S. at 789; Chin, Employment Litigation §§10:395-10:397 (quoting *Faragher*).)

reasonably and justifiably find that the City/DAO's response, encompassing the above-summarized full range of misconduct and systematic failures going far beyond mere negligence, fails to constitute an "appropriate" response to the underlying harassment arising from Larkin's egregious racial slur.

First, contrary to the CA's conclusion, the City/DAO's response to Larkin's racial slur – the so-called counseling given to Larkin – was intrinsically defective and nowhere near conclusively "immediate and appropriate." By definition, counseling is an employer's least robust option for addressing workplace harassment, with leading cases finding the lack of imposed discipline, as here, to be an inherently insufficient response to harassment. (See *Ellison*, 924 F.2d at 881-882 ("[e]mployers send the wrong message to potential harassers when they do not discipline employees for … harassment") and *Fuller*, 47 F.3d at 1529 (failing to "take even the mildest form of disciplinary action" renders remedy insufficient); accord *Yamaguchi v. U.S. Dept. of the Air Force* (9th Cir. 1997) 109 F.3d 1475, 1483.) Here, when Arcelona spoke with Larkin after the January 29 meeting with Bailey, Arcelona only told Larkin that racial slurs like the "n-word" were unacceptable, but neither disciplined Larkin nor warned her of discipline should she repeat the slur. (2.AA.307-308, 334, 336.) While Clendinen also met with Larkin, he did not do so until at least ***six months later***, again without imposing any discipline or warning of future consequences, and doing nothing more than having her sign a receipt of the City's Anti-Harassment policy. (*Id.*; 2.AA.542-543, 468-469; *Christian*, 984 F.3d at 813 (jury could find employer's "glacial response" was "too little, too late").) Asserting a patently absurd rationale, Taylor-Monachino

refused to separate the parties, thereby denying Bailey one of the most efficacious remedies available to employers. (*Supra* at 21-22 and fn. 8; *Swenson*, 271 F.3d at 1092.) For her part, Larkin denied making the slur (2.AA.336:7-21), which a jury could reasonably view as a lack of remorse and refusal to take responsibility for her slur. Indeed, no one involved, including Larkin, who seemed untouched by the counseling, regarded the counseling as adequate discipline. (*Supra* at 19.)

Thus, even indulging the speculative assumption that the counseling led Larkin not to repeat the slur,[18] a jury could nonetheless find the counseling insufficient to satisfy the City/DAO's independent duties to ensure that its response is both "proportionat[e] to the seriousness of the offense" and sufficient to "assure a workplace free from…harassment." (*Ellison*, 924 F.2d at 882-883; *Fuller*, 47 F.3d at 1528-1529.)[19]

As importantly, the CA entirely ignored its duty to consider the full scope ("all the circumstances") of the City/DAO's response, at the heart of which lay Taylor-Monachino's hostile and actively obstructive response to the slur and Bailey's efforts to seek proper redress, which sabotaged the City/DAO's substantive duty to protect harassment victims and to assure a

---

[18] The record lacks any evidence supporting this tenuous inference, which rests entirely on the *post hoc ergo propter hoc* (after this therefore because of this) logical fallacy.

[19] The CA's lengthy discussion of *Bradley* (Slip Op. at 14-17) misses the point. *Bradley* establishes that mere counseling of a perpetrator may not be sufficient where it does not actually stop the perpetrator. (158 Cal.App.4th 1612, 1632.) But no doctrinal reason limits the principle to that result where, as here, the counseling's efficacy is not just questionable but, by virtue of its inefficacy, may actually have reinforced the City/DAO's failure and refusal to take serious corrective action to ensure a harassment-free workplace.

harassment-free workplace. (*Lounds*, 812 F.3d at 1222 ("[T]he totality of circumstances is the touchstone of a hostile work environment analysis"); *id*. at 1224 ("[B]y viewing each incident in isolation, as if nothing else had occurred, a realistic picture of the work environment [i]s not presented"), quoting *King*, 21 F.3d at 1581.) In applying this standard, Bailey won't repeat her detailed account of City/DAO's deficient response (see *supra* at 20-27), but notes especially the following:

