S265223

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.

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First Appellate District, Division One
No. A153520

San Francisco Superior Court
No. CGC 15-549675

PETITION FOR REVIEW

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

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TWANDA BAILEY

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INTRODUCTION AND REASONS FOR REVIEW

Plaintiff Twanda Bailey petitions for review of the unpublished decision ("Decision") of the First Appellate District, Division One ("CA"), affirming the summary judgment for defendants City and County of San Francisco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

1. In affirming the summary judgment, the CA held on Bailey's hostile work environment/unlawful harassment claim that a co-worker's, as opposed to a supervisor's, one-time racial slur, telling Bailey "You n---rs are so scary," which Bailey heard and experienced as "scary n---r," could not create a hostile work environment as a matter of law. (Slip Op. 5-12, esp. 9-12.) The CA's conclusion contradicts California and Federal law affirming that a single instance of unlawful harassment, which may be verbal, may be actionable (see, e.g., §12923(b); *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 788; EEOC Compliance Manual (CCH 2018) Section 15, Race and Color Discrimination §15-VII(A)), with the "N---r" epithet universally recognized as the most serious of all racial slurs (EEOC Compliance Manual, §15-VII(A) at 7222); *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

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

Negro"); *Agarwal v. Johnson* (1979) 25 Cal.3d 923, 941, 946-949 ("n-word" may constitute actionable outrageous conduct when said by supervisor or if the victim is especially susceptible); see also *Ayissi-Etoh v. Fannie Mae* (D.C. Cir. 2013) 712 F.3d 572, 580 (Kavanaugh, J., concurring) ("That epithet has been labeled, variously, a term that 'sums up…all the bitter years of insult and struggle in America'"); *Spriggs v. Diamond Auto Glass* (4th Cir. 2001) 242 F.3d 179, 185, emphasis added ("Far more than a 'mere offensive utterance,' *the word 'nigger' is pure anathema to African Americans*…"; "*it is degrading and humiliating in the extreme*")[2]

2. The CA independently ruled that City/DAO could not be held liable for any hostile work environment/unlawful harassment because as a matter of law they "immediately and appropriately" responded to the racial slur by counseling the perpetrator not to use racial slurs and the slur was not repeated. (Slip Op. 12-17.) However, an employer's affirmative duty to address and remedy unlawful harassment (§12940(j)(1); 2 Cal. Code Regs ("CCR") §11023(a)), requires more than merely addressing the perpetrator, but extends to ensuring that the workplace as a whole sees and understands that the offending conduct will be taken seriously and not be tolerated. (See, e.g., *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 881, 882 (discipline must be both "proportionat[e] to the seriousness of the offense" and

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

employer's condemnation sufficiently strong to "persuade potential harassers to refrain from unlawful conduct" in order to "maintain a harassment-free working environment"); *Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184, 1192-1196.) The CA ignored this governing broader standard, despite evidence that neither the perpetrator nor anyone else saw or experienced the "counseling" as discipline at all, let alone discipline appropriate to the offense. (2.AA.243:22-23 ¶7 (Bailey); 2.AA.468:19-469:25, 475:16-17, 476:18-478:12, 482:6-17 (Larkin); 4.AA.750-751 (Arcelona).) As importantly, the CA ignored abundant evidence that the City/DAO's response also included, among other things, the HR Manager's deliberate obstruction and attempted sabotage of Bailey's harassment complaint and her repeated threats against Bailey for pursuing her complaint. (Pet. for Rehearing at 15-19.)

3. Lastly, the CA ruled that Bailey's retaliation claim conclusively failed because none of the above-referenced misconduct, including the triggering racial slur and the DAO HR Manager's malfeasance in responding to Bailey's harassment complaint, could materially change the terms and conditions of Bailey's employment so as to constitute an actionable adverse employment action as a matter of law. (Slip Op. 17-20.) The CA's Decision, however, directly conflicts with this Court's standards governing retaliation claims: (a) a hostile work environment is itself an actionable adverse employment action (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1056 fn. 16); (b) the retaliatory actions must be assessed "collectively" as an integrated whole (*id*. at 1052 and fn. 11, 1053-1056); and (c) in all cases "[FEHA] protects an employee against unlawful discrimination with respect…to…the *entire spectrum of employment*

actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement"; and that "the phrase 'terms, conditions or privileges' of employment must be *interpreted liberally and with a reasonable appreciation of the realities of the workplace* in order to afford employees the *appropriate and generous protection* against employment discrimination that FEHA was intended to provide" (*id*. at 1052-1055 and fns. 11-14, emphasis added).

FEHA's guarantees and protections against workplace discrimination, harassment and retaliation constitute civil rights embodying fundamental state policy, which must be liberally construed in furtherance of its salutary goals. (§§12920, 12921(a), 12993(a); 2 CCR §11006; *Yanowitz*, 36 Cal.4th at 1153-1154 and fn. 14; *Flannery v. Prentice* (2001) 26 Cal.4th 572, 584; *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 220; *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1157; *Aguilar v. Avis Rent A Car* (1999) 21 Cal.4th 121, 129.)

The CA's ruling here is fundamentally inconsistent with the governing standards on each of these issues. Measured against the appropriate standards applied to the facts taken in Bailey's favor, the CA's ruling here is unconscionable, rendering FEHA's fundamental protections a near nullity, and directly contradicting both the letter and spirit of the Legislature's recent clarification of California anti-harassment law. (§12923(a)–(e), codifying Stats 2018, ch. 955 (SB 1300).) Protections against workplace harassment are among FEHA's most important guarantees and are of statewide importance. This Court should take review in order to make clear the correct California standards governing unlawful workplace harassment claims.

ISSUES PRESENTED FOR REVIEW

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

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

(b) Whether the City/DAO's failure to take immediate and appropriate corrective action in response to the racial slur (§12940(j)(1)) is a triable issue for the jury where the record shows, among other things, that the DAO Human Resources Department Manager (i) deliberately obstructed and undermined Bailey's harassment complaint, ultimately destroying her personnel file; (ii) repeatedly threatened and harassed Bailey for pursuing her complaint; and (iii) refused for nine months to separate Bailey from her harasser, instead forcing Bailey to work closely with her?

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

RESPONSE TO THE CA'S SUMMARY OF FACTS

The CA Decision's factual summary sketches only an outline of the facts material to Bailey's claims, omitting important evidence providing necessary context for the initial slur against Bailey and the following course of the City/DAO's responses. A jury would be entitled to consider that fuller context, i.e., the totality of circumstances (Gov. Code §12923(c); *Yanowitz*, 36 Cal.4th at 1055-1056), in assessing Bailey's harassment and retaliation claims. On summary judgment, the Court must assume the jury would find in Bailey's favor on all material facts and relevant inferences, and must liberally construe the evidence in her favor, resolve all ambiguities, doubts and credibility issues in her favor, and accept her evidence and all reasonable inferences therefrom as true. (*Id.* at 1037; *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 857; *Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1036.) Accordingly, as in her rehearing petition below, Bailey will summarize her full account consistent with these settled standards.

I. BAILEY'S EXEMPLARY WORK PERFORMANCE

The Decision notes that Bailey historically received favorable performance reviews over the course of her career at the DAO, but misses the most salient point, that she was consistently punctual, courteous and responsive to her department coworkers and the public (2.AA. 241 ¶3),[3]

[3] The written compliments from DAO attorneys SFPD officers described Bailey's "conscientiousness," "utmost professionalism," "attention to detail," "pleasant and courteous demeanor," "commitment and dedication to her work," "high moral character," and "organizational skills and…strong work ethic." (AA.241:18-26 ¶3; see also 2.AA.241:24-25 ¶3 (community recognition).)

which strengths contrast starkly with the alleged attendance and attitude problems her June 2015 Performance Review noted, deficiencies stemming directly from, and further amplifying, the emotional trauma Bailey suffered from Larkin's racial slur and DAO's failure to take sufficient corrective action in response to the slur, and their combined effect on Bailey's ability to do her job. (§12923(a); 2.ER.272-273.)

