Case No. S265223 No Fee (Gov. Code § 6103)

In The Supreme Court Of The State Of California

TWANDA BAILEY

Plaintiff, Appellant, and Petitioner,

v.

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

Defendant and Respondent.

ON REVIEW FROM THE COURT OF APPEAL FOR THE FIRST APPELLATE DISTRICT, DIVISION ONE, NO. A153520

SUPERIOR COURT FOR THE STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO, NO. CGC 15-549675,
HON. HAROLD KAHN

APPLICATION FOR PERMISSION TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND THE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

Statutes

TABLE OF AUTHORITIES (CONT'D)

Page(s)

Other Authorities

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE COURT:

Pursuant to California Rules of Court, Rule 8.520(f), the amici curiae identified below respectfully request permission to file the attached brief in support of Respondent City and County of San Francisco. This application is filed within 30 days after the filing of the reply brief on the merits and is therefore timely pursuant to Rule 8.520(f)(2).

INTEREST OF AMICI CURIAE

California State Association of Counties. The California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

League of California Cities. The League of California Cities ("Cal Cities") is an association of 477 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee (the "Committee"),

which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as being of such significance.

THE NEED FOR FURTHER BRIEFING

CSAC represents the interests of counties throughout California and Cal Cities represents the interests of cities throughout California. Therefore, both are uniquely situated to present their views and analysis related to this case.

ABSENCE OF PARTY ASSISTANCE

Pursuant to California Rules of Court, rule 8.520(f)(4), *amici* confirm that no party or counsel for a party in the pending appeal authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

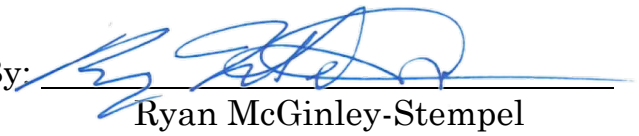
CONCLUSION

CSAC and Cal Cities respectfully request that the Court grant this application for leave to file an amicus curiae brief in support of Respondent.

Dated: August 2, 2021

Respectfully submitted,

RENNE PUBLIC LAW GROUP®

By: 

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AMICI CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND THE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF RESPONDENT

I. INTRODUCTION

As this Court has previously recognized, the racial epithet allegedly uttered in this case has absolutely no place in the workplace, let alone in society. (See, e.g., *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 498, fn. 4.)

Among the spectrum of racial epithets, none may be more viscerally offensive or fraught than the n-word, which has been characterized as "the most noxious racial epithet in the contemporary American lexicon." (*Monteiro v. Tempe Union High School Dist.* (9th Cir. 1998) 158 F.3d 1022, 1034.) It is a phrase that evokes not only an ugly racist history of bondage and subjugation but also the systemic vestiges of that history that persist today.

Any employee that is accused of using the word in the workplace should be swiftly investigated, and if the claims are substantiated, disciplined. Moreover, in certain circumstances, such an employee may be subject to civil liability. But when a coworker allegedly uses the word on a single occasion, a public employer should not be held liable under the Fair Employment and Housing Act ("FEHA") if it promptly responds and no further incidents occur.

Under Plaintiff's view of the law, summary judgment would be unavailable to an employer in any harassment action under FEHA in which a co-worker allegedly utters a single racial epithet. This position overlooks the critical distinction between co-workers

and supervisors under FEHA and Title VII,[1] ignores the City and County of San Francisco's prompt and appropriate response in this case, blurs the lines between negligence and strict liability, and gives employers little margin for error in navigating allegations of harassment. In the context of public employment, this margin rests on the sharpest of razor's edges, as cities, counties, and countless public agencies seeking to swiftly, effectively, and fairly respond to allegations of harassment must also be mindful about civil service rules, collective bargaining agreements, and the constitutional and statutory rights of the accused. Finally, forcing public employers to trial where they promptly respond to an allegation of verbal co-worker harassment that does not recur could inadvertently expand liability for actions of nonemployees. Plaintiff's position would not only cost public employers millions of dollars and valuable public servant time defending meritless suits but also waste scarce judicial resources.