(1) Taylor-Monachino's persistent, 10-month refusal to separate Bailey and Larkin, despite Bailey's and Arcelona's repeated requests, improperly, and in hindsight vindictively, denied Bailey perhaps the most direct and immediately effective remedy against Larkin's harassment. (*Swenson*, 271 F.3d at 1092.) No reasonable jury could consider this delay "immediate" or "appropriate." (§12940(j)(1); *Christian*, 941 F.3d at 813.) Indeed, DAO doubled down on Taylor-Monachino's refusals to separate the parties by directing Bailey for months to periodically cover Larkin's duties, thereby increasing their contact and exacerbating Bailey's trauma stemming from Larkin's slur. (*Ellison*, 924 F.3d at 883 (keeping victim and perpetrator together may ***create or exacerbate*** the hostile environment); *Ayissi-Etoh*, 712 F.3d at 577-578 (same); Chin, Employment Litigation, §§10:422-10:423.)

(2) The investigation here could readily be found deficient. The City stated it would conduct none, and the DAO failed to interview any of the witnesses except Bailey and Larkin, immediately ending the investigation as soon as Larkin denied ever using the "n-word" slur. (See *Swenson*, 271 F.3d at 1093 (observing that an investigation is the "most significant immediate measure an employer can take," is a "key step in the employer's

response," and "can itself be a powerful factor in deterring future harassment. By opening a sexual harassment investigation, the employer puts all employees on notice that it takes such allegations seriously and will not tolerate harassment in the workplace. An investigation is a warning, not by words but by action").)

(3) Taylor-Monachino's ongoing obstruction, hostility and threats against Bailey, which could readily be found to be an aiding and abetting of Larkin's slur (§12940(i); 2 CCR §11020), violated her duty, as DAO HR Department Manager, to enforce FEHA's and the City's anti-discrimination and harassment protections. Indeed, given her managerial status, her malfeasance alone confirms the City/DAO's liability, "adopt[ing] the offending conduct and its results quite as if they had been authorized affirmatively as the employer's policy." (*Faragher*, 524 U.S. at 789; Chin, Employment Litigation, §10:395-10:397.)

To conclude, as the CA does, that no actionable harassment occurred here as a matter of law and that the City/DAO's response was conclusively "immediate and appropriate" contravenes FEHA's governing standards and undermines its remedial purposes, including those embodied in the recent FEHA amendments. (§12923(a)-(e).) On this issue too, the CA should be reversed, and this Court should clarify the substance of an employer's duty to respond "immediate[ly] and appropriate[ly]" to the full circumstances implicated by allegations of co-worker harassment.

III. RETALIATION: THE DETERMINATION OF AN ACTIONABLE ADVERSE EMPLOYMENT ACTION MUST CONSIDER THE COLLECTIVE TOTALITY OF CIRCUMSTANCES, AND MAY CONSIST OF THE EMPLOYER'S DELIBERATE OBSTRUCTION OF AN EMPLOYEE'S HARASSMENT CLAIM.

The CA's rejection of Bailey's retaliation claim fails to follow the governing legal standards set forth in *Yanowitz*, 36 Cal.4th 1028, both as to (1) the breadth of conduct that may be found to constitute actionable adverse employment actions affecting the terms and conditions of employment and (2) the mandate that such conduct targeting the victim be considered "collectively," i.e., in its totality, as the harassment victim would experience it, rather than its fragmented parts.

First, mirroring the expansive statutory definition of harassment itself, *Yanowitz* repeatedly emphasizes the broad range of conduct that may constitute an adverse employment action "materially affect[ing] the terms, conditions, or privileges of employment" supporting a FEHA retaliation claim. (*Yanowitz*, 36 Cal.4th at 1052.) *Yanowitz* unambiguously explains that FEHA must "be interpreted broadly to further [its] fundamental antidiscrimination purposes"; that "[FEHA] protects an employee against unlawful discrimination with respect…to…the *entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance* or opportunity for advancement"; and that "the phrase 'terms, conditions or privileges' of employment must be *interpreted liberally and with a reasonable appreciation of the realities of the workplace* in order to afford employees the *appropriate and generous protection* against employment discrimination that FEHA was intended to provide." (*Id*. at 1053-1054, emphasis added; *Patten v. Grant Joint Union High School District* (2005) 134 Cal.App.4th 1378, 1387-1388 (*Yanowitz*'s

"'materiality' test is not to be read miserly" and is "not crabbed [or] narrow"); *Whitehall v. County of San Bernardino* (2017) 17 Cal.App.5th 352, 366-367 (retaliation assessed in context of employee's workplace reality).)