While the June 2015 Performance Review's overall performance rating stayed the same–which the CA improperly found determinative–a jury could reasonably give significantly more weight to the noted deficiencies, both as evidence reflecting the DAO's disregard of Bailey's work-related trauma, and as part of the hostile work environment arising from the original slur.

II. LARKIN'S JANUARY 22, 2015 RACIAL SLUR

The Decision's recitation of Larkin's January 22, 2015, racial slur incident itself hardly touches on its legislatively mandated "totality of circumstances." (§12923(c).)

First, Larkin leveled not just the "n-word" slur, but said "you n---rs are so scary," effectively calling Bailey a "scary n---r." (Slip Op. 2; 2.AA.241-242 ¶4, 389-391, 394-397; 2.AA.282 ¶3, 285 ¶3, 288 ¶3.) The courts have universally emphasized that the "n-word" by itself is the worst possible slur against African Americans in light of our nation's ongoing history of their slavery, oppression, exploitation and persecution. (*Supra* at 6-7.) Here, a jury could reasonably find that the intensified slur even more strongly evoked the virulent image of African Americans as inherently dangerous, as sub-humans to be feared.

Second, the Decision fails to acknowledge that Bailey had a specific and legitimate basis for fearing retaliation if she complained about Larkin's slur. Bailey knew that Larkin had previously used her close friendship with the DAO's Human Resources Manager, Evette Taylor-Monachino, who would be responsible for any EEO complaint, to make false allegations against other African-American women who were subsequently removed from the office. (2.AA.242:2-6 ¶4, 243:19-24 ¶7; 1.AA.99-101; 2.AA.399:9-400:17.) Accordingly, very much like a slur from a supervisor, Bailey experienced the slur as both a devastating racial insult, and one that posed an immediate threat to her position in the DAO. Given this context, a jury could reasonably find not just that Bailey's hesitance about reporting the event was understandable, but that it accurately reflected the objectively hostile work environment Larkin's slur created.

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

Contrary to the Decision's finding, City/DAO's response to Larkin's slur and Bailey's workplace trauma was both deficient on its own terms and disregards the full adverse import of their response.

First, the response the Decision found sufficient consisted of only two meetings with Larkin, the first with Sheila Arcelona, Bailey's overarching supervisor, who advised Larkin that racial slurs were unacceptable, and the second ***six months later*** where Eugene Clendinen, chief assistant to DA Gascon, had her sign for receipt of the City's Harassment-Free Workplace Policy (2.AA.307-308, 334; 2.AA.542-543).

No discipline or warning that future derelictions would be disciplined was imposed. (*Id*.) Moreover, when Larkin denied making the slur,[4] Clendenin closed he matter. (2.AA.336:7-21 ("no further action was going to be taken")), thereby never interviewing Bailey's witnesses (2.AA.333), all of whom have confirmed Bailey's testimony, including about Larkin's relationship with Taylor-Monachino, and impeached Larkin's denials (2.AA.242:6-9 ¶4; 2.AA.282 ¶¶3-4 (Collins); 2.AA.285 ¶¶3-4 (Mathis-Ward); 2.AA.288 ¶¶3, 6 (Mark); 2.AA.394:11-398:17, 396:24-25 (Bailey Depo.)).

Arcelona did not regard this response as an adequate discipline. (4.AA.750-751.) Neither did Bailey (2.AA.243:22-23 ¶7), or even Larkin, who was barely aware of Bailey's complaint and was essentially untouched by the entire episode (2.AA.468:19-469:25, 475:16-17, 476:18-478:12, 482:6-17).

City HR Department did even less. Its April 24 letter only stated it had "received" Bailey's complaint[5] and would see if her charges were timely and fell within the City's EEO "jurisdiction." (2.AA.250.) By its July 22 letter the City refused to conduct any investigation, stating (1) despite the "n-word's "extreme offensiveness" "unlawful[ly] violating the City's Harassment-Free Workplace Policy (2.AA.594), it wasn't severe

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[4] The Decision treats Larkin's denial as somehow impeaching Bailey's charge. A jury, however, could reasonably read that denial as exposing Larkin's lack of remorse or responsibility for her action, which actually impeaches the sufficiency of DAO's response.

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

enough to "create an abusive working environment," and (2) Taylor-Monachino's refusal to file Bailey's complaint and workplace "slights" were not adverse employment actions constituting unlawful retaliation (2.AA.252-254). Although the letter asserted that Larkin and Taylor-Monachino would be disciplined (*id*.), this never happened (*infra* at 17, 18-19).

IV. THE DAO'S OTHER IMMEDIATE, ONGOING AND PATENTLY INAPPROPRIATE RESPONSE TO LARKIN'S SLUR AND BAILEY'S COMPLAINT.

The Decision consistently minimizes DAO's transparently deficient response to Larkin's slur and Bailey's resulting trauma and turns a blind eye to Taylor-Monachino's hostile refusal as DAO HR Manager to fairly respond to Bailey's subjugation to Larkin's racial slur. A jury, however, could find that DAO's response, taken as a whole, was neither immediate nor appropriate, that it effectively condoned if not ratified Larkin's racial slur, and so altered a critical term and condition of her employment–her right to expect that violations of FEHA's policies protecting employees' core civil rights would be treated seriously, fairly and objectively–so as to support her retaliation claim.

(1) Failure to Separate. Through Taylor-Monachino, the City/DAO refused from the start and for almost ten months thereafter to implement one of the most commonly effective remedial measures, separating the parties so that the situation wouldn't fester. (Chin, Employment Litigation (Rutter Group 2017) §10:423.) With Clendinen's deference, Monachino-Taylor so decided despite Arcelona's repeated requests that the parties be separated. (2.AA.243:4-5 ¶6; 2.AA.546-547, 547-551 (Arcelona); 2.AA.320-321, 322-323, 323-325, 364-367 (Clendinen).)

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

The Decision ignores that Bailey repeatedly complained to Arcelona about the ongoing emotional trauma of covering for Larkin (2.AA.549-551 (Arcelona)), which was noticeably affecting her job performance (2.AA.246:11-26 ¶13, 267, 269; 272-273 (Bailey); 2.AA.562-571 (Arcelona); 2.AA.275 (Dr. Savon, Bailey's psychiatrist).) Arcelona accordingly repeatedly asked Taylor-Monachino and Clendinen to separate Bailey and Larkin, but these requests were refused. (2.AA.549-551, 561-562, 577.) Not until November 2015, almost ten months after the slur, did Clendinen finally transfer Larkin. (2.AA.325-326, 364-367). Arcelona knew no reason why Larkin could not have been transferred earlier. (2.AA.577:5-18.)[6]

(2) Taylor-Monachino's Obstruction of Bailey's EEO Complaint. Although Bailey recounted the January 22 encounter with Larkin in her January 29 meeting with Taylor-Monachino and Arcelona (2.AA.242-243 ¶6; 2.AA.400:21-403:12), Taylor-Monachino chose not to record it as a

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

formal complaint or provide the required notice to the City's HR Department (2.AA.243 ¶¶6-7; 2.AA.413:11-414:7, 416:13-15 (Bailey); 2.AA.252 (July 22 City HR letter); 2.AA.338:18-21, 340, 357-358 (Clendinen).

