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SUPREME COURT OF THE STATE OF CALIFORNIA

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

ANSWERING BRIEF ON THE MERITS OF RESPONDENTS SAN FRANCISCO DISTRICT ATTORNEY'S OFFICE, GEORGE GASCON, CITY AND COUNTY OF SAN FRANCISCO

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

The Honorable Harold Kahn

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INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant Twanda Bailey alleges that she experienced a single incident of racial harassment during the fourteen years she worked for the San Francisco District Attorney's Office ("Office"). According to Bailey, Saras Larkin, Bailey's longtime coworker and friend, said "[y]ou n----rs is so scary" when a mouse ran by their work area and startled Bailey. Larkin was apparently referencing an earlier exchange, when Larkin and Bailey joked that African-Americans, including Larkin's husband, were all afraid of mice.[1]

Appellees (collectively "the City") agree with Bailey that using the n-word is hurtful, offensive and should never be allowed in the workplace. Its use violates the City's Harassment-Free Workplace Policy and is categorically unacceptable. Comments like the one alleged in this case cannot be tolerated and warrant a swift and effective response.

The City took such a response in this case. The Office's Assistant Chief of Finance and Administration, Sheila Arcelona, took corrective action as soon as she learned of Bailey's allegation about the comment. Even though Larkin denied making the remark, Arcelona counseled Larkin about the City's Harassment-Free Workplace Policy and informed her that using the n-word is unacceptable. The City's Department of Human Resources ("DHR") also examined the incident, issued a four-page analysis of its findings, and required that Larkin receive additional counseling. The Office's Chief of Finance and Administration, Eugene Clendinen, then counseled Larkin again, and required her to execute an Acknowledgement of the City's Harassment-Free Workplace Policy, a copy of which was

[1] (AA 180:21-181:5.)

placed in her personnel file and also sent to DHR. The City's corrective action was effective. It is undisputed that Bailey did not experience any other incidents of racial harassment in the Office.

Based on those undisputed facts, the lower courts correctly held that the City is entitled to summary judgment on Bailey's harassment claim for two independent reasons. First, Larkin's one-time use of a racial slur—the only racially motivated incident that Bailey experienced in her fourteen years at the Office—was not sufficiently severe or pervasive to be actionable under the California Fair Employment and Housing Act ("FEHA"). (*Aguilar v. Avis Rent A Car System, Inc*. (1999) 21 Cal.4th 121, 130 (*Aguilar*); *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 (*Lyle*); *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 788 (*Faragher*); *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 67 (*Meritor*); *Harris v. Forklift Systems, Inc*. (1993) 510 U.S. 17, 21 (*Harris*)). Indeed, Bailey has not cited even a single case in which a one-time racial slur by a coworker, without more, has been held to satisfy the severe or pervasive standard.

Second, the City is not liable because the City took prompt corrective action that ended the harassment. (Cal. Civ. Code § 12940, subd. (j)(1); *Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184, 1196 (*Swenson*)). In cases of coworker harassment, the City is not liable for harassing conduct under a *respondeat superior* theory. Instead, the City is liable only where "its own negligence is a cause of the harassment." (*Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 759 (*Burlington Industries*)). To prevail, Bailey must show that the City "(a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action." (*State Dept. of Health*

Services v. Superior Court (2003) 31 Cal.4th 1026, 1041 [citing Cal. Civ. Code § 12940, subd. (j)(1)].) "[T]he reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment." (*Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 882 (*Ellison*).) Here, the undisputed facts demonstrate that the City took immediate corrective action and stopped Bailey from experiencing any further racial harassment. Therefore, the City satisfied its legal obligation, and Bailey cannot prevail on her coworker harassment claim against the City.

The City was also entitled to summary judgment on Bailey's retaliation claim because Bailey did not experience an adverse employment action. Bailey claims that another coworker, Evette Taylor-Monachino, started to ignore her, give her bad looks, laugh at her, and once silently mouthed "you are going to get it." But a coworker's social slights and empty threats are not adverse employment actions. (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1054 & fn. 13 (*Yanowitz*); *Hardage v. CBS Broadcasting, Inc.* (9th Cir. 2005) 427 F.3d 1177, 1189 [affirming that "snide remarks" and empty "threats" did not create a triable issue of adverse employment action]). Likewise, Bailey points to feedback she received on a performance review, but that also is not a cognizable adverse employment action. (*Doe v. Dept. of Corrections & Rehabilitation* (2019) 43 Cal.App.5th 721, 735 [holding work related criticism is not an adverse employment action]). Finally, Bailey complains that she sometimes had to cover Larkin's duties when Larkin was unavailable, but Bailey conceded that her job duties remained the same throughout the relevant period. Being asked to continue to perform the same job duties she regularly

performed (and that all other Investigative Assistants in the Office performed) is not an adverse employment action. (*Yanowitz*, at p. 1051.)

Based on the well-established law and undisputed facts, the trial court properly granted summary judgment for the City, and the Court of Appeal correctly affirmed. Bailey argues that the Court of Appeal adopted a "categorical" rule that precludes liability for coworker misconduct, but the court did not do so. Instead, the court simply did what it was supposed to do when applying the summary judgment standard—the court reviewed the evidence presented, construed that evidence in the light most favorable to the non-moving party, and determined whether that evidence showed a triable issue of material fact for a jury. Because Bailey did not raise a triable issue of material fact on any claim, the Court of Appeal properly affirmed summary judgment.

While complaining (incorrectly) that the Court of Appeal adopted a "categorical" rule, Bailey proposes one of her own. She asserts that harassment claims—particularly those involving racial or other slurs—must always go to a jury because only a jury can evaluate the "totality of the circumstances" and view harassment claims holistically. The Court should reject Bailey's attempt to carve out a FEHA exception to the general summary judgment standard. While FEHA claims *can* raise triable issues of fact concerning motive, intent or other factors that preclude summary judgment, *they do not always*. In this case, there is no dispute concerning anyone's motive, intent or the extent to which Bailey experienced harassment. Because the material facts are undisputed and demonstrate that Bailey's claims fail under the well-established law, the trial court properly granted summary judgment for the City and the Court of Appeal properly affirmed. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 848.)

The Court should affirm.

STATEMENT OF THE CASE

I. Facts.

The following facts are undisputed.

A. From 2001 Through 2014, Bailey Worked At The Office Without Incident.

Bailey joined the Office in April 2001 as a Classification 1404 Clerk. (AA 625:7-10.) Ten years later, in August 2011, the Office promoted her to a Classification 8132 Investigative Assistant position. (AA 625:11-14.) Bailey worked in the Records Room, where she provided clerical support by retrieving and updating case files, inputting information into databases, helping attorneys prepare for daily court calendars and filings, performing other administrative and clerical functions, and completing related duties. (AA 180:10-15.) Larkin was also an Investigative Assistant, and sat next to Bailey in the Records Room. (AA 625:14-18.) Taylor-Monachino was the Department Personnel Officer, and worked in an office next to the Records Room. (AA 180:16-20.)

During their first fourteen years working together, Bailey, Larkin, and Taylor-Monachino became friends who phoned, texted, and spent time with each other and their respective families, including outside of work. (AA 90:8-12, 97:13-99:6, 104:5-21, 134:7-12.) They attended one another's significant family functions, including weddings, graduations, and funerals. (*Ibid*.) Larkin's daughter referred to Bailey as an aunt, calling her "Auntie" or "Tee -Tee." (AA 98:20-25.) And when Larkin's mother passed away, she called Bailey, who went to visit Larkin at her sister's home. (AA 134:7-12.)

Bailey and Larkin were familiar with each other's job duties. (AA 625:19-626:10.) It was typical for Bailey and Larkin to cover one another's

tasks when the other was unavailable, and Bailey did not report a problem in any of these instances. (AA 88:10-89:23, 90:8-15, 91:13-16, 107:17-23, 121, 625:19-626:10.) Nor did Bailey ever report any problems with Larkin or Taylor-Monachino, including any mistreatment or problems on account of her race, during their first fourteen years as coworkers. (AA 171:18-20, 626:18-24.)

B. Bailey Alleges Larkin Used The N-word, And The City Promptly Responded To Bailey's Complaint.

On January 22, 2015, Bailey alleged that Larkin made the following remark when a mouse ran through the room and startled Bailey: "You n----rs is so scary." (AA 626:24-627:4.) Bailey did not initially report the alleged remark to her supervisor or to the Office's Human Resources Department. (AA 627:17-21.) However, Bailey's supervisor overheard Bailey talking about the incident at an after-hours party, and promptly reported it to her supervisor, Sheila Arcelona. (AA 627:22-26; 628:3-6.) Bailey did not want to file a complaint and testified at her deposition that she was "back to [her] happy-go-lucky self" within days of the January 22 incident. (AA 400:4-401:2.)

After learning of the alleged slur, Arcelona promptly conferred with Clendinen and Taylor-Monachino. (AA 628:13-16.) They agreed that Arcelona should first meet with Bailey to discuss and document the allegation, and that Taylor-Monachino, as the Department Personnel Officer, should attend the meeting as well. (AA 628:17-22.) They also agreed that Arcelona and Taylor-Monachino would then meet with Larkin. (AA 628:23-26.)

On January 29, Arcelona and Taylor-Monachino met with Bailey. (AA 629:3-6.) Bailey confirmed that January 22 was the only time that she

heard Larkin use any type of slur during Bailey's tenure at the Office. (AA 629:7-12.) Arcelona and Taylor-Monachino then met with Larkin. (AA 629:14-16.) Even though Larkin denied making the remark, Arcelona counseled Larkin and told her "that any word or any iteration of that word is not acceptable in the workplace." (AA 181:12-13; 357:9-22; 629:17-27.) After her meetings with Bailey and Larkin, Arcelona promptly provided a written summary of the meetings to Clendinen. (AA 181:17-23; 630:3-7.)