Moreover, again consistent with the principles governing consideration of harassment itself, the retaliatory conduct must be assessed "collectively" in light of the "totality of circumstances." (*Yanowitz*, 36 Cal.4th at 1052 and fn. 11, 1055-1056.) The courts may not fragment the employee's experience into isolated parts. (*Id.*) If a plaintiff-employee asserts a "pattern of systemic retaliation," as Bailey does here, the courts "need not and do not decide whether each alleged retaliatory act constitutes an adverse employment action in and of itself…. [T]here is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries." (*Id.* at 1055; *Patton*, 134 Cal.App.4th at 1390.)

Lastly, determining the conduct constituting an adverse employment action "is not, by its nature, susceptible to a mathematically precise test," "adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls within [FEHA's] reach…." (*Yanowitz*, 36 Cal.4th at 1054-1055.) Accordingly, "[r]etaliation claims are inherently fact specific, and…must be evaluated in context…, tak[ing] into account the unique circumstances of the affected employee as well as the [claim's] workplace context…." (*Id.* at 1052.)

The CA's rejection of Bailey's retaliation claim ignores these standards, choosing instead to fragment Bailey's charges into isolated parts

and narrowly defining what may constitute a material term or condition of employment. As *Yanowitz* makes clear, however, whether characterized as a "collective" or "totality of circumstances" view of the allegedly wrongful workplace conduct at issue, FEHA requires a holistic view of such conduct mirroring the reality of employees' workplace experience. (See, e.g., *Oncale*, 523 U.S. at 81 (emphasizing that the courts' inquiry must involve "careful consideration of the social context in which particular behavior occurs and is experienced by its target"); *King*, 21 F.3d at 1583 (explaining that "EEOC regulation[s] reflect[] the common-sense position that it is the totality of the workplace conduct that creates the working environment").)

Measured under these standards, and construing all the evidence in context in her favor, Bailey's account shows far more than "mere" isolated slights or annoyances, as the CA erroneously suggests. Bailey has rather shown a "systemic pattern" of retaliation stemming from Bailey's pursuit of her complaint against Larkin, centrally involving Taylor-Monachino's abuses of her managerial authority designed to sabotage Bailey's complaint, punish Bailey directly and protect Larkin. (*Supra* at 20-27; see *State Department of Health Services*, 31 Cal.4th at 1041 (liability for supervisor/management retaliatory conduct).)[20] Thus, Taylor-Monachino's "mere" workplace slights, which the CA dismissed as insufficient, were inextricably linked to and actually reinforced her more substantive abuses,

[20] City/DAO argued below that since she was not Bailey's direct supervisor, Taylor-Monachino lacked control over the terms and conditions of her employment. However, as Manager of DAO's Human Resources Department, Taylor-Monachino is deemed to have such control (§12926(t); Chin, Employment Litigation, §10:326), as her conduct her amply demonstrates.

thereby creating an actionable hostile work environment themselves (*Yanowitz*, 36 Cal.4th at 1053 fn. 12, 1056 fn. 16), and repeatedly signaling Bailey's new "workplace reality": she had no protection against unlawful discrimination or harassment within DAO, and no longer held one of FEHA's most important guarantees as a basic "term and condition" of employment, the right to a harassment-free workplace, which necessarily includes a right to fair and conscientious protection against such harassment if it occurred (*Davis*, 520 F.3d at 1095 ("Title VII guarantees employees 'the right to work in an environment free from discriminatory intimidation, ridicule, and insult'")). Similarly, Bailey's Performance Review criticisms, which the CA Decision also dismissed as inconsequential, could be seen to be part of this larger reality, reflecting a managerial exploitation of the emotional toll Larkin's slur and the DAO's responsive failures, centrally including the DAO's repeated refusal to separate Larkin, had on Bailey.