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

(3) Taylor-Monachino's Criticism/Ostracism of Bailey. While Bailey's EEO complaint was still pending, and despite her role as DAO HR Manager in charge of EEO matters, Taylor-Monachino began ostracizing, slighting and criticizing Bailey during in-office encounters, culminating in her August 12 self-initiated confrontation with Bailey, threatening her with "you're going to get it!" (2.AA.243:13-17 ¶6, 244 ¶9, 245-246, 247 ¶¶12-13, 15; 2.AA.257-258.) Despite sustaining another employee's complaint against Taylor-Monachino for a similar out-of-control incident the next day (2.AA.288 ¶¶4-5, 291-292, 294 (Mark); 2.AA.244:23-27 ¶9), DAO rejected Bailey's complaint (2.AA.245 ¶11, 263). This last straw resulted in

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[7] "Remedial" actions targeting the victim are improper. (*Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522, 1529.) The threat to silence Bailey violates the recent FEHA amendments: "condition of…continued employment" turning on the employee's agreement not to disclose information about "unlawful acts in the workplace" is "contrary to public policy and is unenforceable." (§12964.5(a)(2), (b).)

Bailey's near-emotional breakdown. (See AOB.19-21; 2.AA.245-247 ¶¶12-14, 246:8-14 ¶13; see 2.AA.550-553, 571, 575-576 (Arcelona); 2.AA.318-319, 327-332, 382-384 (Clendinen)); 1.AA.131:11-24; 2.AA.425:13-416:4 (Bailey).)

(4) 2015 Performance Report. On June 30, 2015, Bailey's Performance Report for the first time criticized her for allegedly excessive absences, and insufficient co-worker courtesy and cooperation with supervisors. (2.AA.265-271, esp. 267 nos. 10-11, 269; 2.AA.246:15-16.) These qualities starkly contrast with Bailey's earlier noted strengths. (2.AA. 241 ¶3.) Bailey's written rebuttal explained that any issues stemmed from her ongoing emotional distress following Larkin's racial slur and DAO's decision forcing her to work with Larkin. (2.AA.272-273; 2.AA.246:15-26 ¶13; 1.AA.113-114; see 2.AA.423:17-424:11, 425:4-11, 427:1-12, 448:8-451:22, 452:18-453:13, 456:4-461:11.) Still, DAO did nothing, failing to address the situation until November, when Clendinen finally transferred Larkin to another DAO department. (2.AA.325:16-326:15 (Clendinen); 2.AA.549-551, 577 (Arcelona).)

(5) DAO's Open Tolerance of Taylor-Monachino. On October 16, 2015, instead of discharging Taylor-Monachino for her malfeasance and subversions of duty, DAO chose to keep her as HR Manager, but transfer major duties, including EEO matters, to an additional full time "Senior Personnel Analyst" (2.AA.244-245 ¶10, 260; 2.AA.353, 4.AA.730-732 (Clendinen)), thereby plainly signaling to staff who DAO would and would not protect (2.AA.244-245 ¶10). Taylor-Monachino was not forced out until 2017, after years of malfeasance, which included destruction of Bailey's personnel records. (2.AA.243:24-28 ¶7.)

(6) Bailey's Serious Emotional Condition. The Decision ignores or minimizes Bailey's emotional trauma stemming from both Larkin's slur and Taylor-Monachino's hostile campaign against her. Although DAO management was well aware of Bailey's emotional distress (2.AA.318-319, 328-332, 382-384 (Clendinen); 2.AA.551-552, 571, 575-576, Arcelona)), and that this distress was manifesting in work performance issues (2.AA.267, 268, 272-273), DAO management nonetheless failed to follow-up on Bailey's response to the Performance Report (2.AA.575-576), or her psychiatrist's August letter (2.AA.247:2-6 ¶14, 275, 328), or otherwise "immediately and appropriately" address Bailey's distress (§12940(j)(1)); 2.AA.318-319, 382-384).

By 2015 year-end, Bailey was deeply emotionally wounded by the initial slur and the City/DAO's patently deficient corrective response, which rejected her charge as facially unworthy, while also protecting Larkin and Taylor-Monachino at her expense. (2.AA.247:6-10 ¶14, 277.) A reasonable woman standing in Bailey's shoes could find this scenario similarly hostile and abusive. On December 4, 2015, Bailey's psychiatrist informed DAO that "Ms. Bailey requires immediate temporary relief from her on-site work duties due to severe workplace stress which is seriously impacting her mental and physical health," concluding: "[Bailey] cannot begin to regain her health until she has a period of rest and recuperation AWAY from her stressful work environment." (2.AA.277, original emphasis.)

The Decision disregards or minimizes most of this evidence despite is duty on summary judgment to accept Bailey's evidence as true and the jury's right to consider the "totality of circumstances" in assessing Bailey's claims. The Legislature has underscored that harassment cases should only

rarely be able to be resolved on summary judgment. (§12923(e); *Nazir v. United Air Lines, Inc*. (2009) 178 Cal.App.4th 243, 286.) This case is nowhere near one of them.

ARGUMENT

I. REVIEW IS NECESSARY TO CLARIFY THAT LIABILITY UNDER FEHA FOR UNLAWFUL HARASSMENT MAY BE BASED ON A ONE-TIME RACIAL SLUR BY A CO-WORKER, WHERE THE EMPLOYER FAILS TO IMMEDIATELY AND APPROPRIATELY REMEDY THE HARASSMENT.

A. The CA's Finding Conflicts With Governing FEHA and Federal Law, Which Would Allow A Jury To Find Larkin's One-Time "Scary N-r" Slur Created An Actionable Hostile Work Environment.

The Decision recognizes that harassment is a form of unlawful discrimination. (*Aguilar*, 21 Cal.4th at 129; EEOC Compliance Manual, §15-VII(A) at 7221.) The Legislature has also recently clarified that unlawful harassment sweeps broadly to encompass a wide range of conduct and actionable effects: "[H]arassment creates a hostile, offensive, oppressive, ***or*** intimidating work environment…when the harassing conduct sufficiently ***offends, humiliates, distresses, or intrudes*** upon its victim, so as to ***disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual,*** or otherwise ***interfere with and undermine the victim's personal sense of well-being***." (§12923(a).)

Since these standards are all recited in the disjunctive, Bailey need only show she meets any one of the identified factors. In particular, Bailey need not show "[l]oss of tangible job benefits" or "prove that…her tangible productivity has declined…." (12923(a); 12940(j)(1).) Rather, Bailey need only adduce evidence on which "a reasonable person subjected to the discriminatory conduct would find, as [Bailey] did, that the harassment ***so***

altered working conditions as to make it more difficult to do the job." (§12923(a).)

The Decision correctly recognizes that, under FEHA "*[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); *Dee v. Vintage Petroleum, Inc*. (2003) 106 Cal.App.4th 30, 36, quoting *Rogers v. Western-Southern Life Ins. Co*. (7th Cir. 1993) 12 F.3d 668, 674 ("there is neither a threshold 'magic number' of harassing incidents that gives rise…to liability…nor a number of incidents below which a plaintiff fails as a matter of law to state a claim").)

Federal law agrees. (EEOC Compliance Manual, §15-VII(A)(2) at 7222 ("*a single extremely serious incident of harassment may be sufficient to constitute a Title VII violation*"); *Castleberry v. STI Group* (3rd Cir. 2017) 863 F.3d 259, 264-265, citing *Faragher*, 524 U.S. at 788 ("an isolated incident of discrimination (if severe) can suffice to state a claim for harassment"); *Boyer-Liberto v. Fontainbleau Corp*. (4th Cir 205) 786 F.3d 264, 268, 277 (a serious "isolated incident of harassment…can create a hostile work environment" and "'amount to discriminatory changes in the terms and conditions of employment'").)

