S265223

IN THE SUPREME COURT OF CALIFORNIA

TWANDA BAILEY,
Plaintiff and Appellant,

v.

SAN FRANCISCO DISTRICT ATTORNEY'S OFFICE et al.,
Defendants and Respondents.

AFTER A DECISION BY THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE
CASE NO. A153520

APPLICATION FOR LEAVE TO FILE AMICUS BRIEF AND AMICUS CURIAE BRIEF OF ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF RESPONDENTS

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APPLICATION FOR LEAVE TO FILE AMICUS BRIEF

Pursuant to California Rules of Court, rule 8.520(f)(1), the Association of Southern California Defense Counsel (ASCDC) requests permission to file the attached amicus curiae brief in support of defendants and respondents the San Francisco District Attorney's Office, George Gascon, and the City and County of San Francisco.[1]

ASCDC is a preeminent regional organization of lawyers who specialize in defending civil actions. It has approximately 1,100 attorney members, among whom are some of the leading trial and appellate lawyers of California's civil defense bar. ASCDC is dedicated to promoting the administration of justice, educating the public about the legal system, and enhancing the standards of civil litigation practice. ASCDC is also actively engaged in assisting courts by appearing as amicus curiae.

ASCDC's members frequently represent employers who are faced with employment-related litigation, even where the claims must fail as a matter of law or no reasonable jury could find in favor of the plaintiff. The proposed amicus brief supplements the parties' briefs by explaining how the recent enactment of Government Code section 12923 does not undermine the

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[1] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than ASCDC, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.200(c)(3).)

continued vitality of the summary judgment procedure in appropriate employment actions and does not substantially alter the Fair Employment and Housing Act principles applicable to this case.

Accordingly, ASCDC requests that this Court accept and file the attached amicus curiae brief.

August 2, 2021

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By: 

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AMICUS CURIAE BRIEF

INTRODUCTION

Government Code section 12923 (section 12923) cannot bear the analytical weight plaintiff places upon it. (See OBOM 7, 9–11, 14, 16, fn. 5, 17, fn. 6, 27–32, 34, 36, 37, 44; RBOM 7–8, 12, 22, 24–26, 35.) Enacted in response to the recent #MeToo movement and related concerns about sexual harassment, section 12923 purports to declare the Legislature's intent with respect to how the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) is to be applied to workplace harassment claims. For several reasons, however, section 12923 does not represent a substantial change in the FEHA principles applicable to this action, which centers on the one-time use of an abhorrent racial epithet by the plaintiff's nonsupervisory coworker.

First, because section 12923 purports to interpret a previous Legislature's intent when enacting longstanding FEHA provisions rather than amend FEHA's harassment standard itself, it is not binding on a court tasked with applying such preexisting law to events occurring before section 12923's enactment nor is it persuasive as to the meaning of that preexisting law. Second, section 12923 did not alter or amend the requirement that a harassment claim must satisfy both an objective and a subjective standard. Third, in explaining that harassment can include a single instance of harassing *conduct* such as a physical assault, section 12923 did not alter the existing law that a single *verbal epithet* by a nonsupervisor is insufficient to support a hostile work environment. And fourth,

the Legislature's general observation that many harassment cases cannot be resolved via summary judgment cannot inform a court's analysis of whether any particular case should be so resolved.

LEGAL ARGUMENT

I. Because Government Code section 12923 purports to interpret long-existing law, it should receive minimal consideration when courts adjudicate claims arising from prior events.

"[S]tatutory interpretation is an exercise of the judicial power assigned to the courts by the Constitution." (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1007; see *Del Costello v. State of California* (1982) 135 Cal.App.3d 887, 893, fn. 8 ["The Legislature has no authority to interpret a statute. That is a judicial task."].) Pursuant to separation of powers principles, "a subsequent legislative declaration as to the meaning of a preexisting statute is neither binding nor conclusive in construing the statute's application to past events." (*Hunt*, at p. 1007.)