The January 22, 2015 incident is the only time Bailey has claimed that anyone in the Office engaged in any discriminatory conduct or made any comments towards her on the basis of her race. (AA 171:18-20.)

C. Bailey Alleges That Taylor-Monachino Began Treating Her Inappropriately In March 2015.

Bailey alleges that on March 23, 2015, she went to Taylor-Monachino's office to request a copy of the complaint regarding her allegation against Larkin. Taylor-Monachino informed her that there was no formal complaint or report. (AA 413:14-415:4.) Bailey also alleges that Taylor-Monachino told her that she should not tell others about the incident because then Larkin's "work can be messed with." [2] (*Ibid.*; AA 633:13-17.)

According to Bailey, Taylor-Monachino began treating her inappropriately after their March 23 conversation. Specifically, Bailey asserts that Taylor-Monachino: (1) ignored her; (2) laughed at her; (3) stared rudely at her; (4) said "jeers" to her; and, (5) on August 12, 2015, made a threatening gesture to her and silently mouthed the words, "you are going to get it." (AA 30; 633:17-26.) Bailey conceded that Taylor-

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[2] During their initial meeting, Arcelona asked Bailey to keep their discussion confidential because it was a personnel matter, and told Bailey to report inappropriate behavior directly to management. (AA 102:3-12.)

Monachino's conduct towards her had nothing to do with their African-American backgrounds. (AA 95:13-23, 634:3-8.)

D. The City's Department of Human Resources Took Corrective Action.

In April 2015, Bailey told an attorney from the San Francisco Police Department's Legal Division about Larkin's alleged January 22 remark. (AA 25.) This attorney reported the allegation to the City's DHR. (*Id.*) DHR assigned the complaint to an Equal Employment Opportunity Specialist, and on May 22, 2015, Bailey and her union representative met with the Specialist to discuss Bailey's allegations against Larkin and Taylor-Monachino. (AA 25.) This was the first time the Office learned of Bailey's allegations against Taylor-Monachino. (AA 339:21-340:7.)

On July 22, 2015, DHR sent a four-page letter to Bailey summarizing her allegations and providing its analysis. (AA 25-28; 630:8-14.) In the letter, DHR "acknowledge[d] the extreme offensiveness of the 'N' word and underst[ood] how upsetting it was … to hear such a highly offensive term," but it did not find the single comment from a coworker "sufficiently severe or pervasive as to alter the condition of [Bailey's] employment and create an abusive working environment." (AA 26, 630:15-22.) It continued that the alleged statement "violates the City's Harassment-Free Workplace Policy, [and] the DA's Office will be taking appropriate corrective action." (AA 26, 630:23-28.) Pursuant to DHR's instruction, on July 30, Clendinen met with Larkin and required her to execute an Acknowledgement of Receipt and Review of The City's Harassment-Free Workplace Policy. The Office placed that Acknowledgement in Larkin's personnel file and sent a copy to DHR. (AA 171:1-6; 631:6-20.)

With respect to Bailey's allegation that Taylor-Monachino engaged in retaliation, DHR concluded that Taylor-Monachino's conduct, including her refusal to file a written complaint, her instruction to Bailey that she should have immediately reported the alleged January 22 incident to a supervisor rather than discussing it with coworkers, and her social slights, did not constitute an adverse employment action. (AA 27; 631:21-27.) The letter confirmed, however, that Taylor-Monachino should have provided Bailey with a copy of her formal complaint, and stated that the Office would take corrective action. (AA 27; 632:3-8.) On July 30, Clendinen provided Taylor-Monachino with a memorandum of instruction that required her to accept and formally document any EEO complaints, and to provide copies of those complaints when requested and to DHR. (AA 171:7-11; 632:9-25.)

DHR also investigated Bailey's August 12 allegation that Taylor-Monachino made a threatening gesture and appeared to mouth the words "you are going to get it," as well as other allegations against Taylor-Monachino unrelated to Bailey. (AA 30; 36; 171:12-17.) DHR did not sustain Bailey's allegation against Taylor-Monachino without any witnesses to the event, but it did sustain other allegations unrelated to Bailey for which the Office took corrective action against Taylor-Monachino. (*Ibid.*) Clendinen sent Bailey a letter in October of 2015 explaining that the City takes "violations [of City policies regarding the treatment of coworkers and the public] very seriously" and that the Office took "appropriate action to ensure … a safe and professional environment." The letter encouraged Bailey to contact Clendinen or other managers with any additional concerns. (AA 36.)

E. Bailey Received A Performance Review With Suggestions For Improvement.

After her complaint about Larkin's slur, Bailey continued to perform the same duties and tasks that she had throughout her tenure as an Investigative Assistant. (AA 171:23-172:2; 634:22-635:15.) When Bailey missed work, Larkin and other Investigative Assistants covered for her. (AA 181:4-20; 635:16-22.) Similarly, Bailey continued to cover for Larkin when she was unavailable. (AA 181:4-20; AA 635:23-636:16.) Bailey had a number of unplanned absences from work—in Fiscal Year ("FY") 2014-2015, Bailey used 192 hours (24 days) of sick leave. (AA 183:3-10; 634:9-13.) There were also days where she failed to come to work and did not notify her supervisor of her absence, which created difficulties for the Office. (AA 570:12-21.) Nonetheless, she was always permitted to use sick leave as needed. (AA 634:14-19.)

During this time, Bailey's supervisors and other staff reported that Bailey seemed annoyed and irritated by standard work requests. (AA 182:19-183:2; 636:17-24.) For instance, on June 2, Bailey's supervisor reported to Arcelona that she asked Bailey to standby to order files if they were needed that morning, and Bailey reacted in a negative manner and was angry for being asked to perform this task. (AA 636:25-637:8.) There were multiple other incidents where Bailey had this type of reaction during FY 2014-2015, and staff reported that Bailey would roll her eyes and make them feel uncomfortable when they asked her work-related questions or asked her to perform her work duties. (AA 565:13-566:8; 637:9-16.)

Bailey's FY 2014-2015 performance review was completed by Bailey's direct supervisor at that time, Irene Bohannon, and reviewed by Arcelona. (AA 190.) Bailey received a "Met Expectations" rating of 2 out of 3 for FY 2014-2015. (AA 189.) She also received the same rating for

the two years before the incident with Larkin. (AA 182:7-14; 638:13-19.) She never received an "Exceeded Expectations" rating in any of those years. (*Ibid*.)

The comments on her FY 2014-2015 performance review included that she is "resourceful when locating files" and "[t]he attorney whom [she] works with the most has positive feedback regarding her work." (AA 189.) It noted two areas for improvement: "In the coming year, [Bailey] can improve her performance by showing greater responsiveness to supervisory requests for assistance, and by regular attendance." (*Ibid*.) On July 20, 2015, Bailey and her union representative scheduled a meeting with Bohannon and Arcelona to discuss Bailey's FY 2014-2015 performance review. (AA 183:11-15; 114:5-7; 637:17-21.) Bailey took issue with her overall rating, and with the feedback noting areas for improvement. (AA 272-273; 637:22-638:5.)

On November 9, 2015, Bailey informed Clendinen for the first time that she no longer felt comfortable covering for Larkin. (AA 172:3-8; 122.)[3] Shortly thereafter, Clendinen separated Bailey and Larkin by transferring Larkin to another division of the Office. (*Ibid*.; AA 105:17-106:2.)

On December 16, 2015, Bailey requested a six-week medical leave of absence, which the Office approved. (AA 173:1-4.) Two weeks later, she filed this lawsuit. (AA 9.) The Office subsequently approved four additional requests to extend her leave, and as of June 2017, Bailey remained on medical leave. (AA 173:2-4.)

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[3] Bailey incorrectly cites AA 122 for the proposition that she told Clendinen that she wanted to separate from Larkin in April. AA 122 shows that the meeting occurred on November 9, 2015.

II. Procedural History.

A. The Trial Court Granted Summary Judgment For The City.

In her complaint, Bailey alleged claims for: (1) race discrimination; (2) racial harassment; (3) retaliation; (4) failure to prevent discrimination; and, (5) wrongful discrimination in violation of public policy, under FEHA, Government Code Sections 12940 (a), (h), (j), and (k). (AA 9-23.)

On June 30, 2017, the City moved for summary judgment, or in the alternative, summary adjudication, as to all claims. At the hearing, Bailey conceded that her claims hinged on two issues: (1) whether Bailey could establish a triable issue that there was severe or pervasive racial harassment based solely on coworker Larkin's one-time use of the n-word; and (2) whether Bailey could show a triable issue that she was subjected to an adverse employment action for purposes of her discrimination and retaliation claims. (Reporter Transcript ["RT"] 9/15/17 3:10-28; 17:10-14.)

On October 20, 2017, the trial court granted summary judgment for the City. The court ruled that no reasonable trier of fact could conclude that the single comment Bailey experienced with Larkin constituted cognizable severe or pervasive racial harassment actionable under FEHA. (AA 652:15-653:22.) The court offered two independently-adequate bases for this ruling. First, the court held that Larkin's single statement alone was insufficient to constitute "severe or pervasive racial harassment." (AA 653:4-12.) Second, the court held that the City is not liable for Larkin's statement, where the City promptly took corrective action that ended the harassment. (AA 653:12-22.)

The trial court likewise found, based on the undisputed material facts, that Bailey did not experience an adverse employment action; and thus, her claims for race discrimination and retaliation failed as a matter of

law. The court concluded that no reasonable trier of fact could find that comments in her FY 2014-2015 review suggesting how Bailey could improve her performance amounted to an adverse employment action. (AA 653:23-654:19.) In addition, the court found that Taylor-Monachino's alleged social slights did not constitute an adverse employment action. (AA 654:19-22.)