For all of these and the following reasons, the Court of Appeal's judgment should be affirmed.

II. ARGUMENT

A. FEHA Expressly Distinguishes Between Co-Worker and Supervisor Harassment When Determining Employer Liability

FEHA provides that it is an unlawful practice "[f]or an employer … because of race … to harass an employee." (Gov. Code

[1] California courts frequently turn to federal authorities interpreting Title VII for assistance in interpreting FEHA. (See *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 463.)

§ 12940(j)(1).)[2] Harassment actions under FEHA against employers typically turn on two questions: (1) whether the underlying conduct at issue qualified as "harassment" because it was severe or pervasive enough to alter the terms and conditions of the victim's employment; and (2) whether the "employer" can be said to have participated in the underlying harassment. This brief focuses on the second question.

In determining whether the employer is responsible for the underlying harassment, FEHA expressly draws a distinction between supervisors and other types of employees. Section 12940(j)(1) provides that "[h]arassment of an employee … by an employee, *other than an agent or supervisor*, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action." (§ 12940, subd. (j)(1) [emphasis added].) Thus, as this Court has explained, "FEHA imposes two standards of employer liability for … harassment, depending on whether the person engaging in the harassment is the victim's supervisor or a nonsupervisory coemployee." (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1040-1041.)

If the perpetrator is a supervisor, FEHA holds the employer strictly liable, reflecting a presumption that when a supervisor harasses an employee, the employer is responsible for the harassment, too. (See *State Dept. of Health Services*, *supra*, 31 Cal.4th at p. 1042 ["FEHA makes the employer strictly liable for

[2] Unless otherwise noted, all statutory references are to the Government Code.

harassment by a supervisor"]; accord *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 768 ["such actions are company acts that can be performed only by the exercise of specific authority granted by the employer, and thus the supervisor acts as the employer" for purposes of Title VII].)

By contrast, if the perpetrator is "an employee, other than an agent or supervisor," the employer is merely held to a "negligence standard" and is liable "only if the employer (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*, *supra*, 31 Cal.4th at p. 1041, citing § 12940(j)(1); *Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174, 1184 ["An employer is not liable for nonsupervisory, coworker harassment if it takes prompt, reasonable and efficacious remedial action"]; accord *Ellerth*, *supra*, 524 U.S. at p. 768 [same rule for Title VII]; *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 882 [employer not liable if it takes remedial actions "reasonably calculated to end the harassment"].) Put another way, liability is "imposed only if the employer is blameworthy in some way." (*Ellerth*, *supra*, 524 U.S. at p. 769; accord *Brown v. Superior Court* (1988) 44 Cal.3d 1049, 1059, fn. 4 [explaining that a test focusing on "blameworthiness" "sounds in negligence"], cited approvingly in *State Dept. of Health Services*, *supra*, at p. 1041.)

B. Promptly Responding to a Single Alleged Instance of Co-Worker Harassment Relieves an Employer of Liability When the Alleged Harassment Does Not Recur

Once an employer learns of alleged harassment, it "must take adequate remedial measures" that are "reasonably calculated to 1) end the current harassment and 2) to deter future harassment." (*Bradley v. Department of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1612, 1630, citing *Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184, 1192.)

"'The most significant immediate measure an employer can take in response to a [] harassment complaint is to launch a prompt investigation to determine whether the complaint is justified. An investigation is a key step in the employer's response.'" (*Mathieu*, *supra*, 115 Cal.App.4th at p. 1185, quoting *Swenson*, *supra*, 271 F.3d at p. 1193.) "'[A] good faith investigation of harassment may satisfy the 'prompt and adequate' response standard, even if the investigation turns up no evidence of harassment.'" (*Ibid.*, quoting *Swenson*, *supra*, 271 F.3d at p. 1196.) "Obviously, the employer can act reasonably, yet reach a mistaken conclusion as to whether the accused employee actually committed harassment." (*Swenson*, *supra*, 271 F.3d at p. 1196; see also *ibid.* ["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"].)

