Supreme Court of the State of California

TWANDA BAILEY,

Plaintiff, Appellant and Petitioner,

vs.

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

Defendants and Respondents.

S265223

First Appellate District, Division One
No. A153520

San Francisco Superior Court
No. CGC 15-549675

PLAINTIFF-APPELLANT'S REPLY BRIEF ON THE MERITS

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

DANIEL RAY BACON, No. 103866
Law Offices of Daniel Ray Bacon
569 Hayes Street, Suite 1
San Francisco, CA 94102
Telephone (415) 864-0907
Facsimile: (415) 864-0989

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

Attorneys for Plaintiff, Appellant and Petitioner
TWANDA BAILEY

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INTRODUCTION

Plaintiff-appellant Twanda Bailey has shown that the lower court's decision affirming the summary judgment for defendants City/DAO on her FEHA racial discrimination-harassment, retaliation and other claims (Gov. Code §12940(a), (h), (j)(1), (k)) irreconcilably contradicts both FEHA's core principles and the Legislature's recent amendments clarifying the standards governing unlawful harassment claims. (SB 1300; Gov. Code §12923.) City/DAO's response, particularly on the threshold issue whether a co-worker's one-time infliction of the n-word slur, on the evidence presented here, sufficiently raised a triable issue of unlawful harassment precluding summary judgment, is without merit.[1]

The threshold question presented is no abstract proposition. Bailey's is but one of likely thousands of similar co-worker slurs on which the CA's categorical rule closes FEHA's door. Unless and until that door is opened workplace insults and stresses, like Bailey encountered here, will continue without meaningful redress. No employee should have to endure being called the "n-word," one of the most virulently destructive slurs in the American language. The courts universally condemn that slur, but until this Court opens FEHA's door to appropriate redress, the injuries from such slurs cause will be left unredressed and will continue unabated.

Bailey's opening merits brief addressed many of City/DAO's contentions, and Bailey will here further respond to additional contentions as appropriate, first addressing City/DAO's misstatement of the relevant

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

evidence, and then each of her FEHA claims in sequence. But two points City/DAO posits need to be addressed up front.

First, , Bailey does not posit any categorical rule to replace the CA's categorical ruling–that a co-worker's, as opposed to a supervisor's, one-time use of the n-word slur. even as amplified here, cannot support an unlawful harassment claim. (Answ.Br. 13.) The CA's rule entirely forecloses employer liability as a matter of law for a co-worker's racial slur. In contrast, Bailey's position does not require liability in every case, but properly allocates that factual assessment to the jury. Consistent with the this Court's declaration that the perpetrator's status is largely irrelevant to the harassment assessment (*Roby v. McKesson Corp*. (2009) 47 Cal.4th 686, 706-707), and the Legislature's declaration that "harassment cases are rarely appropriate for disposition on summary judgment" (§12923(e), affirming *Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 286), Bailey only affords the jury the opportunity of finding unlawful harassment, and even then liability will not attach unless the employer fails, as the City/DAO did here, to "immediate[ly] and appropriate[ly]" respond to the harassment. (§12940(j)(1).)

Second, City/DAO's contention that the facts are undisputed, presenting no jury issues of intent, motivation or credibility, misreads FEHA's standards. Some facts may be undisputed, but others, including what Larkin's intent and motivation behind her slur to Bailey, as well as her understanding, if any, why such slurs are prohibited, and whether a reasonable African American woman might respond as Bailey did, are disputed. Moreover, all of the evidence must be assessed as a whole to determine, by appropriate inference, whether a hostile work environment

was created, which is a fundamental issue for a jury, not for a court to resolve as a matter of law. (See *Nazir*, 178 Cal.App.4th at 285-286, emphasis added ("employment cases present issues of intent and motive *and hostile working environment* issues not determinable on paper").)

Again, "[n]ames can be powerful, for good and ill." (AOB Merits 8.) This case asks this Court to recognize this truth, and to construe FEHA to fully protect employees from racial abuse by words that are intended to destroy their dignity and deny their worth as human beings, the essential value FEHA protects. The CA refused to do so, and the City/DAO defends that view. But FEHA's values and goals, coupled with SB 1300's clarification of the standards governing FEHA harassment claims, and with the universal recognition of the n-word's brutally destructive character, compel a contrary view. In any context the n-word's infliction, even once by a co-worker, is no "mere utterance" (*Spriggs v. Diamond Auto Glass* (4th Cir. 2001) 242 F.3d 179, 185 ("Far more than a 'mere offensive utterance,' the word 'nigger' is pure anathema to African Americans…"), and by itself may be enough to contaminate the workplace with a racial hostility that, unless "immediately and appropriately" addressed (§12940(j)(1)), renders the employer liable for such harassment.

FEHA's protections embody fundamental state policy that must be liberally construed in furtherance of their remedial goals. (§§12920, 12921(a), 12993(a); 2 CCR §11006; *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 220 ("The policy that promotes the right to seek and hold employment free of prejudice is fundamental.

…[FEHA's] aim is to provide effective remedies against the evil"); *Christian v. Umpqua Bank, Inc*. (9th Cir. 2020) 984 F.3d 801, 814,[2] inner citation omitted ("[t]he purpose of Title VII is...to liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment").) The Court must be "acutely conscious" of these principles and the liberal construction they must be afforded. (*Rogers v. Equal Employment Opportunity Comm*. (5th Cir. 1972) 454 F.2d 234, 238; see §12993(a).) Bailey's position is entirely consistent with these principles. The CA's decision, which the City/DAO defends, is not. The CA's decision improperly compromises FEHA's protections and must be reversed.

RESPONSE TO CITY/DAO'S STATEMENT OF FACTS

City/DAO has in important respects failed to properly summarize the facts, ignoring relevant evidence, presenting material disputed facts as undisputed, and drawing inferences from those facts in its favor. Bailey's opening merits brief already answers most of those distortions. (AOB Merits 14-21.) However, because an accurate understanding of the facts is necessary to assess the issues presented, Bailey will address in detail City/DAO's distortion of the facts comprising Bailey's workplace reality and underlying the important legal issues this case presents.

[2] In her opening merits brief at 14, Bailey misstated the *Christian* quotation's point cite, which is p. 814, not pp. 809-810.

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

Throughout its answer brief City/DAO minimizes the serious harm inflicted by the n-word by characterizing the relationship between Bailey and Larkin as a close personal friendship and Larkin's epithet as a joke between friends. Bailey disputes this characterization, describing her relationship with Larkin as only a "working friendship" (1.AA.97:17, 98:14, 134:6; 2.AA.393:13-17), a distinction that City/DAO's counsel recognized during Bailey's deposition (2.AA.402:7-8). Bailey also denied seeing Larkin's slur as a joke (2.AA.407-410), which her increasingly adverse emotional response over the following months confirms (see AOB Merits 20-27).