Section 12923 does not purport to replace the long-standing definition of unlawful harassment found in Government Code section 12940, subdivision (j)(1). Rather, by enacting section 12923 the Legislature "declare[d] its intent with regard to application of the laws about harassment." (§ 12923.) Because the racial slur at issue here allegedly occurred in 2015 (OBOM 16), well before the 2019 effective date of section 12923, the Legislature's views as expressed in section 12923 should receive "due consideration" but are not binding on a court (*Western*

Security Bank v. Superior Court (1997) 15 Cal.4th 232, 244 (*Western Security Bank*)).

Regarding how much consideration is "due," section 12923 should receive only minimal consideration because it was enacted over thirty years after the prohibition against workplace harassment was codified in Government Code section 12940. (Compare Gov. Code, § 12940, added by Stats. 2018, ch. 955, § 1 with Gov. Code, § 12950, as amended by Stats. 1987, ch. 605, § 1, p. 1942.) Generally, "[t]he declaration of a later Legislature is of little weight in determining the relevant intent of the Legislature that enacted the law." (*Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 52.) The fact that so many years have passed between the enactment of section 12923 and the statute it purports to interpret further diminishes section 12923's relevance because "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." (*Western Security Bank*, *supra*, 15 Cal.4th at p. 244.)

II. Section 12923 did not alter the long-established requirement that harassment claims must satisfy both an objective and a subjective standard.

It has long been the law that harassment claims must satisfy both an objective and a subjective standard. That is, an alleged hostile work environment must be " 'one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' " (*Lyle v. Warner Brothers*

Television Productions (2006) 38 Cal.4th 264, 284 [sexual harassment]; see *Ortiz v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 568, 583 [race and age harassment]; *Hope v. California Youth Authority* (2005) 134 Cal.App.4th 577, 588 [sexual orientation harassment].) The objective component to a harassment claim helps to keep FEHA's provisions from becoming an over-intrusive " ' "civility code" . . . designed to rid the workplace of vulgarity.' " (*Lyle*, at p. 295; see *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 788 [118 S.Ct. 2275, 141 L.Ed.2d 662] [holding that under the analogous federal antiharassment law, the objective standard "will filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing' "].)

In section 12923, subdivision (a), the Legislature declared 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.

Relying on this language, plaintiff mistakenly suggests that all a court must do in order to allow a harassment claim to

proceed is assess the subjective effect on the victim. (See OBOM 30.)

Section 12923, subdivision (a), should not be read to dispense with the long-recognized requirement that a plaintiff alleging harassment must meet an *objective,* as well as, a subjective standard. In addition to the text quoted above, section 12923, subdivision (a), affirms the Legislature's approval of the concurrence in *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295] (conc. opn. of Ginsburg, J.) , and agrees that " '[i]t suffices to 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 make it more difficult to do the job.' " (Emphasis added.) To state the obvious, the term "reasonable person" entails an objective standard for assessing claims of workplace harassment, a standard distinct from one relying solely on a plaintiff's subjective experience. (*People v. Mendoza* (2007) 42 Cal.4th 686, 703.) Section 12923's legislative history also confirms that it preserves both the objective and the subjective test for harassment. When discussing Senate Bill 1300, which enacted section 12923, the Senate Judiciary Committee recognized that the existing test for harassment "is both subjective and objective." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1300 (2017–2018 Reg. Sess.) Apr. 17, 2018, p. 9.) The Legislature did not disapprove of the dual objective/subjective nature of the test for harassment or otherwise suggest that it would be converted into a subjective-only test by the bill under consideration.

III. Section 12923 did not change the law with respect to when a single epithet can create a hostile work environment.

When enacting section 12923, the Legislature considered the existing "legal standard for workplace harassment." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1300 (2017–2018 Reg. Sess.) Apr. 17, 2018, p. 8, original formatting omitted.)