Thus, properly taken together, a jury could reasonably find that these actions, taken together, are "reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion." (*Yanowitz*, 36 Cal.4th at 1053-1054.) The CA nonetheless improperly substituted its judgment for the jury's, despite abundant evidence of concrete changes in Bailey's job duties (the additional tasks she had to perform to cover her harasser's work), complaints from Bailey and her psychiatrist about how continuing to work with the perpetrator of the "scary n---r" slur for 10 months was impacting her health and job performance, and documentation in her performance review of that negative impact on her job performance. Independent of Taylor-Monachino's malicious harassment campaign against Bailey, this is more than sufficient evidence

to survive summary judgment on the issue of whether Bailey suffered an actionable adverse employment action in retaliation for her harassment complaint.

Like harassment itself, FEHA's protections against unlawful retaliation against employees for seeking to enforce their rights are among the statute's most fundamental, and this Court in *Yanowitz* properly broadly interpreted the nature and scope of those protections. The CA decision here thoroughly violated *Yanowitz*'s principles in rejecting Bailey's claims as matters of law instead of allowing her claims to be presented to a jury for decision. This case, therefore, affords the Court an opportunity to clarify, emphasize and reaffirm the principles governing FEHA retaliation claims. This Court should reverse the CA decision affirming the trial court's summary judgment on Bailey's retaliation claim, in addition to a ruling reversing the CA decision on Bailey's harassment claim, in order to do just that.

IV. REVERSAL OF THE CA'S DECISION ON BAILEY'S HARASSMENT OR RETALIATION CLAIMS WOULD REVIVE HER CLAIM FOR FAILURE TO PREVENT DISCRIMINATION.

The CA dismissed Bailey's FEHA claim for failure to take all reasonable steps to prevent unlawful discrimination, harassment or retaliation on the ground that this claim requires a successful ruling on the underlying discrimination, harassment or retaliation claim. (Order Denying Rehearing (2020-10-6).) The facts discussed above, particularly the City/DAO's failure to conduct an adequate investigation or even provide a non-corrupt EEO process, would support this failure to prevent unlawful discrimination as well. (§12940(k); 2 CCR §§11006, 11009; *Northrup*

Grumman Corp. v. Workers Comp. Appeals Bd. (2002) 103 Cal.App.4th 1021, 1035.) Accordingly, reversal of either her harassment or retaliation claim, would revive her failure to prevent claim as well.

CONCLUSION

The CA fundamentally misconstrued and misapplied California law under FEHA governing unlawful workplace harassment claims, particularly in light of the 2018 amendments affirming and codifying existing law contemplating that liability may be based on a single severe act of harassment. Viewed through a correct doctrinal framework, however, Bailey's evidence supports her FEHA claims, which may not be resolved on summary judgment, allowing her to present her case to a jury on its merits. This Court should clarify, reemphasize and reaffirm the principles governing FEHA's fundamental guarantees and rights protecting employees against unlawful harassment and retaliation, and reverse the CA decision affirming the summary judgment.

Dated: March 1, 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 Opening Brief on the Merits contains 11,322 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: March 1, 2021

s/ *Robert L. Rusky*

DANIEL RAY BACON
ROBERT L. RUSKY

[¶ 8760]

§ 15-VII EQUAL OPPORTUNITY FOR JOB SUCCESS

A. RACIAL HARASSMENT

Failing to provide a work environment free of racial harassment is a form of discrimination under Title VII. Liability can result from the conduct of a supervisor, coworkers, or non-employees such as customers or business partners over whom the employer has control.[118]

A hostile environment can be comprised of various types of conduct. While there is not an exhaustive list, examples include offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. The conduct need not be explicitly racial in nature to violate Title VII's prohibition against race discrimination, but race must be a reason that the work environment is hostile. To determine if a work environment is hostile, all of the circumstances should be considered. Incidents of racial harassment directed at other employees in addition to the charging party are relevant to a showing of hostile work environment.[120]