City/DAO ignores that Larkin's racial slur, being coupled with the epithet "scary" (see 2.AA.241-242 ¶4; 2.AA.389-391), amplified the n-word's inherent destructive character. Since even the unadorned epithet is universally recognized as the worst possible slur against African Americans (see AOB Merits 9-10, 32-35), a jury could reasonably find that Larkin's slur was even worse, smearing Bailey with the myth of African Americans as inherently violent and dangerous.

Lastly, in discussing Larkin's slur, the City/DAO ignores its context: Although she not had yet become Larkin's target, Bailey knew that Larkin had treated other African American women harshly (see 2.AA.391:23-393:12), using her close relationship with DAO's Human Resources ("HR") Manager, Evette Taylor-Monachino,[3] to falsely accuse these other

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[3] See *infra* at 16-17. Taylor-Monachino was not Bailey's co-worker, but was a DAO managerial-level "officer" whose conduct and knowledge is attributed to City as her employer. (See *Roby*, 47 Cal.4th 686, 707; (continued…)

women who were subsequently removed from the office (2.AA.242:2-6 ¶4, 243:19-24 ¶7; 1.AA.99-101; 2.AA.399:9-400:17). A jury could readily understand Bailey's reluctance to personally report the slur, especially to Taylor-Monachino, because of the threat, later becoming actual, that initiating a complaint would invite retaliation. (2.AA.242:2-6 ¶4, 243:19-24 ¶7; 1.AA.99-101; 2.AA.399:9-400:7.)

II. CITY/DAO'S DEFECTIVE "IMMEDIATE AND APPROPRIATE" CORRECTIVE ACTION.

Bailey has covered the reality of City/DAO's claimed "immediate and appropriate" response to Larkin's slur, including Arcelona's and Bailey's views that Larkin was never properly disciplined or made to see the seriousness of her conduct. (AOB Merits 18-19, 43-44; 4.AA.750-751 [Arcelona]; 2.AA.243:22-23 ¶7; 2.AA.468:19-469:25, 475:16-17, 476:18-478:12, 482:6-17 [Larkin]).) Bailey showed the inadequacies of City/DAO's response on its own terms, and further showed that City/DAO ignored the larger "totality" of its response, despite FEHA's mandate to consider the "totality of circumstances" in harassment cases. (§12923(c); see AOB Merits 18-20, 20-27.) The following, though, requires emphasis.

First, City/DAO ignores that Eugene Clendinen, DA Gascon's chief administrative assistant, immediately closed its investigation of the matter upon Larkin's supposed denial that she used the n-word slur. (2.AA.336:7-21 (Larkin "denied using the N-word and no further action was going to be

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(…continued)
California Fair Employment & Housing Comm. v. Gemini Aluminum Corp. (2004) 122 Cal.App.4th 1004, 1015.)

taken"); but see 2.AA.542:8-543:7 (in Jan. 29 meeting Larkin never denied the slur).) Moreover, Bailey's witnesses, who DAO never interviewed (2.AA.333), confirmed Bailey's testimony. (AOB Merits 19.)

Second, City/DAO ignores that the DAO's second meeting with Larkin, where Clendinen only had her acknowledge receipt of the City's Harassment-Free Workplace Policy (1.AA.171:18), happened six months after the slur (2.AA.307-308, 334), for which Larkin was never disciplined (2.AA.468:19-469:25, 476:18-478:12; see also 2.AA.336:7-21). A reasonable jury could find this remedy was not "immediate and appropriate" (*Christian*, 984 F.3d at 813 ("a trier of fact reasonably could find that Umpqua's glacial response…was too little too late").)

Third, the City HR Department conceded it did not and would not investigate Bailey's charges. (2.AA.252 ("your allegations are insufficient to raise an inference of harassment/hostile work environment or retaliation. Therefore, DHR will not investigate your complaint").)

Finally, Clendinen's claimed "discipline" of Taylor-Monachino on July 30 consisted only of a memo instructing her how employee discrimination-related claims should be handled. (2.AA.355:8-358:14.) A jury could find that this action not only failed to properly discipline Taylor-Monachino for deliberately obstructing Bailey's complaint, but also tacitly admitted that she had not properly processed Bailey's complaint and lacked basic knowledge of the core duties of her position as the DAO HR "Department Personnel Officer." When seen in the broader context of Taylor-Monachino's targeted campaign against Bailey–which ultimately included her destruction of part of Bailey's personnel file (2.AA.243:24-28 ¶7; 4.AA.720:6-8, 720:13-722:13)–a jury could further find that her

conduct was not just negligent, but actively hostile, and the remedy inadequate.

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

City/DAO ignores the breadth of its adverse response to Larkin's racial slur and Bailey's complaint. Bailey will focus on City/DAO's distorted portrayal of her workplace reality, centrally defined by Taylor-Monachino's hostile malfeasance as the DAO Officer responsible for responding to her FEHA harassment complaint.

A. Failure to Separate.

City/DAO concedes that, despite repeated requests, Taylor-Monachino consistently refused to separate Bailey and Larkin, arguing spuriously that to do so would prematurely validate Bailey's charge (2.AA.546:16-20, 547:3-15) despite its recognition as one of the most effective tools in deescalating workplace tensions. (See *Ellison v. Brady* (9th Cir. 1991) 924 F.3d 872, 883 (keeping victim and perpetrator together may create or exacerbate the hostile environment); Chin, Employment Litigation (Rutter Group 2017) §§10:422-10:423.) Indeed, the parties weren't separated until November 2015, ten months after Larkin's racial slur. (2.AA.325-326, 364-367.)

City/DAO attempts to paint the November separation as a prompt and appropriate response, but Arcelona had recommended for 10 months that the parties be separated (2.AA.543:18-547) and that Bailey had repeatedly told Arcelona over the following months that working with Larkin was traumatic (2.AA.249-251; 2.AA.550:10-553:18, 571:6-23, 575:13-576:19), all of which Arcelona raised in DAO's regular supervisor

meetings (2.AA.243:4-5 ¶6 [Bailey]; 2.AA.546-551, 561-562 [Arcelona]; 2.AA.320-321, 322-323, 323-325, 364-367 [Clendinen]; see 2.AA.577:5-18 (Arcelona knew no reason why Larkin's transfer "could not have been done much earlier")).[4]

Furthermore, instead of separating the parties, Bailey was actually directed to begin covering Larkin's desk, thereby exacerbating Bailey's emotional trauma. City/DAO seeks to justify this as a regular part of Bailey's job duties, neither harassment, retaliation, or even inappropriate.[5] City/DAO's contention lacks merit.