B. The Court of Appeal Affirmed.

The Court of Appeal affirmed the trial court's decision. Reviewing the case *de novo*, the court determined that there were no triable issues of material fact on which a jury could find for Bailey on her claim for harassment. The court held that the single alleged racial epithet by Bailey's coworker was not, under the circumstances, sufficiently severe or pervasive to alter the conditions of Bailey's employment. (Opn. at 9-12.) The court noted that "[i]n many cases, a single offensive act by a coemployee is not enough to establish employer liability for a hostile work environment," but the outcome may be different where the act is committed by a supervisor or where other facts show that the action was severe. (Opn. at 10, quoting *Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, 36.) In this case, however, Bailey failed to make "any other factual showing that the conditions of her employment were so altered by the one slur by her coworker as to constitute actionable harassment." (Opn. at 12.) The court did not adopt categorical rules about when coworker statements can constitute actionable harassment. Instead, the court applied the well-established existing law to the undisputed facts and determined that "no reasonable trier of fact could reach [the] conclusion" that Larkin's "single statement . . . , without any other race-related allegations, amounted to severe or pervasive racial harassment." (*Ibid.*)

The Court of Appeal also held that Bailey failed to raise any triable issues about whether the City took prompt and appropriate corrective action to address Larkin's alleged comment. (Opn. at 15.) The undisputed facts showed that the Office promptly investigated Bailey's claim that Larkin called her the n-word, advised Larkin that "any use of the alleged language was unacceptable," required that Larkin meet on two separate occasions with high-level managers for counseling, required Larkin to sign an acknowledgment of receipt of the City's Harassment Free Workplace Policy, and placed the signed acknowledgment in Larkin's personnel file. (Opn. at 16.) Bailey did not offer any evidence that these remedial measures failed to prevent further "unacceptable behavior." (Opn. at 16-17.) Indeed, the undisputed facts show the opposite—the City's corrective action was effective, measured by the City's "ability to stop harassment by the person who engaged in harassment," and thus precluded liability. (Opn. at 17, quoting *Bradley v. Dept. of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1612, 1630 (*Bradley*).)

Finally, the court held that Bailey failed to raise a triable issue of fact supporting her claim that she suffered an adverse employment action. (Opn. at 17-20.) The court determined that Taylor-Monachino's "course of conduct" did not rise to the level of an adverse employment action and neither did the suggestions for improvement on Bailey's performance review. The court found these actions to be "mere offensive utterances," social slights, and work-related criticisms. Bailey also failed to tie them to any retaliatory motive connected to her complaint regarding Larkin's alleged epithet. (Opn. at 18-19.)

This Court granted review on December 30, 2020.

STANDARD OF REVIEW

Because this case comes to this Court after the trial court granted summary judgment, the Court takes the facts from the record that was before the trial court. (*Yanowitz, supra,* 36 Cal.4th 1028, 1037). The Court reviews the trial court's decision *de novo*. (*Ibid; Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 334.)

A party is entitled to summary judgment where "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c)). A moving defendant succeeds, and is entitled to judgment as a matter of law, by demonstrating the plaintiff cannot establish one or more elements of the plaintiff's cause of action (Code Civ. Proc., § 437c, subd. (p)(2)), which may be achieved by showing "the plaintiff 'has not established, and cannot reasonably expect to establish, a prima facie case . . . .'" (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 460, quoting *Saelzer v. Advanced Group* (2001) 25 Cal.4th 763, 768) or by conclusively negating an essential element of plaintiff's claim (*Guz v. Bechtel Nat. Inc.*, *supra*, 24 Cal.4th at p. 334). If the defendant does so, the burden shifts back to the plaintiff to show that a triable issue of material fact exists as to that cause of action or defense. A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 864 (*Thompson*), quoting *Aguilar v. Atlantic Richfield Co.*, *supra,* 25 Cal.4th at p. 850.)

LEGAL ARGUMENT

I. The Trial Court Properly Granted Summary Judgment On Bailey's Racial Harassment Claim.

A. Larkin's One-Time Use Of A Racial Slur, Without More, Does Not Meet FEHA's Standard For Severe Or Pervasive Harassment.

The FEHA prohibits race discrimination, including racial harassment. (Gov. Code § 12940, subd. (g).) FEHA is violated where harassment is "sufficiently severe or pervasive to alter the conditions of the victim's employment." (*Etter v. Veriflo Corporation* (1998) 67 Cal.App.4th 457, 465, quoting *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 517; *Lyle, supra,* 38 Cal.4th at p. 279. "There is both a subjective and objective component to this standard." (*McCoy v. Pacific Maritime Assn*. (2013) 216 Cal.App.4th 283, 293.) "That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception." (*Lyle*, at p. 284.)

"Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's [and FEHA's] purview." (*Aguilar, supra,* 21 Cal.4th at p. 130, quoting *Harris, supra,* 510 U.S. at p. 21.)[4] The "severe or pervasive" standard encompasses "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." (*Harris*, *supra*, 510 U.S. at p. 23.) "[C]onduct must be

[4] California courts "frequently turn to federal authorities interpreting Title VII of the Civil Rights Act of 1964 ... for assistance in interpreting the FEHA ...." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 463.)

extreme to amount to a change in the terms and conditions of employment . . . ." (*Aguilar, supra,* 21 Cal.4th at p. 130, quoting *Faragher, supra,* 524 U.S. at p. 788.) "[H]arassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature." (*Aguilar, supra,* 21 Cal.4th at p. 131, quoting *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 610.) Thus, "when the harassing conduct is not severe in the extreme, more than a few isolated incidents must have occurred to prove a claim based on working conditions." (*Lyle, supra,* 38 Cal.4th at p. 284.)

"[N]ot every utterance of a racial slur in the workplace violates the FEHA." (*Aguilar, supra,* 21 Cal.4th at p. 130.) "[O]ffhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" (*Faragher*, *supra*, 524 U.S. at p. 788.) Nor will the "'mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' … affect the conditions of employment to a sufficiently significant degree." (*Meritor, supra,* 477 U.S. at p. 67, quoting *Rogers v. EEOC* (5th Cir. 1971) 454 F.2d 234, 238; accord, *Harris*, *supra*, 510 U.S. at p. 21.) "These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code.' Properly applied, they will filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language….'" (*Faragher*, *supra*, at p. 788 [citations omitted].) The same standard applies to claims under FEHA. (*Aguilar*, at p. 130.)

1. Bailey Did Not Show that Larkin's One-Time Slur Was Severe Or Pervasive.

The City does not condone or accept an employee's use of the n-word and deems it categorically unacceptable, as Arcelona made clear to Larkin within days of the alleged slur. Nonetheless, Larkin's single utterance—one statement in fourteen years, made by a coworker—did not "permeate" the Office with the "discriminatory intimidation, ridicule and insult" requisite to alter the conditions of Bailey's employment and create an abusive working environment under FEHA. (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 144-45). A single race-based comment by a coworker—even when involving a categorially offensive and impermissible term—over a fourteen year period cannot be considered "pervasive." Nor can it be deemed "severe" under existing law. It is undisputed that Larkin's alleged slur was not combined with any physical threat directed at Bailey, public humiliation, or any threat to Bailey's employment. As a coworker, Larkin had no authority to direct or supervise Bailey or affect the terms and conditions of her employment. Larkin's comment was one "offensive utterance" made in a private conversation between two coworkers who, until this point, had maintained a long-term friendship. (*Harris*, *supra*, 510 U.S. at p. 23.) Under these circumstances, Larkin's one comment does not satisfy the severe or pervasive standard. (*Nichols v. Michigan City Plant Plan. Dept.* (7th Cir. 2014) 755 F.3d 594, 601 ["[O]ne utterance of the n-word has not generally been held to be severe enough to rise to the level of establishing liability."])

The cases Bailey cites in support of her claim further emphasize that Larkin's one isolated remark in context was not "severe or pervasive" harassment. While each of the cases Bailey cites involved relatively few instances of offensive slurs, the slurs were used by *supervisors* who

engaged in a host of additional abusive and sometimes threatening conduct, all motivated by the plaintiff's protected status. In each case, this constellation of circumstances was critical to the court's assessment of the severity of the conduct. (*Gates v. Bd. of Education of the City of Chicago* (7th Cir. 2019) 916 F.3d 631, 640 [holding use of n-word by supervisor sufficient to state claim but "we would likely reach a different conclusion" if the slurs were made by a coworker].) As *Rodgers* found, and many courts have since observed, "[p]erhaps 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----r' *by a supervisor in the presence of his subordinates*." (*Rodgers v. Western–Southern Life Insurance Co.* (7th Cir. 1993) 12 F.3d 668, 675, italics added (*Rogers*), quoting *Meritor, supra,* 477 U.S. at 2405). The language Bailey truncated from this *Rodgers* quote in her brief is significant and at the heart of the issues before the Court. (AOB at 33.) *Rodgers* recognizes both the hatred and dehumanization uniquely imbued in the n-word, as well as the actionability it uniquely triggers when used *by a supervisor*.

Rodgers and its progeny do not bolster Bailey's argument; instead, they support the City's position that the one-time statement by Larkin, Bailey's coworker, is insufficient to establish cognizable harassment under FEHA. As the cases that follow *Rodgers* reiterate, "a *supervisor*'s use of [a racial epithet] impacts the work environment far more severely than use by co-equals." (*Boyer-Liberto v. Fontainebleau Corporation* (4th Cir. 2015) 786 F.3d 264, 278, quoting *Rodgers*, *supra*, 12 F.3d at p. 675 [emphasis added.]) This is because "a supervisor's power and authority invests his or her harassing conduct with a particular threatening character." (*Boyer-*

Liberto, at p. 269-270, 278 [quoting *Burlington Industries, supra,* 524 U.S. at p. 763].)