There are two requirements for race-based conduct to trigger potential liability for unlawful harassment: (1) the conduct must be unwelcome; and (2) the conduct must be sufficiently severe or pervasive to alter the terms and conditions of employment in the mind of the victim and from the perspective of a reasonable person in the victim's position. At this point, the harassing conduct "offends Title VII's broad rule of workplace equality."[121]

1. Unwelcome Conduct

The conduct must be unwelcome in the sense that the alleged victim did not solicit or incite the conduct and regarded it as undesirable or offensive. When the conduct involves misfreatment or is racially derogatory in nature, unwelcomeness usually is not an issue, even when the alleged harasser and victim are of the same race.[122] Sometimes employers argue that the conduct in question was not unwelcome because it was playful banter, and the alleged victim was an active participant. The facts in such cases require careful scrutiny to determine whether the alleged victim was, in fact, a willing participant.[123]

---

118 For a more detailed discussion of the standards for unlawful harassment, see Enforcement Guidance: *Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 1999); *Enforcement Guidance on Harris v. Forklift Sys., Inc.* (November 1993); *Policy Guidance on Current Issues of Sexual Harassment* (Mar. 1990); 29 C.F.R. § 1604.11.

119 *See Aman*, 85 F.3d at 1083 (conduct need not be overtly racial in character as long as harassment was because of race); *Policy Guidance on Current Issues of Sexual Harassment*, at 19 (Mar. 1990) (harassment need not be explicitly sexual, racial, religious, etc. to give rise to Title VII liability as long as it was because of the protected trait), *available at http://www.eeoc.gov/policy/docs/currentissues.html.*

120 *See Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185-86 (4th Cir. 2001) (racial harassment both directed at Plaintiff, and not specifically directed at Plaintiff but part of Plaintiff's work environment, could be considered); *Schwapp v. Town of Avon*, 118 F.3d 106, 111-12 (2d Cir. 1997) (permitting claim of Black Plaintiff to survive summary judgment based on racially offensive incidents involving Plaintiff directly, as well as incidents he was aware of involving other Blacks (some occurring prior to his employment) and other minority groups). Courts might give less weight to racially offensive conduct experienced second-hand. *See Singletary v. Missouri Dep't of Corrections*, 423 F.3d 886, 893 (8th Cir. 2005) (affirming summary judgment for employer in part because racial epithets about Plaintiff were not made in his presence, which lessened the objective hostility of his work environment); *Smith v. Northeastern Ill. Univ.*, 388 F.3d 559, 567 (7th Cir. 2004) ("We do not mean to hold that a plaintiff can never demonstrate a hostile work environment through second-hand comments or in situations where a plaintiff is not the intended target of the statements. However, what Weaver personally experienced does not amount to an objectively hostile work environment. She heard an offensive term directed at a third person once and only learned from others about other offensive comments directed at third persons.").

121 *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

122 *See, e.g., Kang v. U. Lim America*, 296 F.3d 810, 817 (9th Cir. 2002) (hostile work environment could be found where Korean supervisor with stereotypical beliefs about the superiority of Korean workers held Korean Plaintiff to higher standards, required him to work harder for longer hours, and subjected Plaintiff to verbal and physical abuse when he failed to live up to supervisor's expectations); *Ross v. Douglas County*, 234 F.3d 391, 393 & 395-97 (8th Cir. 2000) (affirming verdict in favor of Black employee whose Black supervisor subjected him to racially derogatory slurs, such as the "N-word" and "black boy," and referred to the employee's wife, who was White, as "whitey": "Such comments were demeaning to Ross. They could have been made to please Johnson's white superior or they may have been intended to create a negative and distressing environment for Ross. Whatever the motive, we deem such conduct discriminatory.").

123 *E.g., Vaughn v. Pool Offshore Co.*, 683 F.2d 922, 924-25 (5th Cir. 1982) (trial court did not err in finding for employer where plaintiff used racial slurs along with his co-employees, other employees were subjected to the same obnoxious treatment as plaintiff, his co-workers expressed amicable feelings towards him, and plaintiff testified at trial that he did not believe that pranks against him were racially motivated or that he was singled out for abusive treatment).