Furthermore, events creating a hostile work environment constituting unlawful harassment may be verbal, "e.g., epithets, derogatory comments or slurs." (2 CCR §11019(b)(1); *Aguilar*, 21 Cal.4th at 129-130 ("Verbal harassment…also may constitute employment discrimination under Title VII").) Indeed, the EEOC specifically cites the one-time use of "an

unambiguous racial epithet ***such as the 'N-word'"*** as a paradigm of such verbal harassment: (EEOC Compliance Manual §15-VII(A)(2) at 7222, emphasis added.)

The courts unanimously confirm the uniquely odious nature of this epithet, evoking our nation's centuries-long history of slavery, brutal subjugation and vicious dehumanization African Americans have inherited. (*Alcorn*, 2 Cal.3d at 496-499, fns. 2–4, esp. fn. 4 (the "epithet 'n---r'…has become particularly abusive and insulting in light of recent developments in the civil rights' movement as it pertains to the American Negro"); *Agarwal*, 25 Cal.3d at 941, 946-949 ("n-word" may constitute actionable outrageous conduct when said by supervisor or if the victim is especially susceptible); *Ayissi-Etoh*, 712 F.3d at 580 (Kavanaugh, J., concurring) ("That epithet has been labeled, variously, a term that 'sums up…all the bitter years of insult and struggle in America'"); *Spriggs*, 242 F.3d 179, 185, emphasis added ("Far more than a 'mere offensive utterance,' *the word 'nigger' is pure anathema to African Americans*…"; "*it is degrading and humiliating in the extreme*").

Neither the CA Decision, nor indeed the City/DAO itself, [8] disagree with these principles. Nonetheless, the CA holds that a co-worker's one-time infliction of the slur, as opposed to a supervisor's, is categorically non-actionable under FEHA. (Slip Op. 9-12.) However, nothing in FEHA, its implementing regulations, Title VII or the EEOC Compliance Manual

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

guidelines, makes or requires this categorical distinction. Indeed, as noted, the recent FEHA amendments declare, without reference to the perpetrator's status: "A single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment…." (§12923(b).) The EEOC Guidelines are the same: "a single extremely serious incident of harassment may be sufficient to constitute a Title VII violation." (EEOC Compliance Manual, §15-VII(A)(2) at 7222.) And the EEOC's first example of an actionable one-time racial slur involves a co-worker, not a supervisor. (*Id*. at 7223, Example 15; see also *Williams v. City of Philadelphia Office of Fleet Mgmt*. (E.D. Pa. 2020) 2020 WL 7677665 at *4-5 (triable issue of harassment where co-worker called African American employee "n-word"; plaintiff complained but management instead suspended him and transferred him to a less desirable job); *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).)

The main focus of the cases involving supervisorial use of racial slurs has been on the imposition of employer liability, based on the notion that a supervisor or management perpetrator's actions carry with it the employer's authority. (See, e.g., *Faragher*, 524 U.S. at 788-789.) Here, to the extent the perpetrator's status is relevant to whether Larkin's slur created a hostile work environment, Bailey's knowledge that Larkin had previously used her relationship with DAO Manager Taylor-Monachino to retaliate against other African American women, a factor Bailey realized in the instant of the racial slur, and which a jury could easily find played out

just as Bailey feared, provides that link. (*Agarwal*, 25 Cal.3d at 946, emphasis added ("Behavior may be considered outrageous if a defendant (1) *abuses a relation* or position which gives him power to damage the plaintiff's interest").)

In short, the CA Decision's categorical ruling that a one-time co-worker racial slur could not create a hostile work environment, directly conflicts with FEHA's emphasis that Cwhether alleged conduct constitutes unlawful harassment is a factual question, "rarely appropriate for disposition on summary judgment." (§12923(e), affirming *Nazir*, 178 Cal.App.4th at 264, 283, 286; Chin, Employment Litigation, §10:164); *Lounds v. Lincare Inc*. (10th Cir. 2015) 812 F.3d 1208, 1222, 1227-1228, emphasis added ("'the severity and pervasiveness evaluation is ***particularly unsuited*** for summary judgment' because it is ***inherently fact-based***").) And under FEHA this factual question "depends upon the totality of the circumstances…" (§12923(c)), i.e., the coherent whole, not a "series of discrete incidents" (*Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 23), "assessed from the perspective of a reasonable person belonging to the [plaintiff's] racial or ethnic group" (*Nazir*, 178 Cal.App.4th at 264).

Accordingly, even if the perpetrator's status may be one relevant factor, FEHA's governing standards make that consideration one for the jury in light of the "totality of circumstances" (§12923(c)), "assessed from the perspective of a reasonable person belonging to the [plaintiff's] racial or ethnic group" (*Nazir*, 178 Cal.App.4th at 264). This makes doctrinal sense, because whether a hostile work environment has been created depends on the entire context, conduct and interrelationships involved, not on job labels. (*Onacale v. Sundowner Offshore Services, Inc*. (1998) 523 U.S. 75,

81-82, emphasis added ("[t]he 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*").)

This assessment can rarely be resolved on summary judgment, with the court purporting to stand in the shoes of a "reasonable person belonging to the [plaintiff's] racial or ethnic group." (*Nazir*, 178 Cal.App.4th at 264; *Davis v. Team Electric Co*. (9th Cir. 2008) 520 F.3d 1080, 1089 (in employment discrimination cases, the courts "have emphasized the importance of zealously guarding an employee's right to a full trial").) Given the "constellation of surrounding circumstances, expectations, and relationships" (*Onacale*, 523 U.S. at 81-82), i.e. the totality of circumstances" (§12923(c)), involved here, this case is not one of them. (*Davis*, 520 F.3d at 1096 ("In close cases…it is more appropriate to leave the assessment to the fact-finder").) Review should be granted to make clear these standards under California law.

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

The Decision finds that Taylor-Monachino's actions, including her malfeasance in obstructing Bailey's harassment complaint following Larkin's original slur, cannot be deemed part of the unlawful harassment and that DAO/City conclusively acted "immediately and appropriately" (§12940(j)(1)) to Larkin's slur, thereby immunizing it from liability for Larkin's harassment. The Decision is doctrinally wrong on both counts

Under FEHA, "[e]mployers have an affirmative duty to take reasonable steps to prevent and *promptly correct discriminatory and harassing conduct*" (2 CCR §11023(a)), and, in the case of alleged co-worker harassment, may be held liable for "fail[ing] to take immediate and appropriate corrective action" in response to harassing conduct (§12940(j)(1); *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1040-1041). An employer's failure to take prompt and appropriate corrective action in response to a co-worker's harassing conduct 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,* 524 U.S. at 789, emphasis added; Chin, Employment Litigation §§10:395-10:397 (quoting *Faragher*).)

This affirmative duty is meaningfully broader than only preventing the perpetrator from repeating harassing conduct, which the Decision adopts as its governing criterion. (Slip Op. 17.) Rather, an employer' duty is to ensure a harassment-free workplace, which includes not just appropriate preventative/disciplinary measures directed to the perpetrator, but also corrective actions establishing or reaffirming for the entire workplace that such harassment is taken seriously and will not be tolerated. (*Ellison*, 924 F.3d at 881, 882 (discipline must be both "proportionat[e] to the seriousness of the offense" and employer's condemnation sufficiently strong to "persuade potential harassers to refrain from unlawful conduct" in order to "maintain a harassment-free working environment"); accord *Fuller,* 47 F.3d

at 1528-1529.)[9] More specifically, a sufficient response consists 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.) Liability arises from an employer's negligent response regardless of motivation. (*Swenson*, 271 F.3d at 1194; *State Dept*., 31 Cal.4th at 1041.) Nothing in this harassment liability analysis requires the employer's failure to properly address the harassing conduct to be itself motivated by race or other unlawful criteria.[10]

Here, City's/DAO's post-slur actions (and failures to act) became part of the harassment and establish the City/DAO's liability by at least

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[9] The CA Decision's lengthy discussion of *Bradley v. Department of Corrections* (2008) 156 Cal.App.4th 1612 (Slip Op. 14-17) misses the point. *Bradley* establishes that mere counseling of a perpetrator may not be sufficient, as there where it plainly did not stop the perpetrator. (*Id*. at 1632.) But no doctrinal reason limits the principle to that result only, as here, where the counseling's efficacy is questionable and, in context, may actually be seen to reinforce the City/DAO's failure and refusal to take serious corrective action to ensure a harassment-free workplace.