"An employer has wide discretion in choosing how to minimize contact between two employees, so long as it acts to stop the harassment." (*Bradley*, *supra*, 158 Cal.App.4th at p. 1630,

citing *Swenson*, *supra*, 271 F.3d at pp. 1194-1195.) Indeed, "the reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment." (*Ibid.* [quotation marks omitted].)

In *Swenson*, *supra*, 271 F.3d 1184—which Plaintiff relies on extensively (see Pet'r Reply Br. at pp. 29-33)—the court explained that even a flawed investigation could avoid liability under Title VII. Although the court believed that "the investigation was competent," it explained that "it ultimately doesn't matter" because "[e]ven assuming that the investigation was less than perfect, the Postal Service nevertheless took prompt action to remedy the situation." (*Id.* at p. 1197.) Because "[t]he harassment stopped," the "only possible consequence of a better investigation could have been to make out a stronger case for disciplining" the offending employee. (*Ibid.*) Yet, as the court explained, the "purpose of Title VII [like FEHA] is remedial—avoiding and preventing discrimination—rather than punitive." (*Ibid.*; accord *Shirvanyan v. Los Angeles Community College District* (2020) 59 Cal.App.5th 82, 97 ["The FEHA has a remedial rather than punitive purpose" (quotation marks omitted)].)

Consequently, "[f]ailure to punish the accused harasser only matters if it casts doubt on the employer's commitment to maintaining a harassment-free workplace." (*Swenson*, *supra*, 271 F.3d at p. 1197.) "Where an employee is not punished even though there is strong evidence that he is guilty of harassment, such failure can embolden him to continue the misconduct and encourage others to misbehave. But where the proof of

harassment is weak and disputed, … the employer need not take formal disciplinary action simply to prove that it is serious about stopping … harassment in the workplace." (*Id.* at p. 1197.) Thus, the court explained that "[w]here, as here, the employer takes prompt steps to stop the harassment, liability cannot be premised on perceived inadequacies in the investigation." (*Id.* at p. 1198.)

Similarly, in *Mathieu*, *supra*, 115 Cal.App.4th 1174, the Court of Appeal affirmed summary adjudication in the employer's favor on the plaintiff's claim under section 12940(j)(1) for a co-worker's alleged harassment. The undisputed facts showed that the plaintiff did not complain about her alleged harassment by her co-worker for six months; her supervisor contacted HR within three days of learning of the incident to inquire about the situation and learned that the co-worker had been advised to stop his improper behavior and that the plaintiff had not complained since the warning; her supervisor told her that the co-worker had been admonished and asked her to let her know immediately if any further problems arose; her supervisor contacted her two to three weeks later to inquire about the situation and was told that everything had calmed down; and the plaintiff did not complain to anyone else after the initial complaint about her co-worker's behavior. (*Id.* at pp. 1179-1180, 1184-1185.) "Under those circumstances, the trial court correctly concluded, based on the undisputed facts, that [the employer] acted reasonably with respect to [the plaintiff's] initial complaint" of harassment. (*Id.* at p. 1185.)

Here, similar to the employers in *Mathieu* and *Swenson*, the City took prompt measures to deal with the alleged comment in this case once it learned about the comment and, critically, it did not recur. (See Opn. at pp. 12-17; see also Resp't Ans. Br. at pp. 15-17, 20 & 47, fn. 10; *Bradley*, *supra*, 158 Cal.App.4th at p. 1630 ["the reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment" (quotation marks omitted)].)