2. Severe or Pervasive

To violate Title VII, racially abusive conduct does not have to be so egregious that it causes economic or psychological injury.[124] At the same time, Title VII is not "a general civility code,"[125] and thus conduct is not illegal just because it is uncomfortable, or inappropriate. The "severe or pervasive" standard reflects what the Supreme Court has called a "middle path" between these extremes.[126]

Harassment must be analyzed on a case-by-case basis, by looking at all the circumstances and the context. Relevant factors in evaluating whether racial harassment creates a sufficiently hostile work environment may include any of the following (no single factor is determinative):

- The frequency of the discriminatory conduct;
- The severity of the conduct;
- Whether the conduct was physically threatening or humiliating;
- Whether it unreasonably interfered with the employee's work performance; and
- The context in which the harassment occurred, as well as any other relevant factor.

The more severe the harassment, the less pervasive it needs to be, and vice versa. Accordingly, unless the harassment is quite severe, a single incident or isolated incidents of offensive racial conduct or remarks generally do not create an abusive working environment.[127] But a single, extremely serious incident of harassment may be sufficient to constitute a Title VII violation, especially if the harassment is physical.[128] Examples of the types of single incidents that can create a hostile work environment based on race include: an actual or depicted noose or burning cross (or any other manifestation of an actual or threatened racially motivated physical assault)[129]; a favorable reference to the Ku Klux Klan, an unambiguous racial epithet such as the "N-word,"[130] and a racial comparison to an animal.[131] Racial comments or other acts that are not sufficiently severe standing alone may become actionable when repeated, although there is no threshold magic number of harassing incidents giving rise to liability.[132] Moreover, investigators must be sensitive to the possibility that comments, acts, or symbols that might seem benign to persons of the harasser's race could nevertheless create a hostile work environment for a reasonable person in the victim's position.[133]

---

[124] *See Harris*, 510 U.S. at 22; *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

[125] *Oncale*, 523 U.S. at 80-81.

[126] *Harris*, 510 U.S. at 21 ("This standard, which we reaffirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury.").

[127] *See Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) ("'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment'").

[128] *See Smith v. Sheahan*, 189 F.3d 529, 533-34 (7th Cir. 1999) (a sufficiently severe episode may occur as rarely as once and still violate Title VII).

[129] *See Reedy v. Quebecor Printing Eagle, Inc.*, 333 F.3d 906, 909 (8th Cir. 2003) (racially hateful bathroom graffiti that amounted to death threat aimed at Plaintiff could be fairly characterized as severe); *Williams v. New York City Housing Auth.*, 154 F. Supp. 2d 820, 824-25 (S.D.N.Y. 2001) ("Indeed, the noose is among the most repugnant of all racist symbols, because it is itself an instrument of violence. It is impossible to appreciate the impact of the display of a noose without understanding this nation's opprobrious legacy of violence against African-Americans."); *cf. Jackson v. Flint Ink North Am. Corp.*, 379 F.3d 791, 795 (8th Cir. 2004) (in racial discrimination case involving graffiti depicting a burning cross, court noted that because "its symbolism is potentially more hostile and intimidating than the racial slurs[,] [e]ven a single instance of workplace graffiti, if sufficiently severe, can go a long way toward making out a Title VII claim"), *rev'd on reh'g on other grounds*, 382 F.3d 869, 870 (8th Cir. 2004).

[130] *Cf. Spriggs*, 242 F.3d at 185 ("Far more than a mere offensive utterance," the N-word is "pure anathema to African Americans. Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'n——' by a supervisor in the presence of his subordinates.") (citation and quotation marks omitted).