Boyer-Liberto identified a triable issue of fact on a racial harassment claim based in large part on the manager's "assertion of power in the course of her harassment": The manager was yelling at Liberto in the nightclub's public area about her mishandling of a drink order when she called Liberto a "dang porch monkey" or a "damn porch monkey." (*Boyer-Liberto*, *supra*, 786 F.3d at p. 270.) This public vituperation of Liberto continued the next day, when the manager said to Liberto in the presence of another employee, "I need to speak to you, little girl," again reprimanded Liberto in a loud and angry voice about the previous night's drink order incident, and again called her a "porch monkey." (*Ibid.*) There is no comparable supervisor action here.

Likewise, *Ayissi-Etoh v. Fannie Mae* (D.C. Cir. 2013) 712 F.3d 572, 575, involved racial slurs used by two different supervisors when denying the plaintiff's requests to receive a salary commensurate with his white peers. One supervisor remarked, "[f]or a young black man smart like you, we are happy to have your expertise; I think I'm already paying you a lot of money"; another yelled, "[g]et out of my office [n-word]" when the plaintiff asked him about the raise. (*Ibid.*) Supervisors used these slurs in the process of conveying a decision about the plaintiff's pay—a "condition of employment" over which these supervisors had decision-making power. Bailey offers no comparable facts here.

Castleberry is no more analogous to Bailey's claim. (*Castleberry v. STI Group* (3d Cir. 2017) 863 F.3d 259, 265-266.) When reversing the decision to grant a motion to dismiss, the Third Circuit concluded that plaintiffs' allegations that their supervisor "used a racially charged slur in

front of them and their non-African-American coworkers", that "on several occasions" their sign-in sheets bore racially discriminatory comments, and that they were required to do menial tasks while their less-experienced white colleagues performed more complex work, sufficed to state a claim at the pleadings stage. (*Ibid.*)

The cases on which Bailey relies are also inapposite because the conduct in those cases was distinguishably pervasive. (*Faragher*, *supra*, 524 U.S. at p. 782 [finding severe or pervasive sexual harassment where two supervisors harassed employees "countless" times over five years]; *Lounds v. Lincare, Inc.* (10th Cir. 2015) 812 F.3d 1208, 1215-1216 [African-American employee's supervisor mistook plaintiff's name for other variations that plaintiff considered "stereotypical racial trigger[s] for Black American women," told plaintiff to address the company regional manager by saying "Yes Massa!," and instructed plaintiff to give "attitude" to a customer she characterized as a "big black man" whose "name sounded black"].)

In *Spriggs*, the plaintiff's direct supervisor used "incessant racial slurs, insults, and epithets … [and] rarely hesitated to vilify anyone of African descent, including [ ] employees (whom he proclaimed 'n----rs' or 'monkeys') and customers of the business." (*Spriggs v. Diamond Auto Glass* (4th Cir. 2001) 242 F.3d 179, 182.). For instance, his supervisor "habitually called Spriggs a 'monkey,' 'dumb monkey,' and 'n----r.' In one episode, the supervisor placed a picture of a monkey between the pages of a manual Spriggs regularly used and captioned the picture with X's and O's, along with the notation 'so you'll never forget who you are.'" (*Ibid.*) While the court certainly recognized the devastating impact of such racially

offensive language, it had occasion to do so only in the context of a supervisor's incessant onslaught of racial abuse.

Notably, Bailey did not cite even a single case to the lower courts holding that a "single, albeit egregious racial epithet by a co-worker, without more, created a hostile work environment." (Opn. at 11.) The same is true before this Court. Bailey cites the unpublished decision in *Williams v. City of Philadelphia Office of Fleet Management* (E.D. Pa. 2020) 2020 WL 1677667, but, in that case, a white coworker called plaintiff the n-word, and *"threw a tire hook at him*." (*Id.* at p. *1 [emphasis added]). And even where the employee experienced a coworker racial slur combined with a violent act, the court concluded that the plaintiff "identified *just enough* evidence" to survive summary judgment. (*Id*. at *4, emphasis added). Bailey also cites to *Bynum v. District of Columbia* (D.D.C. 2020) 424 F.Supp.3d 122, in which the plaintiff alleged a series of racially-charged incidents, including when a coworker "assaulted" her through a public, 10-minute barrage of insults and threating behavior, and the same coworker repeatedly "stalk[ed]" her, all while her employer did nothing to protect her. (*Id.* at pp. 126, 136). *Bynum* does not concern a one-time use of a racial slur, but instead concerns a pattern of physically threatening, race-based behaviors. Finally, Baily notes that in the EEOC's Manual, the "first example of an actionable one-time racial slur involves a coworker, not a supervisor" (AOB at 34,), but in that example the employee experienced a racially-charged epithet *and* "a hangman's noose, reminiscent of those historically used for racially motivated lynchings, appeared above" the employee's locker. (EEOC Compliance Manual §15-VII(A)(2) at 7222.) The EEOC found that to be sufficiently severe "[g]iven the violently threatening racial nature of this symbol [the noose] and the

context." (*Ibid*.) None of those authorities suggests that a one-time use of the n-word under the circumstances here—spoken by a coworker and friend without any threats or violence—is sufficiently severe or pervasive to alter the conditions of employment.

2. The Trial Court Properly Granted Summary Judgment.

Although Bailey has not cited a single case supporting her claim that Larkin's one-time use of a racial epithet created a severe or pervasive racially hostile work environment, Bailey nonetheless claims that the Court of Appeal erred when affirming summary judgment. Bailey's argument fails because it rests on a misunderstanding of the Court of Appeal's opinion and the summary judgment standard.

Contrary to Bailey's claim, the Court of Appeal did not hold that a one-time use of the n-word is "categorically non-actionable under FEHA." (AOB at 33-34.) Instead, the court expressly held that "a single, particularly egregious epithet can create a hostile work environment . . . under certain circumstances." (Opn. at 9.) Thus, the question was "whether the single alleged racial epithet made by Bailey's coworker was, in context, so egregious in import and consequence as to be sufficiently severe or pervasive to alter the conditions of [Bailey's] employment." (*Id.* at pp. 9-10 [internal quotations omitted].) After evaluating all of evidence in the light most favorable to Bailey, the court concluded that Bailey failed to make the "factual showing that the conditions of her employment were so altered by the one slur by her coworker as to constitute actionable harassment." (*Id.* at p. 12.) Therefore, "no reasonable trier of fact could reach [the] conclusion" that her coworker's single statement ..., without any

other race-related allegations, amounted to severe or pervasive racial harassment." (*Ibid.*)

The Court of Appeal's decision is consistent with the summary judgment standard. Contrary to Bailey's claim, summary judgment is not disfavored in employment cases or in any other type of case. (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542.) Indeed, "[w]here there is no triable issue of material fact, *summary judgment is a favored remedy*." (*Bozzi v. Nordstrom, Inc*. (2010) 186 Cal.App.4th 755, 764 [emphasis added].) It has "a salutary effect, ridding the system, on an expeditious and efficient basis, of cases lacking any merit." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 248.) Therefore, a trial court "must 'grant[ ]' the 'motion' 'if all the papers submitted show' that 'there is no triable issue as to any material fact'—that is, there is no issue requiring a trial as to any fact that is necessary under the pleadings and, ultimately, the law." (*Aguilar v. Atlantic Richfield Co.*, *supra,* 25 Cal.4th at p. 843 [alterations in original, internal citations removed].) "[E]ven though the court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact, it must nevertheless determine what any evidence or inference could show or imply to a reasonable trier of fact." (*Id.* at p. 856.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Id.* at p. 850.)

The well-established summary judgment standard does not apply differently in employment cases. Summary judgment is appropriate where, as here, the undisputed material facts demonstrate that conduct was not severe or pervasive under the law. (*Lyle, supra*, 38 Cal.4th at pp. 287–288

[affirming summary judgment where plaintiff failed to show she experienced severe or pervasive harassment]; *McCoy v. Pacific Maritime Assn.*, *supra*, 216 Cal.App.4th at p. 294 [affirming summary judgment where crude and offensive remarks "were not so severe and pervasive as to alter the conditions of appellant's employment"]; *Brennan v. Townsend & O'Leary Enterprises, Inc*. (2011) 199 Cal.App.4th 1336, 1339 [affirming JNOV where insufficient evidence supported finding that plaintiff experienced severe or pervasive harassment]). Bailey offers no reason for this Court to depart from the precedent in California and other jurisdictions that counsels against sending the question of an employer's liability for harassment to a jury, based solely on the claim that a coworker used a single highly offensive term.

Bailey notes that employment cases often present disputes of fact about intent, motive or the extent of the discriminatory conduct that may act as a barrier to summary judgment. (*Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 283; *Harris v. Itzhaki* (9th Cir. 1999) 183 F.3d 1043, 1051 ["Issues of credibility, including questions of intent, should be left to the jury."].) But this is not such a case. As Bailey conceded when the trial court heard the City's motion, no issue turns on Larkin's motive or the motive of anyone else. Likewise, there is no dispute about the extent of the conduct at issue or the circumstances of what transpired in the workplace. The parties agree that the only racially-based conduct Bailey experienced in her fourteen years of employment was Larkin's single racial epithet unconnected to any violent or threatening conduct. (AA 95:13-23, 634:3-8; AOB at 28-38.)[5]

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[5] Bailey agrees that the question before the trial court was "whether the use of the word 'n----r' by a co-worker in the course of employment can

Based on those undisputed facts, the only question is whether Larkin's one-time slur constituted severe or pervasive harassment. That is a question of law. (*Fuller v. City of Oakland, Cal.* (9th Cir. 1995) 47 F.3d 1522, 1527 ["[W]hether the conduct found was sufficiently severe and pervasive to constitute [ ] harassment is a question of law . . . .")[6] Applying the law to the undisputed facts, the Court of Appeal correctly held that Larkin's single epithet—while offensive—did not constitute a severe or pervasive change to the terms and conditions of Bailey's employment. Bailey notes that courts should not "carv[e] the work environment into a series of discrete incidents," (AOB at 29), but here, it is undisputed that *there was only a single incident of racial harassment.* Bailey argues that her claim must be viewed in context, but the context of Larkin's remark favors the City—not Bailey. Bailey did not experience any racial harassment in fourteen years except for a single statement, made by a long-time coworker and friend, in a private conversation that did not include any violence, threats of violence, threatening conduct, or other impacts on the terms or conditions of Bailey's employment. "[C]onduct must be extreme to amount to a change in the terms and conditions of employment," not a one-time offensive utterance by a coworker and friend. (*Aguilar, supra,* 21 Cal.4th at p. 130; *Harris, supra,* 510 U.S. at p. 21; *Faragher*, *supra*, 524 U.S. at p. 788; *Meritor*, *supra*, 477 U.S. at p. 67.)