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

their negligent failures–and even more by Taylor-Monachino's deliberate obstruction and attempted sabotage of Bailey's harassment complaint–to promptly and appropriately address the harassment wrought by Larkin's slur.

First, contrary to the Decision's finding, the so-called "counseling" was not conclusively prompt and appropriate even on its own terms. Arcelona only advised Larkin that racial slurs like the "n-word" were unacceptable, but did not either discipline or warn her of discipline should it be repeated. Clendinen advised Larkin the same ***six months later***, again without discipline or warning of future consequences, and only had her sign a receipt of the City's Anti-Harassment policy for her personnel file. Larkin denied making the slur, which a jury could view as a lack of remorse and refusal to take responsibility for her conduct, and no one involved, including Larkin, regarded the counseling as adequate discipline. (*Supra* at 13-15.) Moreover, even assuming that the counseling led Larkin not to repeat the slur (an inference resting on the long-recognized *post hoc ergo propter hoc* fallacy), but a jury could find insufficient to satisfy the City/DAO's independent duties to ensure that the remedy is both "proportionat[e] to the seriousness of the offense" and sufficient to "assure a workplace free from…harassment." (*Ellison*, 924 F.2d at 882-883; *Fuller*, 47 F.3d at 1528-1529.)

Second, this "counseling" was only one part of City/DAO's response, a response a jury could find at best negligently deficient and, through Taylor-Monachino, actually actively obstructive and hostile, and thereby destructive of City/DAO's duty not only to protect harassment victims, but to assure a harassment-free workplace. Bailey won't repeat her

detailed account of City/DAO's deficient response (see *supra* at 15-20), but notes the following:

(1) DAO's deliberate refusals, again through Taylor-Monachino, to separate Larkin, despite Bailey's and Arcelona's repeated requests, denied Bailey perhaps the most immediately effective remedy against unlawful harassment (*Swenson*, 271 F.3d at 1092), and was compounded by DAO's decision to force Bailey for months to work directly with Larkin. (*Ellison*, 924 F.3d at 883 (keeping victim and perpetrator together may ***create or exacerbate*** the hostile environment); *Ayissi-Etoh*, 712 F.3d at 577-578 (same); Chin, Employment Litigation, §§10:422-10:423.)

(2) The investigation here could be found patently deficient, with the City stating it would conduct none, and the DAO failing to interview any of the witnesses except Bailey and Larkin, and immediately ending the investigation upon Larkin's denial. (See *Swenson*, 271 F.3d at 1093 (investigation is the "most significant immediate measure an employer can take," is a "key step in the employer's response," and "can itself be a powerful factor in deterring future harassment. By opening a sexual harassment investigation, the employer puts all employees on notice that it takes such allegations seriously and will not tolerate harassment in the workplace. An investigation is a warning, not by words but by action").)

(3) Taylor-Monachino's ongoing obstruction, hostility and threats against Bailey, amounting which could be found to be an aiding and abetting of Larkin's slur (§12940(i); 2 CCR §11020), subverted her duty, as DAO HR Department Manager, to enforce FEHA's and the City's anti-discrimination and harassment protections. Indeed, given her managerial status, her malfeasance alone confirms the City/DAO's liability, "adopt[ing]

the offending conduct and its results quite as if they had been authorized affirmatively as the employer's policy." (*Faragher*, 524 U.S. at 789; Chin, Employment Litigation, §10:395-10:397.)

To conclude, as the Decision does, that no actionable harassment occurred here as a matter of law and that the City/DAO's response was conclusively "immediate and appropriate" starkly undermines FEHA's remedial purposes and governing standards, including those embodied in the recent FEHA amendments clarifying the standards governing FEHA harassment claims. (§12923(a)-(e).) On this issue too, the Court should accept review in order to clarify the substance required of employers in "immediate and appropriate" response to allegations of co-worker harassment.

II. REVIEW IS NECESSARY TO CLARIFY AND REAFFIRM THAT AN ACTIONABLE ADVERSE EMPLOYMENT ACTION ALTERING THE TERMS AND CONDITIONS OF EMPLOYMENT MUST CONSIDER THE COLLECTIVE TOTALITY OF CIRCUMSTANCES, AND MAY CONSIST OF THE EMPLOYER'S DELIBERATE OBSTRUCTION OF AN EMPLOYEE'S HARASSMENT CLAIM.

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

First, *Yanowitz* repeatedly emphasizes the broad range of conduct constituting adverse employment action "materially affect[ing] the terms,

conditions, or privileges of employment," that would support a FEHA retaliation claim. (*Yanowitz*, 36 Cal.4th at 1052.) Accordingly, FEHA must "be interpreted broadly to further [its] fundamental antidiscrimination purposes"; that "[FEHA] protects an employee against unlawful discrimination with respect…to…the *entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance* or opportunity for advancement"; and that "the phrase 'terms, conditions or privileges' of employment must be *interpreted liberally and with a reasonable appreciation of the realities of the workplace* in order to afford employees the *appropriate and generous protection* against employment discrimination that FEHA was intended to provide." (*Id*. at 1053-1054, emphasis added; *Patten v. Grant Joint Union High School District* (2005) 134 Cal.App.4th 1378, 1387-1388 (*Yanowitz*'s "'materiality' test is not to be read miserly" and is "not crabbed [or] narrow"); *Whitehall v. County of San Bernardino* (2017) 17 Cal.App.5th 352, 366-367 (retaliation assessed in context of employee's workplace reality).)

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

Lastly, determining the conduct constituting an adverse employment action "is not, by its nature, susceptible to a mathematically precise test," but even if "minor or relatively trivial adverse actions" are not actionable, "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.)

Measured under these standards, and construing all the evidence in context in her favor, Bailey's account shows far more than "mere" isolated slights or annoyances, as the Decision repeatedly suggests, but rather a "systemic pattern" of retaliation stemming from Bailey's pursuit of her complaint against Larkin, centrally including Taylor-Monachino's abuses of her managerial authority designed to sabotage Bailey's complaint, punish Bailey directly and protect Larkin. (*Supra* at 15-20; AOB.12-21, 33-38, 40-43; ARB.15-21; see *State Dept. of Health Services*, 31 Cal.4th at 1041 (liability for supervisor/management retaliatory conduct).)[11] Taylor-Monachino's "mere" workplace slights, which the CA Decision dismissed as insufficient, actually reinforced Taylor-Monachino's more substantive

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

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

Like harassment itself, FEHA's protections against unlawful retaliation against employees for seeking to enforce their rights are among the statute's most fundamental, and this Court properly broadly interpreted the nature and scope of those protections. Far too often, however, these principles are honored more in the breach, a defect whose adverse effects may well become increasingly important as the economic fallout of the Covid-19 public health crisis come home to roost. Although unpublished, this case, which so thoroughly violated *Yanowitz*'s principles in rejecting Bailey's claims as matters of law instead of allowing her claims to be presented to a jury for decision, affords the Court an opportunity to clarify, emphasize and reaffirm the principles governing FEHA retaliation claims. This Court should grant review on the retaliation claim, in addition to the ruling on Bailey's harassment claim, in order to do just that.