The existing standard included this Court's holding that an isolated instance of a racial epithet by a nonsupervisory coworker does not constitute actionable harassment. In *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 146, footnote 9 (*Aguilar*), the plurality held that "a single use of a racial epithet, standing alone, would not create a hostile work environment." A dissenting opinion agreed that "[a]n isolated use of an epithet, however odious, does not produce a hostile work environment." (*Id.* at p. 181 (dis. opn. of Kennard, J.); see *Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 466–467 ["isolated incidents, such as the sporadic use of abusive language," are not actionable].)

Against this backdrop, the Legislature enacted section 12923, subdivision (b), which provides that "[a] single incident of harassing *conduct*" can create a hostile work environment if it "unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment." (Emphasis added.)

As the Legislature's chosen language indicates, the term "harassing conduct" in section 12923, subdivision (b), was targeted at sexual harassment that included physical assault such as inappropriate and offensive touching and should not be

interpreted to impliedly abrogate this Court's precedent with respect to an isolated instance of odious *speech*. (See *Aguilar*, *supra*, 21 Cal.4th at p. 134 [recognizing "conduct" as distinct from "speech" by discussing how "spoken words" may amount to employment discrimination "either alone or in conjunction with conduct"].)

Senate Bill 1300 was motivated " 'by movements such as #MeToo and #WeSaidEnough' " and aimed at " 'preventing sexual harassment in the workplace.' " (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1300 (2017–2018 Reg. Sess.) Apr. 17, 2018, p. 6.) Describing the background for the bill, the Senate Judiciary Committee discussed how the "legal standards that prohibit sexual harassment" evolved and decried that "sexual harassment remains commonplace." (*Id.* at p. 1.) With respect to language that eventually would be enacted as section 12923, the committee explained that Senate Bill 1300 "would express the Legislature's intent regarding the application of the legal standard for sexual harassment." (*Id.* at p. 3.)

In particular, the language that became section 12923, subdivision (b), was intended to overturn a perceived "de facto 'one free grope rule' under which even physical assault of a victim is not considered sufficiently severe to support a finding of sexual harassment." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1300 (2017–2018 Reg. Sess.) Apr. 17, 2018, p. 10.) Senate Bill 1300 perceived that rule to emanate from *Brooks v. City of San Mateo* (9th Cir. 2000) 229 F.3d 917 (*Brooks*), in which the Ninth Circuit held the plaintiff "did not have a claim for sexual

harassment even though she had been physically assaulted by a co-worker." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1300 (2017–2018 Reg. Sess.) Apr. 17, 2018, p. 10.) Section 12923, subdivision (b), declared the Legislature's rejection of *Brooks* and stated that the opinion "shall not be used" in determining what kind of conduct constitutes a FEHA violation.

Accordingly, section 12923, subdivision (b), was enacted to clarify that, contrary to *Brooks*, a single physical assault may be "harassing conduct" sufficiently severe to sustain a claim of sexual harassment. It was not intended to abrogate this Court's precedent holding that a single instance of abhorrent *speech* by a nonsupervisory coworker, unaccompanied by a physical assault, is insufficient as a matter of law to support a hostile work environment claim.[2]

IV. Section 12923's statistical observation that certain cases are rarely appropriate for summary judgment provides no reason to deny any particular motion.

As this Court has recently confirmed, the purpose of summary judgment is " 'to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute.' " (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542 (*Perry*).) Code of Civil Procedure section 437c, which establishes the summary judgment procedure, was amended in

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[2] Indeed, plaintiff herself asserts that section 12923 "does not effect a 'substantial change' in law" to argue why it should apply to conduct predating its enactment. (RBOM 26, fn. 8.)