[131] In an *amicus curiae brief in Oates v. Discovery Zone*, 116 F.3d 1161 (7th Cir. 1997), the Commission argued that a Black employee provided sufficient evidence of racial harassment where he complained to his supervisor that a picture of gorillas with his name written on it was racially offensive, and his supervisor laughed at his complaint, refused to take the picture down, and allowed it to remain on display for a week after his complaint. The Seventh Circuit did not reach the merits of the Commission's argument, finding that the plaintiff had waived his racial harassment claim by not alleging it in his complaint. *Id.* at 1168. One member of the panel, however, noted that "[h]ad it been properly before the district court, I agree with the amicus brief filed by the Equal Employment Opportunity Commission that it would not have been a proper candidate for summary judgment." *Id.* at 1177 (Wood, J., concurring in part and dissenting in part). A copy of the Commission's amicus curiae brief is available at *http://www.eeoc.gov/briefs/oates_v_discovery.txt*. *See also Spriggs*, 242 F.3d at 185 ("To suggest that a human being's physical appearance is essentially a caricature of a jungle beast goes far beyond the merely unflattering; it is degrading and humiliating in the extreme.").

[132] The character of the comments or acts is important in determining the frequency needed to alter someone's working conditions. *See, e.g., Cerros v. Steel Technologies, Inc.*, 288 F.3d 1040, 1047 (7th Cir. 2002) (no magic number of offensive comments needed; unambiguous racial epithets fall on the more severe end of the spectrum). *See also* Example 16 and accompanying note 135, *infra*.

[133] *Cf. Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 824 (4th Cir. 2004) (Gregory, Circuit Judge, concurring in the judg-

 ©2006 GCH. All Rights Reserved.

Below are examples designed to explain the concept of conduct sufficiently "severe or pervasive" to alter someone's working conditions.

EXAMPLE 15 SUFFICIENTLY SEVERE CONDUCT

Tim, an African American, is an employee at an auto parts manufacturing plant. After a racially charged dispute with a White coworker, the coworker told Tim: "Watch your back, boy!" The next day, a hangman's noose, reminiscent of those historically used for racially motivated lynchings, appeared above Tim's locker. Given the violently threatening racial nature of this symbol and the context, this incident would be enough to alter Tim's working conditions.[134]

EXAMPLE 16 SUFFICIENTLY PERVASIVE CONDUCT

Miyuki, of Japanese descent, gets a job as a clerk in a large general merchandise store. After her first day on the job, a small group of young male coworkers starts making fun of her when they see her by slanting their eyes, or performing Karate chops in the air, or intentionally mispronouncing her name. This occurs many times during her first month on the job. This is pervasive harassment because of race and/or national origin.[135]

EXAMPLE 17 CONDUCT NOT SUFFICIENTLY SEVERE OR PERVASIVE

Steven, an African American, is a librarian at a public library. Steven approaches his supervisor, White, with the idea of creating a section in the stacks devoted to books of interest particularly to African Americans, similar to those he has seen in major bookstore chains. Steven's supervisor rejects the idea out of hand, stating that he does not want to create a "ghetto corner" in the library. This statement alone, while racially offensive, does not constitute severe or pervasive racial harassment, absent more frequent or egregious incidents.[136]

EXAMPLE 18 SUFFICIENTLY SEVERE OR PERVASIVE CONDUCT

Patrick, Caucasian, is a new employee in a company owned by an African American. All of the employees in Patrick's department, including his manager, also happen to be African American. Patrick's manager was pressured to hire Patrick because his father is a friend of a company executive. On Patrick's first day on the job, the manager said to him, "This is a Black company. Whiteboys like you might get all the breaks in your world, but not here. Your daddy got you this job, but he can't do it for you." Although Patrick made every effort to prove himself, he was unable to do so because over the course of the next six months the manager subjected him to a pattern of mistreatment. For example, the manager would assign Patrick the majority of the uninteresting and routine work, and would set artificial and unrealistic deadlines. The manager would yell at Patrick when he made a mistake due to having to rush. The manager also frequently failed to inform Patrick of important meetings, or ignored Patrick when he spoke at meetings he did attend. Once the manager asked Patrick to get him a cup of coffee - a task not part of his job, and which no one else ever was asked to do - and said to him, "By the way, as you've probably guessed, I like my coffee black." In contrast to the manager's treatment of Patrick, the manager assigned Patrick's coworkers - all African American -challenging assignments, provided them with coaching and training, and often extended their work deadlines. The totality of the evidence supports the conclusion that Patrick suffered from race-based harassment sufficient to alter his working conditions.[137]

(Footnote Continued)

ment) ("While many Southerners unquestionably embrace the [Confederate] flag, not out of malice or continued belief in racial subordination, but out of genuine respect for their ancestors, we must also acknowledge that some minorities and other individuals feel offended, threatened or harassed by the symbol."). See also discussion of "code words," at note 47, *supra*.