According to Plaintiff, the incident occurred on January 22, 2015. (Opn. at pp. 12-13.) Plaintiff did not complain about the alleged incident at that time, yet her supervisor promptly reported the incident to the Office's Assistant Chief of Finance and Administration (Sheila Arcelona) after she overheard Plaintiff talking about it at an after-hours party. (Opn. at pp. 12-13; Resp't Ans. Br. at p. 15.) Arcelona interviewed Plaintiff and Larkin separately about the incident within a week. (Opn. at p. 13.) 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." (Resp't Ans. Br. at p. 16 [quoting record]; Opn. at p. 13.) After these meetings, Arcelona promptly provided a written summary to the Office's Chief Administrative and Financial Officer (Eugene Clendinen). (Opn. at p. 13; Resp't Ans. Br. at p. 16.)

A few months later, the City's Department of Human Resources investigated the alleged incident after Plaintiff complained about it to an attorney from the City Police Department's Legal Division. (Resp't Ans. Br. at p. 17.) An Equal

Opportunity Specialist was assigned to the complaint and met with Plaintiff and her union representative to discuss Plaintiff's allegations. Then, on July 22, 2015, the Department of Human Resources sent a four-page letter to Plaintiff acknowledging "the extreme offensiveness of the 'N' word" and explaining that the alleged statement violated the City's Harassment-Free Workplace Policy and the DA's Office would be taking appropriate corrective action even though it did not believe that the comment created a hostile work environment. (Opn. at p. 13; Resp't Ans. Br. at p. 17.)

Eight days later, on July 30, 2015, Clendinen met with Larkin and required her to execute an acknowledgement of the City's harassment-free workplace policy, a copy of which was placed in her personnel file and sent to the City's Department of Human Resources. (Opn. at p. 13; Resp't Ans. Br. at p. 17.) Later that Fall, when Plaintiff told the City for the first time that she did not want to cover for Larkin's duties when Larkin was out of the office (which did not require the two to interact), she was transferred to a different assignment within two weeks. (Resp't Ans. Br. at pp. 20 & 46-47, fn. 10.) The January 22, 2015 incident is the only time Plaintiff has claimed that anyone in the Office engaged in any discriminatory conduct or made any comments towards her on the basis of her race. (Opn. at p. 7, fn. 3; Resp't Ans. Br. at p. 16.)

As the foregoing amply demonstrates, measured by their speed and "ability to stop harassment by the person who engaged in harassment," (*Bradley*, *supra*, 158 Cal.App.4th at p. 1630), the City's remedies were eminently reasonable. An expectation of

more from an employer under the circumstances would be difficult if not impossible to meet and would unduly blur the lines between strict liability and negligence.

C. Plaintiff's Efforts to Hold Employers Strictly Liable for Isolated Incidents of Co-Worker Harassment Should Be Rejected

Plaintiff appears to contend that summary judgment is unavailable for employers seeking to show that they took immediate and appropriate corrective action in response to learning about allegations of harassment even when it is undisputed that the alleged comment in this case was never repeated. (Pet'r Reply Br. at pp. 30-33.)[3] Under plaintiff's view of the law, employers would be forced to go to trial any time an employee alleges that a co-worker used a racial epithet on a single occasion, amounting to a standard approaching strict liability. Plaintiff's de facto strict liability standard is contrary to FEHA's plain language and purpose, ignores the extensive efforts of public employers to respond to allegations of employee misconduct without violating the rights of the accused, and could lead to a

[3] Citing *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243 and a recent statutory amendment to FEHA enacted in response to the me-too movement (§ 12923(c)), Plaintiff argues that "FEHA harassment cases should only rarely be resolved on summary judgment." (Pet'r Reply Br. at p. 21.) But in *Nazir*, the Court of Appeal "observe[d] 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*, *supra*, at p. 286 [emphasis added].) Here, by contrast, the appropriateness of the City's response does not turn on any of the issues that the *Nazir* court said were "not determinable on paper."

breathtaking expansion of costly and wasteful litigation for blameless public employers.