1992 and 1993 " 'in order to liberalize the granting of [summary judgment] motions.' " (*Perry*, at p. 542.) Now, summary judgment is no longer viewed as a drastic and disfavored procedure to be used with caution, but rather is seen as " 'a particularly suitable means to test the sufficiency' of the plaintiff's or defendant's case." (*Ibid.*)

Notwithstanding *Perry*, section 12923, subdivision (e), declares that "[h]arassment cases are rarely appropriate for disposition on summary judgment" and that "hostile working environment cases involve issues 'not determinable on paper.' " Plaintiff relies on these general observations by the Legislature to argue that the order granting defendants' motion for summary judgment here should be reversed. (See OBOM 27–28, 32; RBOM 22.) Plaintiff's reliance on section 12923, subdivision (e), is misplaced, however.

The Legislature's general statements in Government Code section 12923, subdivision (e), have no bearing on the resolution of this action, or any other particular action. Hostile work environment claims are not exempt from the summary judgment procedures outlined in Code of Civil Procedure section 437c. Notably, the Legislature, when enacting section 12923, did not amend Code of Civil Procedure section 437c or disapprove of *Perry*'s observations that summary judgment is a particularly suitable means to test a plaintiff's case.

Regardless of whether harassment cases are "rarely" appropriate for summary judgment as a statistical matter (Gov. Code, § 12923, subd. (e)), each FEHA action and each individual

summary judgment motion must be assessed on the particular facts presented (see Code Civ. Proc., § 437c, subd. (c) ["The motion for summary judgment shall be granted if 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"]). If a court were to rely on Government Code section 12923, subdivision (e), to deny a motion for summary judgment, it would be akin to an appellate court relying on the statistical observation that the great majority of appeals are unsuccessful as a reason to affirm. (See Jud. Council of Cal., Rep. on Court Statistics (2020) Fiscal Year 2018–2019 Data and Statewide Trends for California Appellate and Trial Courts, p. 34 [about 79% of civil appeals terminated by written opinion are affirmances].) That statistical observation might be true as a general matter, but it is irrelevant to the judicial function and should not affect a court's analysis or the result in any particular case.

It is noteworthy that in enacting section 12923, subdivision (e), the Legislature endorsed *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243 (*Nazir*). *Nazir* involved competing versions of " 'what happened' " (*id.* at p. 279) and a dispute about the relevant parties' intent (*id.* at p. 283), which likely motivated the Court of Appeal's general observation that many FEHA actions are not resolvable by summary judgment (*id.* at pp. 285–286). But *Nazir* did not imply that harassment claims as a class are immune from summary judgment. Indeed, many harassment claims are ripe for summary judgment, e.g., where the alleged

harassment is by a nonsupervisory employee and the undisputed facts show that the employer took "immediate and appropriate corrective action." (Gov. Code, § 12940, subd. (j)(1); see *Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174, 1185 [summary adjudication was proper on sexual harassment claim where employer was not aware of harassment until it had ceased and conducted a prompt investigation upon receiving plaintiff's complaint].)

Nazir also observed that "many employment cases" are "truly lacking in merit" and "should be disposed of as quickly and efficiently as possible." (*Nazir*, *supra*, 178 Cal.App.4th at pp. 285–286.) Just as this second general observation does not provide a reason to grant summary judgment in any particular action, the observation that certain types of claims are often not appropriate for summary judgment should not weigh against granting summary judgment in any particular case.

CONCLUSION

For the foregoing reasons, section 12923 should not drive this Court's analysis when resolving this action.

August 2, 2021

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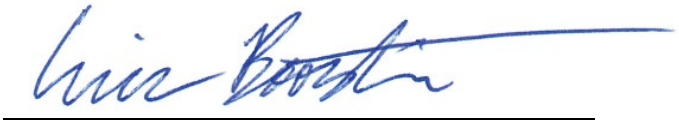
By: 
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(Cal. Rules of Court, rule 8.520(c)(1).)

The text of this brief consists of 2,640 words as counted by the program used to generate the brief.

Dated: August 2, 2021

Eric S. Boorstin

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Bailey v. San Francisco District Attorney's Office et al.
Case No. S265223

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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Cassandra Johnson

Cassandra Johnson

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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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Lower Court Case Number: **A153520**

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