Whether a co-worker coverage practice was part of Bailey's duties is irrelevant to the propriety of separating the parties after the slur incident to prevent or deescalate tensions that might affect the workplace as a whole. Moreover, DAO had for two years been using specially-hired floaters instead of coworkers to provide supplemental coverage. (2.AA.245 ¶12; 1.AA.88-89; cf. 1.AA.106:5-114:4; 2.AA.246-247 ¶¶12-14, 272, 275, 277;

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[4] Clendinen was also on notice from Bailey's rebuttal to her June Performance Report (2.AA.272-273), and from her psychiatrist's August 20 letter (2.AA.247:2-6 ¶14, 275), which he ignored (2.AA.577:5-18), that Bailey was under extreme stress from her hostile workplace environment.

Furthermore, disputing that Bailey earlier told Clendinen that working with Larkin was highly stressful, City/DAO misreads her citation to her November 9, 2015 meeting notes. Those notes explicitly reference Larkin's slur and Taylor-Monachino's March 23 meeting threats, and then state: "I continue to let Eugene [Clendinen] know the [sic] about the FEAR I have when asked to cover Ms. Saras Larkin." (1.AA.122.)

[5] Missing the point of separation, Clendinen testified that separation is unnecessary because no hostile work environment is created if the employees involved retain their same job duties. (2.AA.326:16-328:3; 359:5-363:16.)

see 2.AA.363.) Accordingly, even assuming mutual coverage may have once been a regular part of Bailey's (and other employees') duties, the need for such coverage was almost eliminated. (See Chin, Employment Litigation §5:1561, citing *Burlington Northern & Santa Fe Railway Co. v. White* (2006) 548 U.S. 53, 70-71 (employer's sudden directive that employee begin performing more disagreeable aspects of job may evidence harassment or retaliation).)

In sum, a jury could properly find DAO's failure and refusal to separate the parties to constitute an egregious failure to "promptly and appropriately" respond to Bailey's complaint and the slur incident.

B. Taylor-Monachino's Obstruction of Bailey's EEO Complaint.

Bailey detailed these issues in her opening merits brief. (AOB Merits 20-21.) City/DAO barely addresses this issue here. But certain points need further explication and emphasis,

First, as a key pillar of its defense City/DAO asserts Taylor-Monachino was not a manager, but one of Bailey's co-worker peers. But City/DAO represented Taylor-Monachino as a manager to both the trial court (1.AA.59:2-3 ("Department Personnel Officer"); RT (9-15-2017) 9.27-10:1 ("HR Manager")) and Court of Appeal (Resp.Br. 13 ("Department Personnel Officer and Human Resources Manager")). These courts referenced her, without objection, as the "HR Manager" and "Human Resources Director." (3.AA.652:19-20, 654:19; Slip Op. 8:7-9.)

Moreover, the parties repeatedly identified Taylor-Monachino as the Department Personnel Officer or HR Manager (1.AA.170:22-23 [Clendinen Decl. ¶5]; 1.AA.180:18-20, 181:1-4 [Arcelona Del. ¶¶4-5]; 2.AA.242:23-

24, 244:17-18, 245:8-9, 246:5-6, 260 [Bailey Decl. ¶¶6, 9, 11, 13, Exh. E]; 2.AA.288:11-14 [Mark Decl. ¶4]; 2.AA.291 [Clendinen notes]; 2.AA.537:2-9, 541:1-12, 547:14-15 [Arcelona]). The parties described her as responsible for all personnel matters until, because of her derelictions, a Senior Personnel Analysist was hired to handle employee relations, leaving her only administrative tasks. (2.AA.260; 4.AA.726:21-727:24, 730:22-732:25, exp. 732:13-17 [Clendinen]).) Taylor-Monachino reported directly to Clendinen (1.AA.180:4-9 [Arcelona Decl. ¶2]; 4.AA.720:6-8 [Clendinen]) and regularly attended DAO management meetings with Clendinen and Arcelona (2.AA.321:9-25 [Clendinen]; 2.AA.548:11-19 [Arcelona]), who both deferred to her on personnel matters, particularly her rejections of Arcelona's requests to separate Bailey and Larkin (2.AA.543-548:10, esp. 546:13-548:10 [Arcelona]).

Second, Taylor-Monachino's obstruction of Bailey's effort to secure redress began well before March 23 when she improperly chose not to record Bailey's January 29 account of Larkin's slur as a formal complaint or to provide the required notice to the City HR Department. (2.AA.243 ¶¶6-7; 2.AA.413:11-414:7, 416:13-15 [Bailey]; 2.AA.252 [July 22 City HR letter]; 2.AA.338:18-21, 339:14-341:13, 357:14-358:14, 370:16-371:15 [Clendinen].)

Third, on March 23, when Bailey asked for a copy of the complaint she thought had been prepared, Taylor-Monachino was overtly hostile, telling Bailey that no complaint had been or would be prepared (2.AA.243 ¶¶6-7; 2.AA.413:11-414:7, 416; 1.AA.171 ¶8 [Clendinen]), and threatening Bailey with liability for allegedly harassing Larkin by discussing the slur with co-workers (2.AA.243, 244:13-16 ¶¶6, 8; 2.AA.412:5-415:12).

In sum, instead of responding appropriately to Bailey's complaint, Taylor-Monachino improperly punished Bailey for pursuing justice through her complaint (*Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522, 1529 ("[H]arassment is to be remedied through action targeted at the harasser, not the victim")), and violated her most basic duties as DAO's HR manager responsible for ensuring a harassment-free workplace (see 2 CCR §11023(b)(1), esp. subd. (1)(B)-(1)(E)). City/DAO concedes these failures (2.AA.260, 338:18-21, 339:14-341:13, 357:14-358:14, 370:16-371:15), forcing Clendinen to provide her with written instructions on handling EEO complaints (1.AA.171 [Clendinen Decl. ¶8]).

C. Taylor-Monachino's Harassment/Ostracism of Bailey.

City/DAO trivializes Taylor-Monachino's ongoing harassment of Bailey following her obstruction of Bailey's complaint, where for months she ostracized, slighted and criticized Bailey before her co-workers, culminating on August 12 when she accosted and threatened Bailey, telling her "you're going to get it!" (2.AA.243:13-17 ¶6, 244 ¶9, 245-246, 247 ¶¶12-13, 15; 2.AA.257-258.)

City/DAO doesn't deny Taylor-Monachino's hazing but dismisses it as mere non-actionable social friction among co-workers. Again, however, Taylor-Monachino and Bailey weren't co-workers–Taylor-Monachino held a DAO managerial position that directly affected Bailey's position, making her "mere" harassment and ostracism part and parcel of her obstructionism and hostile treatment of Bailey. The jury is entitled to evaluate this hazing in the "totality" of its workplace context in resolving Bailey's foundational FEHA claims.