1. Requiring Employers to Face Trial Based on a Co-Worker's Single Use of a Racial Epithet Conflicts with FEHA's Text and Intended Purpose

In Plaintiff's view, because a co-worker's alleged use of a racial epithet on one occasion gives rise to a triable issue of fact as to harassment, it also necessarily gives rise to a triable issue of fact as to whether an "employer's response is 'immediate and appropriate.'" (Pet'r Reply Br. at p. 30; see also Pet'r Opening Br. at pp. 39-40.) Not so. As discussed above, FEHA expressly distinguishes between harassment by co-workers and supervisors, imposing a strict liability standard for supervisor harassment but a negligence standard for co-worker harassment. (See § 12940, subd. (j)(1).) Plaintiff's arguments effectively ignore that distinction, reflexively and unjustifiably depriving employers of the ability to show on summary judgment that they took "immediate and appropriate corrective action" to prevent any further harassment upon learning of the alleged misconduct.

Punishing employers for a co-worker's alleged use of a racial epithet on a single occasion not only conflicts with FEHA's "'remedial rather than punitive purpose,'"[4] it also runs counter to

[4] *Shirvanyan*, *supra*, 59 Cal.App.5th at p. 97, quoting *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1019; see also § 12920 ["It is the purpose of this part to provide effective remedies that will eliminate these discriminatory practices"].)

the Legislature's response to this Court's decision in *Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132.

In *Carrisales*, *supra*, 21 Cal.4th 1132, this Court held that under a prior version of the statute, an employee could not be held personally liable to a coworker for harassment under FEHA. (*Id.* at p. 1140.) This Court recognized that under this interpretation of the statute, there might be circumstances "in which a plaintiff would not receive a monetary recovery." (*Id.* at p. 1137.) For example, "[i]f a person who is neither a supervisor nor an agent commits acts of harassment not amounting to a tort outside of the FEHA, and the employer takes immediate and appropriate corrective action when it is or should be aware of the conduct (for example, when the victim or someone else informs the employer), the victim would have no recourse beyond the employer's corrective action." (*Id.* at p. 1137.) But despite this possibility, this Court saw "no suggestion in the FEHA of an intent to involve the courts in coworker harassment cases when the employer does act immediately and appropriately." (*Ibid.*)

The Legislature amended FEHA shortly thereafter to "impose[] on nonsupervisory coworkers the personal liability that *Carrisales* said the FEHA had not imposed." (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 471.) Specifically, the Legislature provided that "[a]n employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity

knows or should have known of the conduct and fails to take immediate and appropriate corrective action." (§ 12940(j)(3).)

In enacting this right of action against coworkers, the Legislature knew that it was filling the gap identified by this Court:

> [I]n certain cases, although the employee has suffered damages due to unlawful harassment by a coworker, *the employer cannot be held liable. This is true, for example,* if the employer did not know (and should not have known) of the harassment, or *if the employer knew but took immediate and appropriate corrective action.*

(Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1856 (1999-2000 Reg. Sess.) Apr. 11, 2000 [emphasis added]; see also *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 646 ["Committee reports are often useful in determining the Legislature's intent"].)

The Legislature recognized that this remedial gap could be most pronounced where the underlying conduct by nonsupervisory employees amounted to harassment but did not continue past the time when the employer had the opportunity to take corrective action. Yet rather than extend employer liability further to cover such instances (e.g., strict liability), the Legislature permitted victims of harassment to sue their co-workers. As the Assembly Committee on Judiciary's analysis of the bill explained, "for the employer to be held liable *there must be, in addition to the requisite severity of conduct* (sufficient to create an abusive environment), *some duration of the conduct in time (past the time when the employer has the opportunity to take corrective action*)." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1856 (1999-

2000 Reg. Sess.) Apr. 11, 2000 [emphasis added]; see also *Emerson Electric Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1109 [relying on a report by the Assembly Committee on Judiciary to interpret provision of the Code of Civil Procedure that was amended to supersede a prior judicial decision].)