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without more create a racially hostile work environment." (RT 3:10-24, italics added; RT 10:21-11:1.)

[6] (*Coleman v. Quaker Oats Co.* (9th Cir. 2000) 232 F.3d 1271, 1282 [explaining summary judgment should be used "prudently" in discrimination cases "involving motivation and intent," but is appropriate where plaintiff fails to show triable issue]; *Scarberry v. Exxonmobil Oil Corporation* (10th Cir. 2003) 328 F.3d 1255, 1257 [holding summary judgment not inappropriate in harassment cases that do not "turn upon the intent of the employer to discriminate"] (Scarberry)).

3. Government Code Section 12923 Does Not Change The Analysis Of Bailey's Claim.

Effective January 1, 2019, the California legislature amended FEHA to add a number of statutory employee protections and a declaration of its intent in several respects. (Sen. Bill No. 1300 (2017-2018 Reg. Sess.) [approved by the Governor on September 30, 2018].) Here, Bailey relies on Government Code Section 12923, in which the Legislature stated its "intent with regard to application of the laws about harassment," but the Legislature's declaration of intent does not alter the analysis of Bailey's claims for three reasons.

First, the Legislature's statement of intent did not change or amend FEHA's definition under Section 12940(j) of what constitutes unlawful harassment. Simply put, the Legislature did not break new ground. Nothing in Section 12923 calls into question the well-established requirement that harassment claims must be based on conduct that is sufficiently severe or pervasive to alter the conditions of the victim's employment. (*Lyle, supra*, 38 Cal.4th at p. 279). Nor did the Legislature change the well-established principle that "offhand comments," and the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" do not alter the conditions of employment. (*Faragher*, *supra*, 524 U.S. at p. 787; see also *Meritor*, *supra,* 477 U.S. at p. 67; *Aguilar*, *supra*, 21 Cal.4th at p. 130.) The Legislature noted that a single incident of harassing conduct can be sufficient to create a triable issue of fact under certain circumstances, such as in the case of *Brooks v. City of San Mateo* (2000) 229 F.3d 917 where a fellow employee physically assaulted the victim. (Gov. Code, § 12923(b)). But, while Section 12923(b) provides that a single incident of harassing conduct can create a triable issue (as the Court of Appeal recognized in this case), that does not

mean that a single incident always creates a triable issue. Rather, the conduct still must "unreasonably interfere[] with the plaintiff's work performance or create[] an intimidating, hostile, or offensive working environment" to do so. (Gov. Code § 12923 subds. (b).) Bailey's claim did not meet this standard, and summary judgment was appropriate.

Likewise, nothing in Section 12923 undermines the well-established requirement that harassment claims must satisfy both a subjective and objective inquiry. (*Lyle*, *supra,* 38 Cal.4th at p. 279.) The Legislature recognized, as the Supreme Court did in *Harris*, that the subjective standard does not require an employee to show "a tangible psychological injury" or a "nervous breakdown." (*Harris, supra,* 510 U.S. at pp. 21-22). Instead, a plaintiff must prove that a "reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to ma[k]e it more difficult to do the job." (*Id.* at 25 [Ginsburg, concurring].) Neither *Harris* and its progeny, nor Section 12923, contemplates a jury trial each time a coworker allegedly utters an offensive statement. To the contrary, *Harris* affirmed that a "'mere utterance of an . . . epithet which engenders offensive feelings in an employee,' does not sufficiently affect the conditions of employment to implicate Title VII." (*Harris, supra,* 510 U.S. at p. 21, quoting *Meritor, supra*, 477 U.S. at p. 67.)[7]

Second, even if there are some differences between Section 12923 and case law construing FEHA, Section 12923's statement of intent is not controlling. "[T]he interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts." (*Carter v. California Dept. of*

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[7] Further, Bailey testified she was "back to [her] happy-go-lucky self" within days of the January 22 incident. (AA 400:4-401:2.)

Veterans Affairs (2006) 38 Cal.4th 914, 922, quoting *Western Security Bank v. Super. Ct.* (1997) 15 Cal.4th 232, 244). Therefore, a "legislative declaration of an existing statute's meaning is neither binding nor conclusive in construing the statute." (*Western Security Bank, supra*, 15 Cal.4th at p. 244.) "Indeed, there is little logic and some incongruity in the notion that one Legislature may speak authoritatively on the intent of an earlier Legislature's enactment when a gulf of decades separates the two bodies." (*Ibid*). For that reason, subsequent statements of intent are typically afforded "little weight." (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 54 n.17; *Consumer Product Safety Com. v. GTE Sylvania, Inc.* (1980) 447 U.S. 102, 117–118 [explaining "the oft-repeated warning that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"]; *Sullivan v. Finkelstein* (1990) 496 U.S. 617, 632 [Scalia, J., concurring] ["Arguments based on subsequent legislative history ... should not be taken seriously, not even in a footnote"].)

Finally, even if Section 12923 could be read to change FEHA's requirements, any such changes would not apply retroactively to this case. "Generally, statutes operate prospectively only." (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 475 [quotations and citations omitted]). "[A] statute may be applied retroactively only if it contains express language of retroactivity or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application." (*Ibid,* quoting *Myers v. Philip Morris Companies, Inc*. (2002) 28 Cal.4th 828, 841). Even then, a retroactive application "would also raise constitutional implications." (*Id.* at p. 476). Here, Section 12923 does not contain express language of retroactivity or any language showing that the

Legislature intended retroactive application to claims like Bailey's that arose years before Section 12923's enactment.

B. The City Is Not Liable Because The City Took Prompt And Effective Corrective Action.

In addition to failing to show "severe or pervasive" racial harassment, Bailey's claim also fails for another independent reason. The undisputed facts preclude a finding that the City is liable under FEHA for Larkin's alleged comment, as Bailey's coworker, because the City promptly took corrective action to address the sole alleged incident of racially motivated conduct—Larkin's one-time use of a racial slur—and ended the harassment.

The standard for imputing liability to the City is demanding: "The employer is liable for harassment by a *nonsupervisory* employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. [Citation.] This is a negligence standard." (*State Dept. of Health Services v. Super. Ct.*, *supra,* 31 Cal.4th at p. 1041 [citing Cal. Civ. Code § 12940, subd. (j)(1), italics added].) "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections*, *supra,* 21 Cal.4th at p. 1136). Thus, an employer in coworker harassment cases can be liable only where "its own negligence is a cause of the harassment." (*Burlington Industries, supra,* 524 U.S. at p. 759).

To insulate itself from liability, an employer must take "immediate corrective action that is reasonably calculated to (1) end the current harassment and (2) to deter future harassment." (*Bradley, supra,* 158 Cal.App.4th at p. 1630.). "If (1) no remedy is undertaken, or (2) the remedy attempted is ineffectual, liability will attach." (*Fuller v. City of Oakland, Cal*. (9th Cir. 1995) 47 F.3d 1522, 1528–1529). "Conversely, the employer will insulate itself from Title VII liability if it acts reasonably." (*Swenson, supra,* 271 F.3d at p. 1196). "[T]he reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment." (*Ellison*, *supra*, 924 F.2d at p. 882; see also *Adler v. Wal-Mart Stores, Inc*. (10th Cir. 1998) 144 F.3d 664, 676 ["[S]toppage of the harassment by the disciplined perpetrator evidences effectiveness."]).

Here, the undisputed facts demonstrate that the City is not liable under FEHA because the City took immediate corrective action and stopped any further racial harassment. Although Bailey did not report the harassment, the Office promptly acted once it learned of Larkin's alleged comment. (AA 627:17-629:16.) Within days, Arcelona interviewed both Bailey and Larkin, counseled Larkin that use of the alleged language was unacceptable, and provided Clendinen with a written summary of the meetings with Larkin and Bailey. (AA 628:13-16; 629:14-16, 630:3-7.) The City's DHR also opened a file regarding the allegation after it learned of Larkin's statement through a different source. It conducted an in-person investigatory interview with Bailey and her union representative, and followed up with a four-page letter containing its analysis. (AA 630:8-14.) In accordance with DHR's determination letter, Clendinen counseled Larkin yet again, required that she execute an Acknowledgement and

Receipt of the City's Harassment-Free Workplace Policy, and placed that acknowledgement form in her personnel file. (AA 631:6-20). Bailey notes that "inaction" by an employer after learning of racial harassment may be viewed as "the employer's adoption of the offending conduct and its results," but there was no inaction here. (*Faragher, supra,* 524 U.S. at p. 789). At no point did the City condone or tolerate the slur. Instead, the City took immediate action to demonstrate that racial slurs are not tolerated and to prevent any reoccurrence of the alleged epithet.

Further, the City's actions worked. Bailey concedes that she did not experience any racially motivated comments or conduct by Larkin or anyone else from the City ever again. (AA 100:20-22; 171:18-20.) And the record does not show that Larkin made any offensive comments ever again to anyone. Measured by the employer's "ability to stop harassment by the person who engaged in harassment," the City's corrective action here was completely effective. (*Bradley, supra,* 158 Cal.App.4th at p. 1630; see also *Ellison, supra*, 924 F.2d at p. 882.)