[134] *See supra* notes 129-131 and accompanying text.

[135] *Compare with, e.g., Manatt v. Bank of America*, 339 F.3d 792 (9th Cir. 2003) (Asian Plaintiff's working environment was not so objectively abusive as to alter the conditions of her employment where, over a two-and-a-half year period, harassment consisted of: two offensive and inappropriate incidents (one in which two co-workers cruelly ridiculed Plaintiff for mispronouncing a word, and another instance in which co-workers pulled their eyes back with their fingers in an attempt to imitate or mock the appearance of Asians), as well as other offhand remarks by her coworkers and supervisors (Plaintiff overheard jokes in which the phrase 'China man' was used, and overheard a reference to China and communism); the court noted that the incidents occurred over a span of two-and-a-half years and that if they had occurred over a shorter period of time or been repeated more frequently, Plaintiff "may very well have had an actionable hostile environment claim").

[136] *Compare with, e.g., Reedy*, 333 F.3d at 908-09 (working environment of Plaintiff, Black, was so objectively abusive as to alter the conditions of his employment where, over a seven-month period coworkers called him and other Black employees "n———" on numerous occasions and threatened them with violence, and the company allowed racial slurs, pictures, and threats to linger in the men's bathroom).

[137] *See Aman*, 85 F.3d at 1078-84 (reasonable jury could find two Black employees were subjected to racially hostile environment where managers and coworkers repeatedly made coded racial remarks, and managers required them to do menial tasks outside their job description, yelled at them, and made their jobs more difficult by withholding necessary

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: S265223 (A15352)

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):*

   Plaintiff-Appellant's Opening Brief on the Merits

   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: March 1, 2021

   (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: S265223 (A15352)
	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:

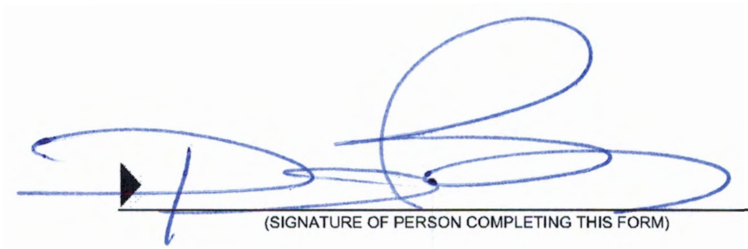
(d) Time delivered:

☐ 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: March 1, 2021

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



(SIGNATURE OF PERSON COMPLETING THIS FORM)

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 3/1/2021 by Tayuan Ma, Deputy Clerk

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
BRIEF	2021-3-1 Plaintiff-Appellant's Opening Brief on Merits - final + Appendix + POS

Service Recipients:

Person Served	Email Address	Type	Date / Time
Jonathan Rolnick Office of the City Attorney 151814	jonathan.rolnick@sfcityatty.org	e-Serve	3/1/2021 7:17:24 PM
Daniel Bacon Law Offices of Daniel Ray Bacon 103866	bacondr@aol.com	e-Serve	3/1/2021 7:17:24 PM
Tara Steeley Office of the City Attorney	tara.steeley@sfgov.org	e-Serve	3/1/2021 7:17:24 PM
Tara Steeley Office of City Attorney 231775	tara.steeley@sfcityatty.org	e-Serve	3/1/2021 7:17:24 PM
Christopher Ho Legal Aid at Work 129845	cho@las-elc.org	e-Serve	3/1/2021 7:17:24 PM
Robert Rusky Law Office of Robert L. Rusky 84989	ruskykai@earthlink.net	e-Serve	3/1/2021 7:17:24 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.

3/1/2021
Date

/s/Robert Rusky
Signature

Rusky, Robert (84989)

Last Name, First Name (PNum)

Law Offices of Robert L. Rusky

Law Firm