Here, the alleged conduct falls squarely into the category that the Legislature contemplated would *not* result in employer liability but could result in co-worker liability. It is undisputed that the alleged racial harassment did not last for any duration in time past the time when the City and County had the opportunity to take corrective action. Rather, as the Legislature expressly contemplated in amending FEHA after *Carrisales*, Plaintiff's remedy is to sue her co-worker for the alleged comment. (See § 12940, subd. (j)(3) ["An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, *regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action*."], emphasis added.) If this case is not amenable to summary judgment, it is hard to envision one that is—effectively creating a strict liability regime in which employers must face trial for allegations of one-time harassment, regardless of how prompt their actions are in response to learning of the alleged harassment.

2. Plaintiff's De Facto Strict Liability Standard Ignores Public Employers' Extensive Efforts to Promptly, Effectively, and Fairly Respond to Allegations of Employee Misconduct

Anti-harassment statutes like FEHA and "Title VII in no way require[] an employer to dispense with fair procedures for those accused or to discharge every alleged harasser." (*Swenson*, *supra*, 271 F.3d at p. 1196.) As the Ninth Circuit explained in concluding that the U.S. Postal Service should not be held liable under Title VII for its response to the plaintiff's allegations of co-worker harassment, courts must be "mindful of the difficulty employers face when dealing with claims of harassment, finding themselves between the rock of an inadequate response under Title VII [or FEHA] and the hard place of potential tort liability for wrongful discharge of the alleged harasser." (*Ibid.*, quotation marks omitted.)

Plaintiff's de facto strict liability standard ignores this dichotomy and overlooks that public employers take great care to promptly and effectively respond to allegations of employee misconduct without violating the rights of the accused—rights that flow from state statutes, collective bargaining agreements, civil service rules, and the state and federal constitutions.

For example, the Meyers-Milias Brown Act ("MMBA") "imposes on local public entities a duty to meet and confer in good faith with representatives of recognized employee organizations, in order to reach binding agreements governing wages, hours, and working conditions of the agencies' employees." (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment*

Relations Bd. (2005) 35 Cal.4th 1072, 1083; see also § 3500 et seq.)[5] Such agreements—which become binding when the governing body of the public agency votes to accept them (*Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 335)—often contain provisions governing the investigation and imposition of discipline, including for alleged harassing behavior. (See, e.g., *Swenson*, *supra*, 271 F.3d at p. 1196 [employer had "entirely legitimate reason for declining to discipline … and resorting to other methods of remedying the situation" where employee "was covered by a collective bargaining agreement" and there was "insufficient evidence to sustain a charge of harassment"].)

Beyond the contractual restrictions that flow from collective bargaining statutes such as the MMBA, public employers must be mindful of constitutional concerns when responding to allegations of employee misconduct. Most public employees in California have a property interest in their continued employment, position, or compensation, and may not be deprived of that property interest without due process. (*Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 206-207, 215-216; see also *Jones v. Omnitrans* (2004) 125 Cal.App.4th 273, 279; Holtzman & Hartinger, Cal. Practice

[5] "State employees and those of school districts were excluded from the MMBA [citation], but separate statutes were later enacted to cover these government workers." (*County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 916; see also *id.* at p. 916, fn. 9 [discussing Ralph C. Dills Act and Educational Employment Relations Act (citing §§ 3512 et seq. & 3540 et seq.)].)

Guide: Public Sector Employment Litigation (The Rutter Group 2021) ¶¶ 8:45-8:57, 8:250-8:279 [cataloguing employment actions that trigger due process protections].)

When a public employee has a property interest in continued employment, compensation, or benefits, due process requires that the employer provide minimum procedural safeguards before taking action that adversely affects the employee's property interest. Generally, the employee is entitled to the following minimum predeprivation safeguards: (1) notice of the proposed action; (2) grounds for the proposed action; (3) a copy of the charges and materials upon which the proposed action is based; and (4) the opportunity to respond to the proposed action, either orally or in writing. (*Skelly v. State Personnel Bd.*, *supra*, 15 Cal.3d at p. 215; *Jones v. Omnitrans*, *supra*, 125 Cal.App.4th at p. 280; Holtzman & Hartinger, *supra*, Cal. Practice Guide: Public Sector Employment Litigation (The Rutter Group 2021) ¶¶ 8:300-8:309.)