Bailey does not and cannot dispute any of those facts. Instead, she asserts that whether an employer took reasonable corrective action is inherently a question of fact and therefore cannot be resolved on summary judgment, even where (as here) the relevant facts are undisputed. (AOB at 39). Bailey is incorrect. Certainly, there may be cases where fact issues preclude summary judgment, such as where there are disputes about when the employer learned or should have learn of the harassment, what corrective action was taken, or whether the harassment stopped. (See, e.g., *Swenson, supra,* 271 F.3d at p. 1198 [noting jury properly resolved question of when employer knew about harassment]; *Christian v. Umpqua Bank* (9th Cir. 2020) 984 F.3d 801, 813 [holding triable issue of fact where

it was disputed whether employer took steps to end the harassment and the harassment did not stop]; *Reitter v. City of Sacramento* (E.D. Cal. 2000) 87 F.Supp.2d 1040, 1046 [holding triable issue of fact concerning whether employer ended the harassment]). But where—as here—it is undisputed that the City took prompt corrective action and the racial harassment stopped, the City's liability is a question of law that the Court can decide on summary judgment. (*Mathieu v. Norrell Corporation* (2004) 115 Cal.App.4th 1174, 1185 [affirming summary judgment where the employer took prompt corrective action in response to complaint of harassment; and therefore, the employer is not liable under FEHA]; *Swenson, supra,* 271 F.3d at p. 1198 [overturning a jury verdict where the employer took appropriate, prompt corrective action that stopped harassment]; *Knabe v. Boury Corporation* (3d Cir. 1997) 114 F.3d 407, 413 (*Knabe*) [holding counseling employee that harassing conduct was unacceptable was "adequate as a matter of law because it was reasonably calculated to prevent further harassment"]; *Holmes v. Utah, Dept. of Workforce Services* (10th Cir. 2007) 483 F.3d 1057, 1069 ["A court may determine on summary judgment whether an employer's responses to claims of sexual harassment were reasonable as a matter of law."]; *Scarberry, supra,* 328 F.3d at p. 1257 [rejecting argument that summary judgment is inappropriate in employment cases because "the court may simply examine the record, including the undisputed evidence, to determine whether [the employer's] responses" to harassment "were reasonable as a matter of law."])

Bailey cites no case supporting her claim that a court cannot decide whether an employer took appropriate corrective action on summary judgment. Nor does Bailey identify any disputed facts that would prelude summary judgment here. Bailey claims that counseling Larkin was an

"inherently insufficient response" because the City did not "discipline" Larkin with punitive measures—such as a suspension or termination—but Bailey misunderstands the requirements of FEHA. (AOB at 41). Employers are required to take "corrective action" to prevent harassment from occurring again, and that corrective action is sometimes referred to as "discipline." (See, e.g., *Ellison, supra,* 924 F.2d at p. 881-882; *Fuller, supra*, 47 F.3d at p. 1529.) But discipline need not be punitive. The purpose of FEHA (like Title VII) is "remedial—avoiding and preventing discrimination—rather than punitive." (*Swenson, supra*, 271 F.3d at p. 1197.) Therefore, "taking punitive action against the harassing employee, e.g., reprimand, suspension or dismissal, is not necessary to insulate the employer from liability for a hostile work environment." (*Knabe*, *supra*, 114 F.3d at p. 414; see also *Swenson, supra,* 271 F.3d at p. 1197 ["[T]he employer need not take formal disciplinary action simply to prove that it is serious about stopping sexual harassment in the workplace"].)

Counseling or admonishing the offender is adequate corrective and preventative action where—as here—it ends the harassment. (*Swenson, supra,* 271 F.3d at p. 1198; *Star v. West* (9th Cir. 2001) 237 F.3d 1036, 1039 [describing counseling as an "adequate 'disciplinary' response"]; *Intlekofer v. Turnage* (9th Cir. 1992) 973 F.2d 773, 779 [holding counseling sufficient for first offenders, explaining that "an oral rebuke may be very effective in stopping the unlawful conduct."])[8] Bailey asserts that the City and Larkin did not regard the counseling as discipline, but that

[8] Even the cases Bailey cites make "clear that counseling or admonishing the offender can constitute an adequate 'disciplinary' response." (*Star v. West, supra,* 237 F.3d at p. 1039 [explaining that *Ellison*, *Fuller*, and *Yamaguchi* do not hold that punitive action is required to satisfy an employer's obligation to take corrective action]).

is immaterial: "An employer's refusal to apply the label 'discipline' to any of these actions is not determinative of their adequacy as a remedy. What is important is whether the employer's actions, however labeled," ended the racial harassment. (*Star,* at p. 1039). Furthermore, Larkin *did* view counseling as discipline. (AA 478-480 [Larkin testifying: "I think I did get disciplinary action."])

Public policy also does not support Bailey's claim that employers must impose punitive disciplinary measures against employees accused of harassment, particularly in cases like this where the evidence of misconduct was inconclusive. Bailey contends that Larkin used the slur without any witnesses present, and Larkin denied making the statement. (AA 181:12-13; 242:2; 333:11-334:10; 390:15-393:7; 629:3-16.) Under those circumstances, where the City could neither sustain or disapprove the allegation, the City appropriately focused on taking steps to prevent any further harassment—and the undisputed facts show the City's actions succeeded in preventing further harassment. (AA 100:20-22; 171:18-20.)

FEHA does not require the City to do otherwise. Indeed, as the Ninth Circuit explained, "[a]s a matter of policy, it makes no sense to tell employers that they act at their legal peril if they fail to impose discipline even if they do not find what they consider to be sufficient evidence of harassment." (*Swenson, supra,* 271 F.3d at p. 1196; see also *Harris v. L & L Wings, Inc.* (4th Cir. 1997) 132 F.3d 978, 984.) Although "[e]mployees are no better served by a wrongful determination that harassment occurred than by a wrongful determination that no harassment occurred," requiring employers to take punitive discipline against all employees accused of harassment would cause employers to "conduct investigations that are less than fully objective and fair," and impose punitive measures when they are

not warranted. (*Swenson,* at p. 1196). No sound public policy supports that result. (*Ibid.*; *Harris,* at p. 984 [holding Title VII "in no way requires an employer to dispense with fair procedures for those accused or to discharge every alleged harasser."]; *Adler v. Wal-Mart Stores, Inc*. (10th Cir. 1998) 144 F.3d 664, 677 ["If our rule were to call for excessive discipline, employers would inevitably face claims from the other direction of violations of due process rights and wrongful termination."]). Bailey suggests that a punitive disciplinary response would have deterred future harassers by sending a message that the City takes its obligation to create a harassment-free workplace seriously, (AOB at 39), but Bailey is incorrect. Personnel matters are confidential to protect privacy interests. The City is not required to impose punitive discipline and then broadcast news of that discipline throughout the workforce to send a message. (*Adler,* at p. 679 ["Whether even the immediate firing of each harasser would have actually deterred future wrongdoers is purely speculative, and factually impossible if the future harassers did not know about those actions. Unless we hold employers strictly liable for failing to broadcast sensitive disciplinary matters to their entire workforces, we cannot predicate liability on this theory."])

Bailey contends that the City's response was insufficient because she claims the City should have immediately separated Bailey and Larkin, and assigned someone else to cover Larkin's duties when Larkin was unavailable. (AOB at 40.) But FEHA does not require the City to provide Bailey with a Larkin-free workplace. (*Swenson, supra,* 271 F.3d at pp. 1192–1193). An "employer's legitimate interest in avoiding disruption to its business" can cause an employer to "reasonably decide that the employees must continue working together while awaiting the outcome of

the investigation" and after the investigation concludes where, as here, the charge of harassment could not be proved. (*Swenson,* at p. 1193 n. 8; *Konstantopoulos v. Westvaco Corporation* (3d Cir. 1997) 112 F.3d 710, 718 [rejecting argument that it is "always illegal for an employer to require a prior victim of sexual harassment to return to work in the company of co-workers responsible for the prior harassment"]). An employer has "wide discretion" in deciding whether employees must continue to work together "so long as it acts to stop the harassment." (*Bradley, supra,* 158 Cal.App.4th at p. 1630.) And, given that it is undisputed that the City stopped Bailey from experiencing any further racial harassment, the City's response is not improper merely because Bailey wishes the City had exercised its discretion in a different way. (*Knabe, supra,* 114 F.3d at p. 414 [explaining that "if the remedy chosen by the employer is adequate [to end the harassment], an aggrieved employee cannot object to that selected action. Concomitantly, an employee cannot dictate that the employer select a certain remedial action."])[9] In any event, the Office accommodated Bailey's request. When Bailey told Clendinen *for the first time* that she did not want to work with Larkin, Clendinen transferred Larkin to a different assignment outside the Records Room *within two weeks*. (AA 105:1-106:2). While Bailey implies that she repeatedly requested a separation over the prior ten-month period, that claim is not supported by evidence in the record.[10] And, in any event, the law does not require a separation because Larkin ceased any race-based comments or conduct.

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[9] Bailey claims she received an "[u]njustifiably critical June 2015 Performance Report." (AOB at 40.) But the City's obligation to take corrective action to end racial harassment does not prevent the City from providing constructive feedback to employees.

[10] Likewise, the evidence does not support Bailey's claim that the Office changed her work duties or increased her interactions with Larkin.