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

The CA Decision dismissed Bailey's FEHA claim for failure to take all reasonable steps to prevent unlawful discrimination, harassment or retaliation on the ground that this claim requires a successful ruling on the underlying discrimination, harassment or retaliation claim. (Order Denying Rehearing (2020-10-6).) Accordingly, review and reversal of either her harassment or retaliation claim, would revive her failure to prevent claim as well. (§12940(k); 2 CCR §§11006, 11009; *Northrup Grumman Corp. v. Workers Comp. Appeals Bd*. (2002) 103 Cal.App.4th 1021, 1035.)

CONCLUSION

The Decision repeatedly misstates or conflicts with governing law and operative facts in reaching a profoundly erroneous decision rejecting Bailey's claims. Bailey's evidence, however, viewed through a correct doctrinal framework, supports her FEHA claims, which may not be resolved on summary judgment, allowing her to present her case to a jury on its merits. This Court should grant review in this case to clarify, reemphasize and reaffirm the principles governing FEHA's fundamental guarantees and rights protecting employees against unlawful harassment and retaliation.

Dated: October 26, 2020

Respectfully submitted,

s/ *Robert L. Rusky*

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Attorneys for Plaintiff and Appellant
TWANDA BAILEY

CERTIFICATE OF COMPLIANCE
(Cal. Rules of Court rule 8.204(c))

Bailey v. City and County of San Francisco et al.
S_____
CA 1.1 No. A153520

As attorney of record on appeal for plaintiff and appellant Twanda Bailey, I hereby certify that the foregoing Petition for Review contains 7,296 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: October 26, 2020

s/ *Robert L. Rusky*
_____
DANIEL RAY BACON
ROBERT L. RUSKY

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

TWANDA BAILEY, Plaintiff and Appellant, v. SAN FRANCISCO DISTRICT ATTORNEY'S OFFICE et al., Defendants and Respondents.	A153520 (San Francisco County Super. Ct. No. CGC-15-549675)

THE COURT:

On our own motion, we modify the opinion in this case by adding at page 20, at the end of the first sentence, the following footnote:

"Bailey claimed the trial court likewise erred in concluding she could not prevail on her cause of action for failure to prevent discrimination, harassment or retaliation under section 12940, subdivision (k) because she 'does have viable claims . . . [for] unlawful harassment and retaliation.' '[C]ourts have required a finding of actual discrimination or harassment under FEHA before a plaintiff may prevail under section 12940, subdivision (k).' (*Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 925, fn. 4.) Because we have concluded there is no triable issue regarding Bailey's discrimination, harassment and retaliation causes of action, there is likewise no triable issue as to her cause of action for failure to prevent discrimination, harassment or retaliation."

There is no change in the appellate judgment.

Appellant Twanda Bailey's petition for rehearing is denied.

Date: 10/06/2020 **Humes, P. J.** P.J.

PRESIDING JUSTICE

Filed 9/16/20

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

TWANDA BAILEY, Plaintiff and Appellant, v. SAN FRANCISCO DISTRICT ATTORNEY'S OFFICE et al., Defendants and Respondents.	A153520 (San Francisco City & County Super. Ct. No. CGC-15-549675)

Following a co-worker's alleged use of a highly offensive racial epithet, plaintiff Twanda Bailey filed suit under the Fair Employment and Housing Act (FEHA)[1] against the San Francisco District Attorney's Office (DA's Office) and the City and County of San Francisco (City), alleging causes of action for discrimination and harassment, failure to prevent discrimination, and retaliation. She appeals from the grant of a defense summary judgment. We affirm.

BACKGROUND

Bailey commenced employment with the DA's Office in 2001. In 2011, she was promoted to a "class 8132 Investigative Assistant," working in the

[1] Government Code section 12940, et seq. All further statutory references are to the Government Code, unless otherwise indicated.

records room. Saras Larkin, also an investigative assistant, worked next to Bailey.

Bailey claims that in January 2015, after a mouse ran through the records room and startled her, Larkin said " 'You niggers is so scary.' " Bailey was deeply offended and left the records room to calm down. Outside, she encountered three co-workers who asked her what was wrong, and Bailey told them about the incident. She did not, however, report it to the human resources office because she feared retaliation, given Larkin's close relationship with Human Resources Director Evette Taylor-Monachino.

The next day, at on offsite office social gathering, Bailey's supervisor Alexandra Lopes overheard a conversation about the incident. Lopes asked Bailey if she had reported it. When Bailey said she had not, Lopes said she would notify human resources.

A few days later, Assistant Chief of Finance Sheila Arcelona asked Bailey to meet with her and Taylor-Monachino. Arcelona reported to Chief Administrative and Financial Officer Eugene Clendinen who, in turn, reported directly to the District Attorney.

Arcelona took Bailey's statement, and thereafter she and Taylor-Monachino met with Larkin, who denied making the remark. Arcelona told Larkin " 'that word or any iteration of that word is not acceptable in the workplace.' "

About two months later, Bailey asked Taylor-Monachino for a copy of the report Bailey thought was being prepared about the incident. When Taylor-Monachino told her no report had been prepared, Bailey said she wanted a complaint filed, but Taylor-Monachino refused. Taylor-Monachino also told Bailey that if she discussed the incident with others, she would be

creating a hostile working environment for Larkin. Bailey then went on leave for a "few weeks."

In April, Bailey received a letter from the human resources department stating it had received notice of the incident and would be reviewing it. A San Francisco Police Department employee who had heard of the incident had notified the Department.

Bailey maintains that after she returned from leave, Taylor-Monachino treated her differently. According to Bailey, Taylor-Monachino made faces and chuckled at Bailey and refused to speak to her. Bailey later learned Taylor-Monachino had vetoed separating Bailey and Larkin at work.

Bailey also felt she was asked to perform tasks she believed were outside her job description and were normally Larkin's responsibility. Bailey's supervisors, however, perceived that she seemed annoyed and irritated by work requests they considered standard.

In June, Bailey's new supervisor, Irene Bohannon, gave Bailey a performance plan and appraisal report that identified two areas for improvement: "regular attendance, and responsiveness to supervisory requests." However, Bohannon gave Bailey the same overall rating, "Met Expectations," Bailey had received the prior two years.

The following month, the human resources department notified Bailey it would not investigate the complaint because the "allegations are insufficient to raise an inference of harassment/hostile work environment or retaliation."

In August, after Taylor-Monachino, according to Bailey, silently mouthed the words, " 'You are going to get it,' " Bailey filed a harassment complaint with Clendinen.

Three months later, in November, Bailey told Clendinen she was not comfortable covering for Larkin or performing tasks that she believed were Larkin's duties. Clendinen promptly separated Bailey and Larkin, transferring Larkin out of the records room.

The following month, Bailey requested and was granted a six-week medical leave. She subsequently filed the instant action, alleging causes of action under the FEHA for racial discrimination and harassment, retaliation for having made a complaint, and failure to prevent discrimination.

As of June 2017, Bailey remained on leave. In the meantime, Taylor-Monachino's employment with the DA's Office was terminated in May 2017 pursuant to a settlement agreement.

DISCUSSION

Standard of Review

Our standard of review of a grant of summary judgment is well-settled. "We review a grant of summary judgment de novo; we must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law." (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) The trial court's stated reasons for granting summary relief are not binding on the reviewing court, which reviews the trial court's ruling, not its rationale. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.)