D. June 2015 Performance Report.

Bailey's June 2015 Performance Report for the first time raised criticisms of her work performance (2.AA.241 ¶3), criticizing her for alleged excessive absences, and insufficient co-worker courtesy and cooperation with supervisors (2.AA.265-271, esp. 267 nos. 10-11, 269; 2.AA.246:15-16). These criticisms directly contradict Bailey's prior reports, which recognized her to be consistently courteous with the public, and cooperative and punctual, receiving many compliments from the DAO and SFPD attorneys on, e.g., her "conscientiousness" and "utmost professionalism." (See 2.AA.241 ¶3; AOB Merits 15.)

City/DAO contends these criticisms were constructive observations. A jury, however, assessing them in light of the totality of circumstances, could conclude otherwise, including as to (a) their potentially adverse effects on her position and advancement; (b) their conflict with Bailey's earlier noted strengths (2.AA.241 ¶3); (c) Bailey's denial that she failed to notify supervisors of absences (2.AA.272 ("the Office received notice of all of my requests for leave well in advance of my taking leave time"); and (d) Bailey's written rebuttal, to which DAO never responded (2.AA.575-576), explained how any performance issues arose from her ongoing workplace stresses (2.AA.272-273; 2.AA.246:15-26 ¶13; 1.AA.113-114; see 2.AA.423:17-424:11, 425:4-11, 427:1-12, 448:8-451:22, 452:18-453:13, 456:4-461:11 [Bohannan]; see also 2.AA.325:16-326:15 [Clendinen]; 548:18-551:20, 577:5-18 [Arcelona] (doesn't know reason why Larkin's transfer "could not have been done much earlier").)

A jury could readily understand these criticisms to reflect and confirm Bailey's trauma arising from her co-worker's racial slur and

City/DAO's failure to take appropriate corrective action (§12923(a); 2.AA.272-273), despite its awareness of her trauma and its causes, which it largely ignored (AOB Merits 18-19, 20-27).

E. DAO's Open Tolerance of Taylor-Monachino.

On October 16, 2015, instead of discharging Taylor-Monachino for her malfeasance, DAO chose to keep her as its fulltime HR Manager, but to transfer her major employee relation duties, notably including EEO matters, to a new fulltime "Senior Personnel Analyst." (2.AA.244-245 ¶10, 260; 2.AA.353, 4.AA.730-732 (Clendinen).) A jury could reasonably infer that Bailey's charges were credible and that City/DAO was choosing to protect a deficient manager rather than one of its longtime valuable employees.

F. Bailey's Personal and Objective Emotional Trauma.

City/DAO ignores Bailey's serious emotional trauma stemming from Larkin's slur and City/DAO's ensuing actions, particularly Taylor-Monachino's obstructive, hostile and disparaging campaign against her. (See 2.A.275 ("[Ms. Bailey] is being treated for severe anxiety and depression…developed as a result of recent events in her workplace which have created a very *hostile work environment*...").) DAO management was well aware of Bailey's emotional distress and its effect on her work performance (2.AA. 247:2-6 ¶14, 267, 268, 272-273, 275 [Bailey]; 2.AA.318-319, 328-332, 382-384 [Clendinen]; 2.AA.551-552, 571, 575-576 [Arcelona]). But DAO nonetheless failed to take appropriate remedial action (*id*.), failing to "immediately and appropriately" address Bailey's

ongoing workplace distress (§12940(j)(1)); 2.AA.318-319, 382-384).[6] A reasonable African American woman standing in Bailey's shoes could find this scenario hostile and abusive, as Bailey plainly did.

Like the CA, City/DAO trivializes or disregards this evidence that a hostile workplace environment targeting Bailey, particularly given the jury's task to consider the "totality of circumstances" in assessing Bailey's claims. (§12923(c).) This Court, however, need not and should not. FEHA harassment cases should only rarely be resolved on summary judgment (§12923(e); *Nazir*, 178 Cal.App.4th at 286), but this case is not one of them.

ARGUMENT

I. CITY/DAO MISSTATES THE STANDARD OF REVIEW

Bailey correctly summarized the summary judgment standards governing this case. (AOB Merits 15, 27-28.) City/DAO's charge that Bailey seeks to subvert those standards in FEHA discrimination cases lacks any merit.

While summary judgment is generally available in all civil actions, some cases, like FEHA harassment claims, are meaningfully less amenable to summary judgment precisely because they involve inferences drawn from the totality of evidence as to the creation of a hostile workplace environment, and turn on the basic human questions of credibility, intent and motivation as assessed in light of the workplace realities the victim experiences. (AOB Merits 27-28; *Nunez v. Superior Court* (5th Cir. 1978)

[6] On December 4, 2015, Dr. Savon informed DAO that "severe workplace stress" required "a period of rest and recuperation AWAY from her stressful work environment." (2.AA.277, original emphasis.)

572 F.2d 1119, 1126 ("If the inference to be drawn requires 'experience with the mainsprings of human conduct' and reference to 'the data of practical human experience, we entrust the jury with that determination…. Hence, juries determine…issues turning on motive, purpose, design or intent"); *Nazir*, 178 Cal.App.4th at 283; *Earl v. Nielsen Media Research, Inc*. (9th Cir. 2011) 658 F.3d 1108, 1112.)

The California Legislature has codified these governing principles in §12923(e) as state policy under FEHA, declaring: "Harassment cases are rarely appropriate for disposition on summary judgment," and reinforcing its declaration by affirming *Nazir*, which explained:

> [J]udges and commentators have expressed concern that trial courts have moved too far [in granting summary judgments,] particular[ly in] employment cases. [¶] We take no position on this criticism, but do observe that many employment cases present issues of intent, and motive, *and hostile working environment*, issues not determinable on paper. Such cases, we caution, are rarely appropriate for disposition on summary judgment….

(*Nazir*, 178 Cal.App.4th at 285-286, emphasis added, inner citations omitted).) This principle should be followed here.

II. CITY/DAO FAILS TO REBUT BAILEY'S SHOWING THAT, UNDER FEHA, A CO-WORKER'S ONE-TIME RACIAL SLUR MAY CREATE A HOSTILE WORKPLACE ENVIRONMENT CONSTITUTING UNLAWFUL HARASSMENT, WITH EMPLOYER LIABILITY ARISING FROM ITS FAILURE TO IMMEDIATELY AND APPROPRIATELY ADDRESS THE HARASSMENT.