Bailey complains that another coworker, Taylor-Monachino, obstructed and sabotaged Bailey's complaint, thus allegedly impeding the City's corrective actions to prevent harassment, but the facts do not support that claim either. Nothing Taylor-Monachino did kept the City from learning of, examining, and promptly responding to the complaint with appropriate and effective corrective action. (AA 627:17- 631:20.) Bailey claims that Taylor-Monachino treated her rudely, but another coworker's rudeness does not demonstrate that the City's corrective action to prevent race-based harassment was deficient. Under FEHA, the City had an obligation to take steps reasonably calculated to end racial harassment against Bailey, and it is undisputed that the City did so. (*Bradley, supra,* 158 Cal.App.4th at p. 1630.) Taylor-Monachino's conduct was not based on Bailey's race. Indeed, Bailey repeatedly conceded that Taylor-Monachino's conduct towards her had nothing to do with their shared African-American backgrounds. (AA 95:13-23, 634:3-8.) FEHA requires employers to end racial harassment, but it does not require employers to eliminate all social slights and interpersonal conflicts between coworkers.[11] (*Yanowitz, supra*, 36 Cal.4th at p. 1054 & fn. 13; *Hardage v. CBS Broadcasting, Inc.* (9th Cir. 2005) 427 F.3d 1177, 1189.)

Further, the City is not directly liable for the actions of coworkers but instead is only liable for its own negligence in failing to take corrective

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Bailey and Larkin covered each others' job duties when the other was unavailable, both before and after the incident. Bailey's job duties never changed. (AA 88:8-91:16; 106:16-22, 107:17-23; 171:23; 462:18-19; 625:19-626:10, 634:22-635:15.) Further, covering Larkin's duties when Larkin was out of the office did not require Bailey and Larkin to interact. (AA 440:23-441:13; 491:23-492:7.)

[11] In any event, the Office advised Taylor-Monachino that her behavior was inappropriate, counseled her about handling personnel complaints appropriately, and took corrective action. (AA 632:9-25; 243:23-24.)

action in response to harassment prohibited by FEHA by nonsupervisory employees, when it knows or should know of that conduct. (*Carrisales, supra,* 21 Cal.4th at p. 1136; *Burlington Industries, supra,* 524 U.S. at p. 759; *Swenson, supra,* 271 F.3d at pp. 1191–92 [holding an "employer is responsible for its own actions or omissions, not for the coworker's harassing conduct."].) Bailey suggests without evidentiary support that Taylor-Monachino has "managerial status," but that is incorrect. Taylor-Monachino did not supervise Bailey in her job duties as an Investigative Assistant, or have the authority to "transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline" Bailey or direct her work. (Gov. Code, § 12926(t); AA 180:4-15; 389:1-7.) They were coworkers who worked in different divisions of the Office, and no facts in the record support Bailey's claim to the contrary. Likewise, Bailey claims that the fact that Larkin denied making the racial slur could be viewed as a "lack of remorse," (AOB at 42), but Larkin's remorse is not a relevant factor. In this coworker harassment case, the City is liable only for its own conduct—not the internal thoughts of its employees.

Finally, Bailey contends that the City's investigation into her claim was deficient. (AOB at 43.) Bailey accuses the City of not interviewing "any of the witnesses," but that is false. There were no witnesses to the alleged racial slur except Bailey and Larkin, who were both interviewed by the City. (AA 242:1-2; 333:11-334:10; 629:3-16). The City contacted the people Bailey claims were "witnesses," but none heard the slur. (AA 333:11-334:10; see also AA 281-289.) Bailey's claimed "witnesses" were people who could provide only hearsay testimony that Bailey told them that Larkin made the statement. (*Ibid*; AOB at 19.) In any event, any deficiencies in the investigation do not show that the City failed to take

corrective action to end racial harassment. Even the lone case cited by Bailey holds that, "[w]here, as here, the employer takes prompt steps to stop the harassment, liability cannot be premised on perceived inadequacies in the investigation." (*Swenson*, *supra,* 271 F.3d at p. 1198.) The law does not require that investigations into harassment complaints be perfect. The law requires that the City take corrective action to stop racial harassment, and the undisputed facts demonstrate that the City effectively did so here. (*Ibid.*; *Knabe, supra,* 114 F.3d at p. 412 ["The question before us is not whether the investigation was adequate—it appears not to have been—but rather whether the remedial action was adequate."])

In short, the City did exactly what FEHA requires and the caselaw suggests employers "should do" in response to claims of coworker harassment: "it investigated, documented and counseled." (*Ribando v. United Airlines, Inc.* (7th Cir. 1999) 200 F.3d 507, 511). And those actions stopped Bailey from experiencing any further racial harassment. Given those undisputed facts, the Court of Appeal properly held that there was no triable issue of fact concerning the City's liability on Bailey's FEHA harassment claim. (*Mathieu v. Norrell Corporation*. *supra*, 115 Cal.App.4th at p. 1185; *Swenson*, *supra,* 271 F.3d at p. 1198.)

II. The Trial Court Properly Granted Summary Judgment On Bailey's Retaliation Claim.

The trial court correctly granted summary judgment on Bailey's retaliation claim because she did not show either an adverse employment action or any causal relationship between an adverse employment action and her protected activity. (*Yanowitz, supra,* 36 Cal.4th at p. 1042 ["[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the

employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action."].)

Bailey asserts that the Court of Appeal's opinion conflicts with *Yanowitz*, but it does not. The parties agree, and the Court of Appeal recognized, that adverse employment actions are not limited to actions such as terminations or demotions that impose an economic detriment on an employee, but also extend to employment actions that are "reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." (*Yanowitz, supra,* 36 Cal.4th at p. 1054.) Likewise, no one disputes that courts should consider "the unique circumstances of the affected employee as well as the workplace context of the claim," and view allegations of retaliation "collectively." (*Yanowitz, supra,* 36 Cal.4th at pp. 1052, 1055.)

Nonetheless, *Yanowitz* does not render the requirement to show an adverse employment action toothless, as Bailey suggests. To prevail on a retaliation claim, "an employee must demonstrate that he or she has been subjected to an adverse employment action that materially affects the terms, conditions, or privileges of employment." (*Yanowitz, supra,* 36 Cal.4th at p. 1051.) That evaluation is made from the "objective perspective" of a reasonable employee. (*Id.* at pp. 1054-1055; *Burlington Northern and Santa Fe Ry. Co. v. White* (2006) 548 U.S. 53, 68–69 (*Burlington*) [explaining whether an adverse employment action has occurred is an objective, judicially administrable standard].) The adverse employment action requirement is not satisfied by evidence of a "mere offensive utterance or even a pattern of social slights by either the employer or co-employees" because those actions "cannot properly be viewed as materially

affecting the terms, conditions, or privileges of employment." (*Yanowitz*, at p. 1054.) An adverse employment action is a "substantial and detrimental" impairment in the terms and conditions of employment. (*Thomas, supra,* 77 Cal.App.4th at p. 511.) Conduct that merely inconveniences, displeases or upsets the employee does not meet this standard. (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1455; *Fisher v. San Pedro Peninsula Hospital*, *supra*, 214 Cal.App.3d at p. 608; *Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, 357-358 ["Workplaces are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action."])

The adverse employment action requirement serves an important purpose. Requiring employees to prove substantial adverse job effects "guards against both 'judicial micromanagement of business practices,' [citation] and frivolous suits over insignificant slights." (*Akers v. County of San Diego*, *supra,* 95 Cal.App.4th at p. 1455.) Likewise, it prevents FEHA from becoming a "general civility code for the American workplace." (*Burlington, supra,* 548 U.S. at p. 68.) By evaluating the significance of employment actions while "taking into account the legitimate interests of both the employer and the employee," courts ensure that retaliation suits will not be based on "[m]inor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee," but instead will be based only on actions that "materially" affect "the terms, conditions or privileges of employment." (*Yanowitz, supra*, 36 Cal.4th at p. 1054.)

Here, Bailey has not raised a triable issue of material fact about whether she experienced an adverse employment action. Bailey primarily points to Taylor-Monachino's conduct, which the parties agree amounts to the following: Taylor-Monachino told Bailey there was no formal complaint regarding her allegation against Larkin and she could not file one, and that talking to other coworkers about the incident could cause Larkin's "work [to] be messed with." (AA 633:13-17.) Bailey's complaint was nevertheless lodged with both Office supervisors and DHR, and both agencies took corrective action. (AA 628:13-16; 630:8-14.) Bailey also alleges that Taylor-Monachino ignored her; laughed at her; stared rudely at her; said "jeers" to her; and once made a threatening gesture, mouthing the words 'you are going to get it.'" (AA 633:17-27.)[12]

Taken as true, none of Taylor-Monachino's actions amounts to a "substantial and detrimental" impairment in the terms and conditions of Bailey's employment.[13] Because employers cannot force employees to socialize, "[a] pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment." (*Yanowitz, supra*, 36 Cal.4th at p. 1054 & fn. 13; see also *Burlington, supra,* 548 U.S. at p. 68 ["[P]ersonality conflicts at work that generate antipathy and snubbing by supervisors and co-workers are not actionable."]; *Strother v. Southern Cal.*

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[12] Bailey claims without evidentiary support that Taylor-Monachino destroyed Bailey's personnel records, but that is incorrect. (AOB 20.) The Office has Bailey's complete personnel file.

[13] Bailey does not show that Taylor-Monachino had any control over the terms and conditions of her employment. (*Thomas v. Dept. of Corrections*, *supra*, 77 Cal.App.4th at p. 511.) Taylor-Monachino did not work with or supervise Bailey in her job duties as an Investigative Assistant—they were simply coworkers in different departments. (AA 389:1-7.)