Although "due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action, … due process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective." (*Skelly*, *supra*, 15 Cal.3d at p. 215.) If the employee is not satisfied with the outcome of the hearing, she may petition for rehearing and further may seek review by means of a petition for writ of administrative mandamus filed in the superior court. (*Id.* at 206.) If discipline is imposed, the employer must provide the employee an opportunity for a full evidentiary hearing within a reasonable time thereafter.

(*Townsel v. San Diego Metropolitan Transit Develop. Bd.* (1998) 65 Cal.App.4th 940, 949-951.) This right may be satisfied by grievance arbitration under a collective bargaining agreement, provided the hearing procedures meet due process requirements. (*Jones v. Omnitrans*, *supra*, 125 Cal.App.4th at pp. 280-281.)

Procedures for challenging discipline vary by type of agency and can even vary among agencies of the same type. For example, the state civil service law sets out the procedures for state employees (Cal. Const. Art. VII, §§ 2, 3; *State Personnel Bd. v. Department of Personnel Administration* (2005) 37 Cal.4th 512, 527); the Education Code to a large extent details the procedures for school district and community college employees (Educ. Code, §§ 45305 et seq., 88124 et seq.); and charters, ordinances and resolutions detail procedures for local government employees. (Gov. Code, §§ 45000 et seq.; see *Taylor v. Crane* (1979) 24 Cal.3d 442, 447 [pursuant to charter, city council passed ordinance creating personnel board and granting city employees right to appeal discipline to board]; *Zuniga v. Los Angeles County Civil Service Comm'n* (2006) 137 Cal.App.4th 1255, 1259 [county charter required civil service commission to adopt rules for appeal of "discharges and reductions of permanent employees"].)

An employee who successfully appeals discipline or discharge may be entitled to reinstatement, backpay, restoration of lost benefits, compensation for expenses incurred in pursuing the appeal, seniority credit for time off pending reinstatement, transfer or location change, and expungement of the disciplinary action from the employee's personnel record. (See, e.g., Educ.

Code, § 45307 [classified school employees]; Gov. Code, § 19583 [state employees].)

Stigmatizing allegations of misconduct also potentially implicate constitutional liberty interests. (See *Tibbetts v. Kulongoski* (9th Cir. 2009) 567 F.3d 529, 535-536 ["A liberty interest is implicated in the employment termination context if the charge impairs a reputation for honesty or morality"], quotation marks omitted.) When an employer proposes to discharge a public employee based on charges of misconduct that could negatively affect the employee's reputation or ability to earn a living, the employee must be afforded an opportunity to refute the charges before discharge becomes effective. (*Board of Regents of State Colleges v. Roth* (1972) 408 U.S. 564, 573; *Tibbetts*, *supra*, 567 F.3d at p. 536; see also *Licausi v. Allentown School Dist.* (E.D. Pa. Feb. 4, 2020) 2020 WL 550614, at *6 [public employee "satisfie[d] the 'stigma' prong of the [stigma-plus] test because he allege[d] stigmatizing statements—such as [his] being a racist, violating collective bargaining and privacy rights, and being professionally inadequate—that were both false and made publicly"].)

Other constitutional protections, such as the First Amendment, may also factor into disciplinary decisions regarding allegations of employee misconduct. For example, in *Moser v. Las Vegas Metropolitan Police Department* (9th Cir. 2021) 984 F.3d 900, the Ninth Circuit held that a police department must face trial on a SWAT sniper's claim that his disciplinary transfer and demotion violated the First Amendment even though the sniper had written in a Facebook comment that it was "a shame" that a

suspect who shot another police officer "didn't have a few holes in him…" when the suspect was apprehended. (*Id.* at p. 903.) The court recognized that some statements, such as racial slurs, may be so patently offensive that the government can reasonably predict they would cause workforce disruption and erode public trust. (*Id.* at p. 910, fn. 8.) But where it is disputed whether such a statement was made, public employers may well be limited in their ability to impose discipline. (See *ibid.* [explaining that the plaintiff's statement in that case was "ambiguous" so it was "not clear cut whether it would have caused disruption," requiring the government to "provide some evidence to support its prediction"].)