A. City/DAO Minimizes And Ignores The State and Federal Standards That Would Support A Jury Finding That A Co-Worker's One-Time "Scary N-r" Slur, Like Larkin's Here, Could Create An Actionable Hostile Workplace Environment.

Bailey has shown that, contrary to the CA's decision, FEHA properly recognizes that a harasser's one-time infliction of the n-word slur on a co-worker may survive summary judgment as a potentially actionable instance of racial harassment. This recognition flows compellingly from (a) FEHA's core purposes and standards, (b) the Legislature's amendments clarifying the standards governing unlawful harassment claims, and (c) the universal condemnation of the n-word as the most brutally offensive slur in the American language, a condemnation reflected in the EEOC's explicit identification of the n-word as a paradigm of a one-time verbal act of actionable harassment under Title VII. (AOB Merits 9-10, 31-32, 34; see EEOC Compliance Manual (CCH 2018) Section 15: Race and Color Discrimination §15-VIII(A) at 7222-7223.)

City/DAO nonetheless contends that the CA correctly distinguished between a supervisor's and a co-worker's use of the n-word slur, a categorical distinction it maintains is reflected in Title VII jurisprudence, and that the Court should disregard the FEHA and federal authority Bailey relies on to show that Larkin's slur created an abusive or hostile work environment. City/DAO's contentions lack merit.

First, FEHA's core purposes and principles, and the protections and guarantees arising therefrom, may not be so easily disregarded, because they are civil rights embodying fundamental state policy that must be liberally construed in furtherance of FEHA's purposes. (*Supra* at 9-10; AOB Merits 13-14; see, e.g., §§12920, 12921(a), 12993(a); *Commodore Home Systems*, 32 Cal.3d at 220.)

Second, the relevant standards defining the assessment of actionable workplace harassment under FEHA has remained substantially the same, with SB 1300 principally codifying and clarifying the harassment provisions relevant here. For example, compare *Nazir*'s articulation of the basic FEHA standard defining unlawful workplace harassment (178 Cal.App.4th at 263-264), with SB 1300's codification and elucidation of this same standard of actionable harassment under FEHA at §12923(a):

> The Legislature hereby declares that harassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives victims of their statutory right to work in a place free of discrimination when the harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being.

Additionally, rejecting reliance on *Brooks v. City of San Mateo* (9th Cir. 2000) 229 F.3d 917, which misconstrued the conduct that could create a hostile workplace environment, the Legislature clarified in SB 1300:

> *A single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment* if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment.

(§12923(b); compare *Dee v. Vintage Petroleum, Inc*. (2003) 106 Cal.App.4th 30, 36 (there is neither a threshold 'magic number' of harassing incidents that give rise…to liability…nor a number of incidents below which a plaintiff fails as a matter of law to state a claim"); EEOC Compliance Manual, §15-VII(A)(2) at 7222 ("A single serious incident of harassment may be sufficient to constitute a Title VII violation"). These standards, singly and together, properly encompass the full range of human conduct that may constitute harassment FEHA prohibits. (See *Roby*, 47 Cal.4th at 706, emphasis the Court's ("[H]arassment focuses on situations in which the *social environment* of the workplace becomes intolerable because the harassment (whether verbal, physical, or visual) communicates an offensive message to the harassed employee").)

Lastly in this sequence, also indisputable is that whether harassing conduct creates such an actionable "abusive working environment" because it is either "severe or pervasive," is a quintessential question of fact for the jury, which "must be assessed from the perspective of a reasonable person belonging to the [plaintiff's] racial or ethnic group" (*Nazir*, 178 Cal.App.4th at 264, 285-286 (determination of hostile workplace environment a question of fact)) in light of the "totality of circumstances" (§12923(c)),[7] which cannot be understood by "carving the work

[7] City/DAO argues that all the relevant facts are undisputed, rendering the harassment issue a question of law for the courts. As discussed in text and *supra* at 8-9, this is not so, because the relevant facts are disputed, especially as to the inferences to be drawn, including the ultimate question of the creation of a hostile workplace environment. Moreover, the assessment of such an environment cannot be cabined, because City/DAO's failure to respond promptly and appropriately effectively becomes part of the harassment itself. (See Arg.II.B, *infra*; AOB Merits 38.)

environment into a series of discrete incidents." (AOB Merits 29-30; see esp. *Oncale v. Sundowner Offshore Services, Inc*. (1998) 523 U.S. 75, 81-82 ("The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed").)[8]

Fourth, City/DAO unsurprisingly relies heavily on the federal case law allowing or simply finding actionable racial harassment by supervisors, noting that Bailey cites no case finding the one-time use of a racial epithet by a co-worker to be actionable harassment.

Although most of the relevant federal authorities involve supervisorial, not co-worker, harassment,[9] these decisions focused far more on the n-word's perniciously destructive power as a tool creating a hostile

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[8] City/DAO asserts, without analysis, that SB 1300 can be disregarded either because it doesn't change existing harassment law, or because it does effect a non-retroactive change in existing law. However, because SB 1300 does not effect a "substantial change" in law, but merely codifies, clarifies and explicates existing law, it does not present any retroactivity issue (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243-244, accord *Carter v. California Department of Veterans Affairs* (2006) 28 Cal.4th 914, 922-923), and properly applies here. See Letter of Amicus Curiae Legal Aid at Work in Support of Petition for Review (Dec. 18, 2020) 6-9, citing Assembly Judiciary Comm., 2017-2018 Reg. Sess., SB 1300 (Jackson) June 24, 2018 1, 4-5; Senate Judiciary Comm., 2017-2018 Reg. Sess., SB 1300 (Jackson) April 16, 2018) 9-10.

[9] Bailey did cite two cases involving co-worker verbal racial harassment: *Williams v. City of Philadelphia Office of Fleet Mgmt*. (E.D. Pa. 2020) 2020 WL 1677667 at *4-5 (triable issue of harassment where African American called "n-word" by co-worker); *Bynum v. District of Columbia* (D.D.C. 2020) 424 F.Supp.3d 122, 134-138, esp. 136-138 (co-worker's one-time "you need to go back to the South where you came from" epithet to African American employee sufficiently racially-tinged to create hostile work environment).

workplace environment, a factor that applies universally. (*Supra* at 9; AOB Merits 9-11, 32-35; see, e.g., *Ayissi-Etoh v. Fannie Mae* (D.C. Cir. 2013) 712 F.3d 572, 580 (Kavanaugh, J., concurring) ("That epithet has been labeled, variously, a term that 'sums up…all the bitter years of insult and struggle in America'"); *Spriggs*, 242 F.3d 179, 185, emphasis added ("Far more than a 'mere offensive utterance,' *the word 'nigger' is pure anathema to African Americans*…"; "*it is degrading and humiliating in the extreme*"); see Letter of Amicus Curiae Legal Aid at Work in Support of Petition for Review (Dec. 18, 2020) 3-6 .)