Permanente Medical Group (9th Cir. 1996) 79 F.3d 859, 869 ["[M]ere ostracism in the workplace is not enough to show an adverse employment decision."]. Likewise, Taylor-Monachino's alleged empty threat and incorrect statement about Bailey's claim—a claim that was in fact submitted to the City's DHR—is not actionable.[14] (*Hardage v. CBS Broadcasting, Inc.* (9th Cir. 2005) 427 F.3d 1177, 1189 [affirming that "snide remarks" and "threats" did not create a triable issue of adverse employment action]; *Tepperwien v. Entergy Nuclear Operations, Inc*. (2d Cir. 2011) 663 F.3d 556, 571 [holding that "empty verbal threats do not cause an injury, and therefore are not materially adverse actions, where they are unsupported by any other actions."); *Hottenroth v. Village of Slinger* (7th Cir. 2004) 388 F.3d 1015, 1030 ["[U]nfullfilled threats that result in no material harm cannot be considered an adverse employment action under Title VII."].) Bailey offers no facts to propel her theory that Taylor-Monachino's conduct comprised an adverse employment action past this fatal hurdle.[15]

Bailey's theory premised on her performance review fares no better. Bailey received the same overall "Meets Expectations" rating, and a 2 or 2.5 out of 3, on the performance reviews she received both before and after

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[14] Bailey offers no evidence to the contrary. Bailey asserts that Taylor-Monachino "sabotage[d] Bailey's complaint," but that is plainly incorrect. (AOB at 47.) Nothing Taylor-Monachino did kept the City from learning of, examining, and responding to the complaint. Further, Taylor-Monachino received corrective action for her alleged behavior. (AA 632:17-633: 17.) How the City handled other personnel matters concerning Taylor-Monachino unrelated to Bailey has no relation to the terms and conditions of Bailey's employment.

[15] Further, Bailey offers no evidence that the Office knew of and condoned Taylor-Monachino's alleged conduct. (*Cf. Gunnell v. Utah Valley State College* (10th Cir. 1998) 152 F.3d 1253, 1265.) The undisputed facts show the City took corrective action once the Office learned of Bailey's allegations against Taylor-Monachino. (AA 339:21-340:7; 243:23-24; 632:9-25.)

the incident with Larkin. (AA 182:7-183:15.) The comments from her direct supervisor, Irene Bohannon, on her FY 2014-2015 review suggested that Bailey could "improve her performance by showing greater responsiveness to supervisory requests for assistance, and by regular attendance." (AA 189.) Such feedback does not, as a matter of law, rise to the level of impairing the terms and conditions of Bailey's employment. (*Doe v. Dept. of Corrections & Rehabilitation* (2019) 43 Cal.App.5th 721, 735 [holding work related criticism is not an adverse employment action].) A "mere oral or written criticism of an employee … does not meet the definition of an adverse employment action under FEHA." (*Akers v. County of San Diego*, *supra*, 95 Cal.App.4th at p. 1457.) While an unfavorable evaluation "may be actionable where the employee proves the 'employer subsequently uses the evaluation as a basis to detrimentally alter the terms or conditions of the recipient's employment,'" (*Ibid*), Bailey has not made any showing that the City did so here. Her assigned tasks remained the same as they always had throughout her tenure as an Investigative Assistant, and Bailey's position was never in jeopardy. (AA 634:22-635:15; AA 183:11-15.) Bailey's supervisor did not even consider it to be a "bad review." (AA 451:1-3.)

Nevertheless, even if Bailey could prove that her performance review was an adverse employment action, Bailey cannot show—as she must—that there is any causal link between the review and the complaint Bailey lodged about Larkin's slur. Bohannon and Arcelona completed the performance review. Bailey does not offer any evidence to suggest that either sought to retaliate or discriminate against her; indeed, she agrees that they did not. (AA 96:11-19.) Thus, Bailey has not established any causal link between the constructive feedback and the complaint Bailey lodged,

thus defeating her *prima facie* retaliation claim related to the evaluation. (*George v. California Unemployment Insurance Appeals Bd*. (2009) 179 Cal.App.4th 1475, 1489 [holding "there must be a causal link between the protected activity and the employer's action" to support retaliation claim]).

Nor does Bailey offer any other evidence to support the notion that the feedback was pretextual. Bailey admits that she was absent from work often and objected to the work tasks she was asked to perform. (AA 113:4-6; 130:5-8; 182:15-183:10; 272-73; 636-37). She asserts that her performance review should not have mentioned these facts because her actions resulted from her workplace stress, (AA 636-37), but it cannot be an adverse employment action to provide accurate feedback about an employee's performance. "In order to properly manage its business, every employer must on occasion review, criticize, demote, transfer, and discipline employees." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1255 [citations omitted].) Finding accurate and constructive feedback to be an adverse employment action would leave employers unable to manage any employee who makes a complaint without fear of litigation or of creating potential liability by taking routine and necessary employment actions. (*McRae v. Dept. of Corrections & Rehabilitation* (2005) 142 Cal.App.4th 377, 387, 392 (*McRae*).)

Bailey claims that the City retaliated against her by asking her to cover Larkin's duties when Larkin was unavailable, but the evidence does not support that claim. Bailey's job duties never changed. (AA 171:23; 625:19-626:10, 634:22-635:15.) Bailey now claims that "floaters" previously covered Larkin's duties, but that claim is inconsistent with Bailey's deposition testimony and should be disregarded. (*D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 21.) Bailey testified that it was

typical for her to cover Larkin's duties when Larkin was out. (AA 88:8-89:23, 90:8-15, 91:13-16; 106:16-22, 107:17-23.) Before the January 22 incident, Bailey did so with no complaints, as corroborated by her emails. (*Ibid.*; see e.g., AA 121 [July 2014 email exchange with supervisor asking Bailey to order files due to absence of Larkin and another coworker].) Bailey did not dispute this point in her briefing before the trial court. (AA 224:17-21). Further, Bailey was treated the same as any other Investigative Assistant. As Bailey admits, Investigative Assistants routinely covered for each other. (AA 635:16-22.) Larkin and other Investigative Assistants covered for Bailey while she was unavailable, and Bailey likewise was asked to fill in while other Investigative Assistants were unavailable. (*Ibid.*) It is not an adverse employment action for the Office to ask and expect Baily to continue to perform the same duties that she previously performed and that all Investigative Assistants routinely perform.

Finally, Bailey suggests that Larkin's slur was retaliation in itself because it created a hostile work environment. (AOB at 12). That argument makes no sense. To prevail, Bailey must show that her employer retaliated against her because she engaged in "protected activity"—in this case, filing a complaint against Larkin for making a racial slur. (*Yanowitz, supra,* 36 Cal.4th at p. 1042.) Larkin's slur—which predated the protected activity—cannot be retaliation in response to the protected activity. Bailey asserts that she suffered emotional upset as a result of her coworker's alleged slur and, in turn, that emotional upset impacted her job performance. But, as the Court of Appeal explained, "Bailey's assertion that she suffered emotional upset due to Larkin's alleged racial slur which affected her performance, which, in turn, precipitated the improvement

comments, is not an assertion that any supervisor was retaliating against Bailey for complaining about Larkin's offensive language." (Opn. at 19.)

In short, Bailey has not demonstrated that she experienced "an adverse employment action that materially affect[ed] the terms, conditions, or privileges of employment." (*Yanowitz, supra*, 36 Cal.4th at p. 1051.) She identifies only social slights, constructive (and warranted) feedback, and being required to perform her usual and customary duties, which were the same duties as other Investigative Assistants performed. None of those actions, either collectively or individually, would "materially" affect the terms, conditions or privileges of employment for a reasonable person. Accordingly, the City was entitled to summary judgment. (*Ibid*; *Jones v. Dept. of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367, 1382 [affirming summary judgment in FEHA retaliation claim where evidence did not show adverse employment action]; *McRae, supra,* 142 Cal.App.4th at p. 390 [reversing jury verdict where plaintiff failed to show actionable adverse action].)

III. Bailey Cannot "Revive" Claims Under Section 12940(k).

Bailey seeks to revive her claim under Section 12940(k), which she describes as a claim based on the City's "failure to take all reasonable steps to prevent unlawful discrimination, harassment or retaliation." (AOB at 49). Bailey's claim fails at the outset because Bailey has not demonstrated that she experienced any unlawful discrimination, harassment or retaliation; and therefore, she cannot state a claim for failure to prevent those same acts. (*Carter v. Cal. Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 925 n.4 (Carter) ["[C]ourts have required a finding of actual discrimination or harassment under FEHA before a plaintiff may prevail under section

12940, subdivision (k).”]; *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 289.).

Bailey’s Section 12940(k) claim also should not be “revived” even if she prevails on her other claims in this appeal. To the extent she grounds her claim on an alleged failure to prevent racial discrimination, that claim fails. Bailey abandoned her racial discrimination claim by not pursuing it on appeal; and therefore, she cannot state a claim for failure to prevent racial discrimination. (*Carter*, *supra*, 38 Cal.4th at p. 925 n.4.)

To the extent Bailey now bases her claim on some unidentified failure by the City to prevent harassment and retaliation, that claim fails because Bailey did not plead a claim based on any failure to prevent harassment or retaliation in her complaint, or at any point below. (AA 20-21). Bailey cannot “revive” a claim that she never pled in her complaint.

Finally, Section 12940(k) charges employers “to take all reasonable steps necessary to prevent discrimination and harassment from occurring,” with no mention of retaliation. Bailey cannot state a claim based on failure to prevent retaliation, because no such claim is authorized by Section 12940(k). Bailey also cannot recast her retaliation claim as a race discrimination claim. Bailey concedes that she was not retaliated against because of her race. (AA 95:13-96:19.)

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CONCLUSION

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

Dated: April 30, 2021

DENNIS J. HERRERA
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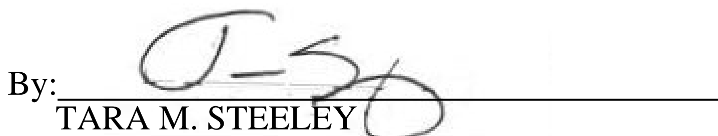

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I hereby certify that this brief has been prepared using proportionately double-spaced 13-point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 13,984 words.

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PROOF OF SERVICE

I, Pamela Cheeseborough, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, 1 Dr. Carlton B. Goodlett Place, City Hall, Room 234, San Francisco, CA 94102.

On April 30, 2021, I served the following document(s):

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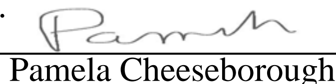

Pamela Cheeseborough

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Date

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