Public employers go to great lengths to ensure that allegations of harassment are responded to swiftly, effectively, and fairly. Plaintiff's effort to hold employers strictly liable for isolated incidents of co-worker harassment ignores these efforts and would penalize public employers for abiding by their statutory and constitutional obligations.

3. Requiring Public Employers to Face Trial for Isolated Instances of Harassment Would Reap Unintended Consequences and Unduly Burden the Public Fisc

Amici also fear that Plaintiff's construction of FEHA could dramatically expand public employers' litigation exposure for one-time verbal harassment by nonemployees because the statute uses the same "fails to take immediate and appropriate corrective action" language to trigger liability for harassment by co-workers and nonemployees. "[A]n employer may be held liable under the FEHA for [] harassment by clients or customers." (*Salazar v.*

Diversified Paratransit, Inc. (2004) 117 Cal.App.4th 318, 328.) Section 12940(j)(1) provides that "[a]n employer may also be responsible for the acts of nonemployees, with respect to harassment of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace, if the employer, or its agents or supervisors, *knows or should have known of the conduct and fails to take immediate and appropriate corrective action*." (§ 12940(j)(1) [emphasis added].) "In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered." (*Ibid.*)

Courts have held that employers may be liable under this provision for harassment committed by (among others): clients of a paratransit transportation company (*Salazar*, *supra*, 117 Cal.App.4th 318); trespassers (*M.F. v. Pacific Pearl Hotel Management LLC* (2017) 16 Cal.App.5th 693, 701); residents of halfway house facilities wherein federal and state prisoners were housed to transition them into the workplace and society prior to their full release on parole (*Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 55); and residents at a Veterans Affairs hospital (*Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 918-919).

Public agencies across California provide services to millions of residents every day and rely on thousands of independent contractors. If one of these individuals regrettably uses a racial epithet towards a public employee on a single occasion, what type

of response (if any) could the public agency take to avoid liability under FEHA? If the immediacy and appropriateness of the City's corrective action cannot be resolved on summary judgment, then it is hard to envision any cases involving a single epithet that can be resolved through dispositive motion practice. Because the "immediate and appropriate corrective action" language is the same for harassment committed by co-workers and nonemployees, this could require blameless public agencies to defend even the most frivolous FEHA actions to jury and would closely resemble strict liability. Yet that appears to be exactly what Plaintiff's view of the law would entail, costing public agencies (and taxpayers) millions of dollars in needless litigation expenses and valuable public servant time over meritless claims while wasting scarce judicial resources. This Court should reject that invitation.

III. CONCLUSION

For the foregoing reasons, the Court of Appeal's judgment should be affirmed.

Dated: August 2, 2021

Respectfully submitted,

RENNE PUBLIC LAW GROUP®

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CERTIFICATION OF WORD COUNT
(California Rules of Court, Rules 8.520(c)(1) & 8.204(c)(1))

The foregoing application and brief contains 5,874 words (including footnotes, but excluding the table of contents, table of authorities, certificate of service, and this certificate of word count), as counted by the Microsoft Word processing program used to generate the brief.

Dated: August 2, 2021 RENNE PUBLIC LAW GROUP®

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PROOF OF SERVICE

Case Name: *Bailey v. City and County of San Francisco*
Case No.: S265223

I am not a party to the within action, am over 18 years of age. My business address is 350 Sansome Street, Suite 350, San Francisco, CA 94104.

On August 2, 2021, I served the following document(s):

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I declare, under penalty of perjury that the foregoing is true and correct. Executed on August 2, 2021, in Dublin, California.

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