The EEOC recognizes this power, specifying the n-word as the paradigm example of a verbal attack whose one-time use may create a hostile workplace environment actionable as unlawful harassment. (EEOC Compliance Manual, §15-VIII(A) at 7222 ("[A] single, extremely serious incident of harassment may be sufficient to constitute a Title VII violation…. Examples…include…an unambiguous racial epithet such as the 'N-word'").) City/DAO's attempt to dismiss the EEOC's declaration by arguing that its first example involved both the n-word and the depiction of a noose is absurd: determination of unlawful harassment under either federal or state law should not be an accounting exercise, but Bailey notes that Larkin's slur too was materially enhanced by its allusion to "scary n---r" and by Larkin's notorious use of her connection with Taylor-Monachino to retaliate against other African American women.

California has also recognized the destructive power the n-word carries. (See *Alcorn v. Anbro Engineering, Inc*. (1970) 2 Cal.3d 493, 496-499, fns. 2–4, esp. fn. 4 (the "epithet 'n---r'…has become particularly abusive and insulting in light of recent developments in the civil rights'

movement as it pertains to the American Negro"); *Agarwal v. Johnson* (1979) 25 Cal.3d 923, 941, 946-949, 946 ("n-word" may constitute actionable outrageous conduct when used by supervisor or if the victim is especially "susceptible to injuries").)

Hardly surprising given this context is this Court's explicit recognition that the harasser's status is substantially irrelevant under FEHA to the assessment of a hostile workplace environment:

> [H]arassment often does not involve any official exercise of delegated power on behalf of the employer….[¶]… *Because a harasser need not exercise delegated power on behalf of the employer to communicate an offensive message, it does not matter for purposes of proving harassment whether the harasser is the president of the company or an entry-level clerk,* although harassment by a high-level manager of an organization may be more injurious to the victim because of the prestige and authority that the manager enjoys.

(*Roby*, 47 Cal.4th at 706-707, emphasis added.)

Thus, while the harasser's status is significant in determining liability, FEHA contains no statutory basis for the threshold categorical distinction the CA imposed in determining whether the one-time racial slur here could constitute a hostile workplace environment supporting an unlawful harassment claim. To the extent the harasser's status "may" be relevant to injury, it is but one factor in the "totality of circumstances" the jury, not the courts, must assess (§§12923(c) and (e)). This is, and should be, the proper substance of California law. Given the overarching importance of FEHA's remedial goals and "of zealously guarding an employee's right to a full trial" (*Davis v. Team Electric Co*. (9th Cir. 2008) 520 F.3d 1080, 1089, 1096), Bailey's showing should be more than

adequate to preclude categorical summary adjudication of her harassment claim.

B. City/DAO Fails to Rebut Bailey's Showing That Its Response To The Harassment Arising From Larkin's Racial Slur, Taken As A Whole, Was Neither Immediate Nor Appropriate.

City/DAO argues that, even if a jury should find a hostile workplace environment in this case, liability still does not attach because it conclusively responded immediately and appropriately to the slur by counseling Larkin, who did not repeat the slur. Like the CA here, City/DAO misunderstands the broader scope of its FEHA obligations, as well as how the efficacy of the remedial action it did take must be measured.

First, FEHA imposes an overarching "affirmative duty" on employers "to take reasonable steps to prevent and *promptly correct discriminatory and harassing conduct.*" (2 CCR §11023(a).) Specifically, in cases of co-worker harassment, employers may be held liable for "fail[ing] to take immediate and appropriate corrective action." (§12940(j)(1); *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th at 1040-1041.)

This affirmative duty is meaningfully broader than solely preventing the perpetrator from repeating her harassing conduct, which the CA adopted, and City/DAO defends, as the governing criterion. (Slip Op. 17.) Indeed, that narrow construction of employers' duties has been repeatedly and properly rejected. (*Ellison*, 924 F.2d at 881-883; *Fuller*, 47 F.3d at 1528-1529; *Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184, 1192-1196.) Rather, the employer's appropriate remedial actions not only must be

"proportionat[e] to the seriousness of the offense" and "reasonably calculated to end the harassment,"[10] but also must be focused on dissuading other potential harassers in order to assure a harassment-free workplace as a whole. (*Ellison*, 924 F.3d at 881-882; accord *Christian*, 984 F3d at 812; *Fuller*, 47 F.3d at 1528-1529.)

Second, whether the employer's response is "immediate and appropriate" is a factual question to be decided in light of all the circumstances. (*Swenson*, 271 F.3d at 1197 ("we consider the overall picture"); *Reitter v. City of Sacramento* (E.D. Cal. 2000) 87 F.Supp.2d 1040, 1046 (the jury resolves "the adequacy of the employer's response under all the circumstances"); see also *Lounds v. Lincare Inc*. (10th Cir. 2015) 812 F.3d 1208, 1222, 1224.) Liability arises from an employer's negligent response regardless of motivation. (*Swenson*, 271 F.3d at 1194; *State Department of Health Services*, 31 Cal.4th at 1041.) Indeed, an employer's failure to take sufficient corrective action effectively becomes part of the harassment by "*adopt[ing] the offending conduct and its results quite as if they had been authorized affirmatively as the employer's policy*" (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 789, emphasis added; accord *Christian*, 984 F.3d at 811 ("employer may be held liable for…harassment…, where the employer either ratifies or acquiesces in the

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[10] Sufficient responses focused on the perpetrator may consist of: (1) initial temporary steps, *including separating the employees and conducting a prompt and thorough investigation*; and (2) appropriate permanent remedies, such as *permanent separation*. (*Swenson*, 271 F.3d at 1192-1196; Chin, Employment Litigation §§10:420 et seq.)

harassment by not taking immediate and/or corrective actions"); *Swenson*, 271 F.3d at 1192 (same); Chin, Employment Litigation §§10:395-10:397.)

Here, Bailey has already shown that a jury could find that Larkin's counselling was insufficiently prompt and appropriate to satisfy City/DAO's obligations under FEHA. (*Supra* at 12-14, 14-16; see AOB Merits 18-20, 41-42.) Especially given the lack of evidence the counselling had any meaningful effect on her, the mere fact that Larkin did not repeat the slur is not conclusive on the sufficiency of its response. (See *Fuller*, 47 F.3d at 1529 ("We refuse to make liability for ratification of past harassment turn on the fortuity of whether the harasser, as he did here, voluntarily elects to cease his activities").)

Looking at the "totality of circumstances" presented here, the "overall picture" (*Swenson*, 271 F.3d at 1197), the deficiencies a jury could readily find in City/DAO's response are manifest. (*Supra* at 12-21; AOB Merits 20-27.)