"A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action if that party has shown that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subds. (o)(2), (p)(2).) If the defendant does so, the burden shifts back to the plaintiff to show that a triable issue of fact exists as to that cause of action or

defense. In doing so, the plaintiff cannot rely on the mere allegations or denial of his or her pleadings, 'but, instead, shall set forth the specific facts showing that a triable issue of material fact exists. . . .' (*Id.*, § 437c, subd. (p)(2).) A triable issue of material fact exists 'if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' " (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 864 (*Thompson*), quoting *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

Racial Harassment and Discrimination Under the FEHA

The FEHA prohibits race discrimination, of which harassment is one form. (§ 12940, subd. (g); *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129 (*Aguilar*); *Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464 (*Etter*).)

"The law prohibiting harassment is violated '[w]hen the workplace is permeated with discriminatory intimidation, ridicule and insult that is " 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.' " ' [Citations.] This must be assessed from the 'perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff.' [Citation.] And the issue of whether an employee was subjected to a hostile environment is ordinarily one of fact." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 263–264, abrogated on other grounds as stated in *Serri v. Santa Clara University* (2014) 225 Cal.App.4th 830, 853, fn. 12.) The California Code of Regulations defines harassment to include " '[v]erbal harassment, e.g., epithets, derogatory comments or slurs on a basis enumerated in the [FEHA].' " (*Aguilar*, *supra*, 21 Cal.4th at p. 129.)

To establish a "prima facie case of a racially hostile work environment," a plaintiff must show "(1) he [or she] was a member of a protected class; (2) he [or she] was subjected to unwelcome racial harassment; (3) the harassment was based on race; (4) the harassment unreasonably interfered with his work performance by creating an intimidating, hostile, or offensive work environment; and (5) the [employer] is liable for the harassment." (*Thompson, supra,* 186 Cal.App.4th at p. 876.)

Thus, even if some racial harassment has occurred, a violation of the FEHA does not occur unless the harassing behavior has resulted in a hostile work environment, both subjectively and objectively. (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 786–787.)[2] Racial harassment violates the FEHA when it is " ' " 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " ' " (*Etter*, *supra*, 67 Cal.App.4th at p. 465, quoting *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 517 (*Beyda*).)

"[T]o prevail on a harassment or hostile work environment claim, the plaintiff 'must establish that . . . the discrimination was severe *or* pervasive.' " (*Castleberry v. STI Group* (3d Cir. 2017) 863 F.3d 259, 263, italics added.) "We have noted that '[t]he difference [between the two standards] is meaningful' because 'isolated incidents (unless extremely serious) will not amount to [harassment].' [Citations.] Indeed, the distinction 'means that "severity" and "pervasiveness" are alternative possibilities: some harassment may be severe enough to contaminate an

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[2] Racial harassment in the workplace is also actionable discrimination under Title VII of the federal Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.), the federal counterpart of the FEHA. Accordingly, title VII cases may be considered in interpreting the FEHA, but are not determinative. (*Etter*, *supra*, 67 Cal.App.4th at pp. 464–465; *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1051 (*Yanowitz*).)

environment even if not pervasive; other, less objectionable, conduct will contaminate the workplace only if it is pervasive.' " (*Id.* at p. 264, italics omitted.) In short, " '[n]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment. . . . For . . . harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." [Citation.]' " (*Aguilar*, *supra*, 21 Cal.4th at p. 130, quoting *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 67.)

With respect to whether harassment has altered the conditions of employment, the California Legislature has recently "affirm[ed] its approval of the standard set forth by Justice Ruth Bader Ginsburg in her concurrence in *Harris v. Forklift Systems* (1993) 510 U.S. 17"—that " 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find . . . that the harassment so altered working conditions as to make it more difficult to do the job.' (*Id.* at 26.)" (§ 12923, subd. (a).)

While Highly Offensive, There Is No Triable Issue the Single Epithet by a Co-worker Altered Bailey's Working Conditions

Citing *Boyer-Liberto v. Fontainebleau Corp.* (4th Cir. 2015) 786 F.3d 264 (*Boyer-Liberto*), Bailey correctly points out a single racial epithet can be so offensive it gives rise to a triable issue of actionable harassment.[3]

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[3] Bailey conceded "the only race-related allegation" at issue was Larkin's racial slur. As the trial court recited, it was undisputed Bailey did "not believe that Taylor[-Monachino's] conduct towards her had anything to do with their African-American backgrounds."

The plaintiff in *Boyer-Liberto* was an African-American waitress at a hotel. (*Boyer-Liberto, supra*, 786 F.3d at p. 268.) She alleged that in a 24-hour period, the food and beverage manager "threatened [her] with the loss of her job," and twice called her a " 'porch monkey.' " (*Id.* at pp. 268–270.) After she reported the incidents to the company's human resources director, she was fired. (*Id.* at p. 270.) She sued, asserting claims for hostile work environment and retaliation. The district court granted summary judgment in favor of the hotel and owner. (*Id.* at p. 268.) The Fourth Circuit Court of Appeals reversed.

The circuit court "underscore[d] the Supreme Court's pronouncement in *Faragher* . . . that an isolated incident of harassment, if extremely serious, can create a hostile work environment." (*Boyer-Liberto, supra*, 786 F.3d at p. 268.) The court also emphasized the egregiousness of the epithet. "[A] reasonable jury could find that [the manager's] two uses of the 'porch monkey' epithet—whether viewed as a single incident or as a pair of discrete instances of harassment—were severe enough to engender a hostile work environment." (*Id.* at p. 280.) The court cited, among other cases, *Ayissi–Etoh v. Fannie Mae* (D.C. Cir. 2013) 712 F.3d 572, which observed, as had other courts, " 'perhaps no single act can more quickly alter the conditions of employment' than 'the use of an unambiguously racial epithet such as "nigger" by a supervisor.' [Citation.] This single incident might well have been sufficient to establish a hostile work environment." (*Id.* at p. 577.) The concurring opinion commented, "[I]n my view, being called the n-word by a supervisor—as Ayissi–Etoh alleges happened to him—suffices by itself to establish a racially hostile work environment." (*Id.* at p. 580, conc. opn. of Kavanaugh, J.)

The DA's Office, while acknowledging the slur by Bailey's co-worker was "categorically unacceptable," nevertheless asserts " '[a]n isolated use of an epithet, however odious, does not produce a hostile work environment.' " (*Aguilar*, *supra*, 21 Cal.4th at p. 181.) The DA's Office is simply mistaken on this point. Indeed, it has quoted from the dissenting opinion in *Aguilar*.[4]

Moreover, the Legislature has since expressly declared: "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, subd. (b).) "The existence of a hostile work environment depends upon the totality of the circumstances and a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a nondecisionmaker, may be relevant, circumstantial evidence of discrimination. In that regard, the Legislature affirms the decision in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512 in its rejection of the 'stray remarks doctrine.' " (§ 12923, subd. (c).) Although not effective until January 1, 2019, section 12923 codified numerous opinions concluding a single racial slur can be so offensive it creates a triable issue as to the existence of a hostile work environment.

Thus, the question is not whether a single, particularly egregious epithet can create a hostile work environment—under certain circumstances, it can. Rather, the pertinent question is whether the single alleged racial epithet made by Bailey's co-worker was, in context, so egregious in import and consequence as to be " ' " 'sufficiently severe or pervasive to alter the

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[4] The DA's Office provided the wrong page cite for the quote, indicating it was at page 131, in the majority opinion.

conditions of [Bailey's] employment.' " ' " (*Etter*, *supra*, 67 Cal.App.4th at p. 465.)

"[R]acial epithets by supervisors . . . are commonly considered more serious because they are inherently vested with the employer's authority." Bailey acknowledges as much, but again citing to *Boyer-Liberto,* asserts "whether such a slur by a co-worker gives rise to a hostile work environment is at least a question of fact for the jury, not an issue of law for a court on summary judgment."