(1) While FEHA does not always require severe punishment, a jury could find that the lukewarm admonishments given Larkin had little constructive effect and lacked the seriousness required either to dissuade other potential harassers or to demonstrate City/DAO's commitment to a harassment-free work environment. (*Swenson*, 271 F.3d at 1197 ("Failure to punish the accused harasser…matters if it casts doubt on the employer's commitment to maintaining a harassment-free workplace"); *Fuller*, 47 F.3d

at 1529 (failing to "take even the mildest form of disciplinary action" renders remedy insufficient); *Ellison*, 924 F.2d at 881-882.)[11]

(2) Despite Bailey's and Arcelona's repeated requests, communicated in DAO management meetings, City/DAO refused to separate the parties for almost 10 months, thereby denying Bailey one of the most efficacious, and immediately effective, remedies. (*Supra* at 14-16; AOB Merits 21-22 and fn. 8; *Swenson*, 271 F.3d at 1092.) Moreover, City/DAO exacerbated Bailey's trauma by directing her to cover Larkin's desk even though DAO had largely discontinued this practice by adding "floaters." (2.AA.245:22-27; *Ellison*, 924 F.3d at 883 (keeping victim and harasser together may ***create or exacerbate*** the hostile environment); *Ayissi-Etoh*, 712 F.3d at 577-578 (same); Chin, Employment Litigation, §§10:422-10:423.)[12] A reasonable jury could readily find City/DAO's decision and delay insufficient to meet its statutory duties. (§12940(j)(1); *Christian*, 941 F.3d at 813.)

(3) A jury could readily find the investigation conducted here patently defective. The City conducted none (2.AA.252), and the DAO failed to interview any of witnesses except Bailey and Larkin (2.AA.333,

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[11] City/DAO points to Larkin's testimony where at one point she asserts, "I think I did get disciplinary action. (2.AA.478:10-14.) But City/DAO ignores the rest of her testimony contradicting and putting that statement in dispute (2.AA.467:24-482:17), but also ignores that the "discipline" she is referencing was Arcelona's admonishment that the n-word was inappropriate (2.AA.478:15-482:17).

[12] City/DAO argues that Bailey's declaration testimony about the floaters should be disregarded because it allegedly contradicts her deposition testimony. It does not. Indeed, City/DAO's own witness confirms the DAO's use of floaters. (See 2.AA.457:24-458:1 [Bonanno].)

336:7-21). This failure seriously undermined any hope of conveying either to Bailey, to Larkin or to the office as a whole that City/DAO took the charges seriously in order to promote a harassment-free workplace. (See *Swenson*, 271 F.3d at 1093 (an investigation is the "most significant immediate measure an employer can take," is a "key step in the employer's response," and "can itself be a powerful factor in deterring future harassment. By opening a sexual harassment investigation, the employer puts all employees on notice that it takes such allegations seriously and will not tolerate harassment in the workplace. An investigation is a warning, not by words but by action").)

(4) Taylor-Monachino's deliberate obstruction, hostility and threats against Bailey not only violated her legal duty as DAO HR Manager to fairly enforce FEHA's protections, but confirmed by managerial action that, whatever pretense it presented, DAO was not a harassment-free workplace. Indeed, Taylor-Monachino's malfeasance alone confirms the City/DAO's liability, "adopt[ing] the offending conduct and its results quite as if they had been authorized affirmatively as the employer's policy." (*Faragher*, 524 U.S. at 789; *Christian*, 984 F.3d at 811; Chin, Employment Litigation, §10:395-10:397.)

In sum, assessing the evidence in light of the properly governing standards renders it impossible to conclude, as the CA does and City/DAO advocate, that City/DAO's response was conclusively "immediate and appropriate." Accordingly, this Court should clarify that these standards correctly reflect FEHA's purposes and the protective guarantees §12940(j)(1) embodies, and reverse the CA decision.

III. CITY/DAO FAILS TO REBUT BAILEY'S SHOWING THAT THE CA'S REJECTION OF HER RETALIATION CLAIM VIOLATED THE STANDARDS THIS COURT AFFIRMED IN *YANOWITZ*.

City/DAO contends that the CA, following the standards articulated in *Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1049-1060, correctly found that Bailey had not presented evidence showing she had suffered an adverse employment action or that the City/DAO's actions were in retaliation for her complaint challenging Larkin's racial slur. City/DAO, however, ignores material aspects of the standards governing retaliation actions. (AOB Merits 45-46.) City/DAO's attempt to trivialize and dismiss Bailey's retaliation charges lack merit.

Adverse Employment Action. City/DAO ignores the broad range of conduct constituting an actionable adverse employment action: FEHA "protects an employee against…the *entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance* or opportunity for advancement"; and "the phrase 'terms, conditions or privileges' of employment must be *interpreted liberally and with a reasonable appreciation of the realities of the workplace* in order to afford employees the *appropriate and generous protection* against employment discrimination that FEHA was intended to provide." (*Yanowitz*, 36 Cal.4th at 1052-1054, emphasis added; *Patten v. Grant Joint Union High School District* (2005) 134 Cal.App.4th 1378, 1387-1388 ("'materiality' test is not to be read miserly" and is "not crabbed [or] narrow").)

Significantly, the Legislature's amendments addressing harassment claims mirrors *Yanowitz*'s broad definition of the conduct constituting

actionable harassment: "harassment creates a hostile, offensive, oppressive, or intimidating work environment…when the harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being." (§12923(a).)

Second, although City/DAO gives a nod to one of *Yanowitz*'s most important holdings–that alleged retaliatory conduct may not be fragmented into its parts, but must be assessed "collectively" in light of the "totality of circumstances" (*Yanowitz*, 36 Cal.4th at 1052 and fn. 11, 1055-1056; see §12923(a), (c))–City/DAO nonetheless proceeds to fragment Bailey's "pattern of systemic retaliation" in order to show that none arise to an adverse employment action. But the collective whole is what counts: the courts "do not decide whether each alleged retaliatory act constitutes an adverse employment action in and of itself…. [T]here is no requirement that an employer's retaliatory acts constitute one swift blow…." (*Id*. at 1055; *Patten*, 134 Cal.App.4th at 1390.)

Lastly, City/DAO entirely ignores *Yanowitz*'s third major holding, that assessing whether alleged conduct constitutes an adverse employment action "is not, by its nature, susceptible to a mathematically precise test," "adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls within [FEHA's] reach…." (*Yanowitz*, 36 Cal.4th at 1054-1055.) Accordingly, "*[r]etaliation claims are inherently fact specific, and…must be evaluated in context…, tak[ing] into account the unique circumstances*

of the affected employee as well as the [claim's] workplace context…." (*Id*. at 1052, emphasis added; compare §12923(e).)

Like the CA decision, City/DAO's effort to trivialize Bailey's charges contravenes these standards. As City/DAO recognizes, Taylor-Monachino sits at the heart of its retaliatory campaign. (1) Her campaign starts with her refusal, to which both Clendinen and Arcelona deferred, to separate the parties, and to continue to refuse to separate them despite Arcelona's repeated requests on Bailey's behalf. City/DAO fails to defend this decision, which rejects one of the most recognized remedial tools for addressing such conflicts. (See *Ellison*, 924 F.3d at 883; Chin, Employment Litigation, §§10:422-10:423.).

(2) Rather than separate Bailey and Larkin, Taylor-Monachino exacerbated the conflict by directing or allowing Bailey to be directed to cover for Larkin, although for the most part "floaters" had largely provided such coverage for two years. (See 2.AA.245:22-27.)

(3) Taylor-Monachino obstructed the EEO process by failing to prepare Bailey's formal complaint about Larkin's racial slur following her first meeting with Bailey on January 29, 2015, and refused to do so when questioned by Bailey on March 23, choosing instead to berate Bailey for discussing the incident with other employees and threatening her with liability for harassing Larkin, further traumatizing Bailey. Nonetheless, City/DAO argues that Taylor-Monachino's deliberately hostile malfeasance had no adverse consequences because the City HR Department was somehow eventually notified (see 2.AA.238:18-21), although it failed to conduct its own investigation of Bailey's charges (2.AA.252). A jury, however, could justifiably find that Taylor-Monachino's malfeasance was

inherently harmful, both systemically and personally, as a patent breach of City/DAO's duties under FEHA.

(4) City/DAO's contention that Taylor-Monachino's harassment campaign against Bailey following their March 23 meeting were mere workplace slights and frictions that cannot constitute an adverse employment action ignores that this campaign was inflicted not by a co-worker but by a DAO Manager responsible for Bailey's harassment complaint (see, e.g., *Roby*, 47 Cal.4th at 707), and (b) the campaign must be seen not in isolation but in the full collective context of Taylor-Monachino's retaliatory actions toward Bailey.

(5) For the same reason, Taylor-Monachino's August 12 threat was not "empty," but coming from the DAO HR Manager was inherently harmful and, in any event, was part of the broader retaliatory campaign she waged against Bailey for pursuing her complaint against Larkin.

(6) Additionally, City/DAO seeks to dismiss the criticisms in Bailey's June 2015 Performance Report as mere constructive observations, rather than an adverse employment action. These criticisms are inextricably intertwined with Taylor-Monachino's retaliatory course of conduct and their traumatic effects on Bailey, leading to the performance problems noted, all of which Bailey explained in her rebuttal (2.AA.272-273; see also 2.AA.241 ¶3), which DAO management ignored (see 2.AA.575:13-576:19).

In sum, under the standards *Yanowitz* articulated, City/DAO's actions, viewed in light of the "realities of the workplace," easily fall within that "spectrum of employment actions that are reasonably likely to

adversely and materially affect an employee's job performance or opportunity for advancement." (*Yanowitz*, 36 Cal.4th at 1052-1056.)

Causation. Under FEHA, a showing that the employee's protected activity was a "substantial motivating factor" for the retaliation establishes causation. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 229-232; CACI 2507.) Here, a reasonable jury could find Bailey's pursuit of her unlawful harassment claim was causally linked to the retaliatory course of conduct centrally orchestrated by Taylor-Monachino. (*State Department of Health Services*, 31 Cal.4th at 1041 (under FEHA, "employer is strictly liable for all acts of…harassment by a supervisor")), and cannot be resolved against Bailey as a matter of law. The CA erred in concluding differently, and City/DAO's attempt to argue the contrary lacks any merit.

IV. CITY/DAO'S CONTENTION THAT BAILEY'S FAILURE TO PREVENT CLAIM REMAINS CONCLUSIVELY BARRED LACKS MERIT.

If her foundational FEHA claims are dismissed, Bailey's claim under §12940(k) for failure "to take all reasonable steps necessary to prevent discrimination and harassment from occurring" will also be dismissed. (See also Order Denying Rehearing (A153520) (2020-10-6).) City/DAO's contention that this claim must also be dismissed on other grounds (Answ.Br. 57-58) lacks any merit.

First, although statutorily distinct, both unlawful harassment and unlawful retaliation are forms of unlawful discrimination encompassed by §12940(k). (*Aguilar v. Avis Rent A Car* (1999) 21 Cal.4th 121, 129; *Taylor v. City of Los Angeles Dept. of Water & Power* (2006) 144 Cal.App.4th

1216, 1240.) Accordingly, all of Bailey's foundational FEHA claims are encompassed within this claim.

Second, Bailey did plead, and pursue, a failure to prevent claim. (1.AA.20-21: Complaint ¶¶41-45.) Bailey's pleading includes her factual allegations defining all her FEHA claims (1.AA.21 ¶41, incorporating ¶¶1-40, esp. ¶¶7-18), and additionally alleges that City/DAO failed to establish and implement "effective appropriate policies, procedures, practices, guidelines, rules, and/or training," that would have prevented the harassment and retaliation that occurred (*id*., ¶42).

Accordingly, if this Court's decision revives either her discrimination-harassment or retaliation claim, Bailey's §12940(k) claim is necessarily revived as well.

CONCLUSION

Bailey ends where she began: at stake here is whether ordinary non-supervisorial employees will have the protections they deserve and need to prevent and redress all forms of unlawful harassment in furtherance of FEHA's ultimate remedial goals. The CA fundamentally misconstrued and misapplied California law in resolving this question, particularly in light of SB 1300's amendments affirming FEHA's broad protections and guarantees. Viewed through a correct doctrinal framework, Bailey's evidence supports her FEHA claims, which may not be resolved on summary judgment. The CA's judgment should be reversed.

Dated: July 2, 2021

Respectfully submitted,

s/ *Robert L. Rusky*

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

CERTIFICATE OF COMPLIANCE

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

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

As attorney of record on appeal for plaintiff and appellant Twanda Bailey, I hereby certify that the foregoing Plaintiff-Appellant's Reply Brief on the Merits contains 8,024 words, exclusive of the cover sheet, the tables of contents and authorities, and this certificate of compliance, as determined by the Microsoft Word 2016 word processing program used to prepare the brief. (Cal. Rules of Court rule 8.204(c).)

Dated: July 2, 2021

s/ *Robert L. Rusky*

DANIEL RAY BACON
ROBERT L. RUSKY

STATE OF CALIFORNIA
Supreme Court of California

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Law Firm