However, what the circuit court in *Boyer-Liberto* actually said was that "[i]n measuring the severity of harassing conduct, the status of the harasser may be a significant factor—e.g., 'a supervisor's use of [a racial epithet] impacts the work environment far more severely than use by co-equals.' [Citation.] Simply put, 'a supervisor's power and authority invests his or her harassing conduct with a particular threatening character.' " (*Boyer-Liberto*, *supra*, 786 F.3d at p. 278.) Thus, the court focused on whether the employee who used the epithet, a food and beverage manager, was the plaintiff's supervisor. (*Id.* at pp. 269–271.) Although "[w]hether [that manager] had been empowered by the [hotel] to fire Liberto or take other tangible employment actions against her [was] unclear on the record. . . . Liberto did not know that [the manager] held a manager title and did not consider [her] to be her manager." (*Id.* at p. 270–271.) The evidence further showed, however, that the manager "repeatedly and effectively communicated to Liberto . . . that [she] had [the owner's] ear and could have Liberto fired." (*Id.* at p. 279.) The court therefore concluded "in gauging the severity of [the

manager's] conduct, we deem [the manager] to have been Liberto's supervisor."[5] (*Boyer-Liberto,* at p. 280.)

Other cases have similarly commented on the significant difference between a slur by a co-worker and one by a supervisor. "In many cases, a single offensive act by a coemployee is not enough to establish employer liability for a hostile work environment. But where that act is committed by a supervisor, the result may be different." (*Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, 36.) A "supervisor's use of the term impacts the work environment far more severely than use by co-equals." (*Rodgers v. Western-Southern Life Ins. Co.* (1993) 12 F.3d 668, 675.)

In fact, Bailey did not in the trial court, nor has she on appeal, cited to any case holding that a single, albeit egregious, racial epithet by a co-worker, without more, created a hostile work environment.

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[5] In *Ayissi-Etoh v. Fannie Mae, supra,* 712 F.3d 572, when the plaintiff was promoted, he was the only one of ten new team leaders who did not receive a salary increase. (*Id.* at p. 576.) His manager, whose preferred candidate had not received one of the promotions, then began quarreling with the plaintiff on a regular basis. His manager also began to prepare critical evaluations. (*Ibid.*) Concerned, the plaintiff went to the chief audit executive, who allegedly told him: " 'For a young black man smart like you, we are happy to have your expertise; I think I'm already paying you a lot of money.' " (*Id.* at p. 574.) When he later complained to the new vice-president, the latter allegedly shouted at him, " '[g]et out of my office nigger.' " (*Id.* at p. 575.) After the plaintiff filed a complaint with the EEOC, his Fannie Mae supervisor allegedly gave him a choice: drop the racial discrimination claim or be fired. (*Ibid.*) Shortly thereafter, he was dismissed. (*Ibid.*) Fannie Mae disputed most of this, and the circuit court concluded, not surprisingly, that triable issues precluded summary judgment on the plaintiff's discrimination claims. (*Id.* at pp. 576–577.) The court likewise concluded plaintiff had made a sufficient showing raising a triable issue of a hostile work environment—not only were there numerous asserted discriminatory acts, but these acts were by the plaintiff's supervisors (indeed, they went up the chain to a Fannie Mae vice-president). (*Id.* at p. 577–578.)

Nor has Bailey made any other factual showing that the conditions of her employment were so altered by the one slur by her coworker as to constitute actionable harassment.

We therefore agree with the trial court that "no reasonable trier of fact could reach [the] conclusion" "that her co-worker's single statement . . . , without any other race-related allegations, amounted to severe or pervasive racial harassment."

There Is No Triable Issue That Defendants Failed to Take Corrective Action

Bailey also maintains neither the District Attorney's Office nor the City conducted "a reasonable inquiry into her allegations and utterly failed to provide the 'prompt and appropriate corrective action' that could absolve it from liability."

"Harassment 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).) " 'The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. (§ 12940, subd. (j)(1).) This is a negligence standard.' " (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1419–1420.)

In Bailey's response to the District Attorney's separate statement of undisputed material facts, she did not dispute the following: "Plaintiff did not initially report Larkin's January 22 remark to her supervisor or HR. [¶] Instead, the next day, Plaintiff's supervisor overheard Plaintiff talking about the incident during an after-hours party. [¶] Plaintiff's supervisor then

reported the allegation to her supervisor, Sheila Arcelona. [¶] . . . [¶] After learning about Plaintiff's allegation, Arcelona promptly conferred with Clendinen and [Monachino-]Taylor. [¶] They agreed that Arcelona should first meet with Plaintiff to discuss and document the allegation, and that Taylor, as the Department Personnel Officer, should attend the meeting as well. [¶] They also agreed that Arcelona and [Monachino-]Taylor would then separately meet with Larkin. [¶] On January 29, Arcelona and Taylor met with Plaintiff. [¶] Plaintiff confirmed that January 22 was the only time that she had heard Larkin use any type of slur during Plaintiff's tenure at the DA's office. [¶] Arcelona and [Monachino-]Taylor then met with Larkin. [¶] Arcelona counseled Larkin about the City's Harassment-Free Workplace Policy, and she specifically informed her that any use of the alleged language from January 22 was unacceptable. [¶] After her meetings with Plaintiff and Larkin, Arcelona promptly provided a written summary of the meetings to Clendinen."

Bailey likewise did not dispute that the City's Department of Human Resources sent her a letter summarizing her allegations, acknowledging the slur was extremely offensive, and, stating that, if true, it "violated the City's Harassment-Free Workplace Policy, and that the DA's office would take corrective action." The letter concluded, however, that "one comment from a co-worker was 'not sufficiently severe or pervasive as to alter the condition of your employment and create an abusive working environment." Bailey also did not dispute that "on July 30, Clendinen met with Larkin regarding DHR's analysis" and "Clendinen required Larkin to execute an Acknowledgment of Receipt and Review of the City's Harassment-Free Workplace Policy, and this Acknowledgment was placed in Larkin's personnel file and a copy of it was sent to DHR."

Bailey characterizes these undisputed facts as "depict[ing] that the DAO/City's response to Larkin's racial slur against Bailey was at least negligent, but with Taylor-Monachino's central involvement metastasized into an aiding and abetting and, because of her authority as DAO HR Department Director responsible for responding to discrimination complaints, an outright 'ratification' [citation] of Larkin's initial racial slur." However, Bailey has never disputed that Taylor-Monachino's conduct was *not* motivated by any racial animus. Accordingly, Bailey cannot look to Taylor-Monachino's conduct as purported ratification of Larkin's alleged racial slur.

Bailey also asserts the "minimal remedial steps" taken by the DA's Office were "not necessarily sufficient," (italics omitted) relying on *Bradley v. Department of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1612 (*Bradley*). The plaintiff in *Bradley,* an independent contractor social worker at Corcoran State Prison, was repeatedly sexually harassed, both at work and at home, by a prison chaplain. When the chaplain showed up at the plaintiff's home in the middle of the night, she called the police, who described him as "obsessed" and recommended she obtain a restraining order. (*Id.* at p. 1618–1620.) The plaintiff had reported the repeated sexual harassment to numerous prison authorities, including the Employee Relations Office. Two prison officials interviewed her, then "called the Corcoran police and Bradley's landlady to verify her story." (*Id.* at p. 1620.) The complaint was reported to the warden, who was told "a written report was coming." (*Ibid.*) The prison officials "told [the plaintiff] to prepare a written diary of what had occurred and to let them know if anything else happened." (*Ibid.*) The only remedial steps taken by prison officials consisted of advice to "to buy binoculars, not to go out alone, to get a restraining order, and to carry a cell phone." (*Id.* at p. 1621.) The plaintiff

was told an official had "talked to [the harasser] and given him a letter . . . however, [he] had not taken responsibility for his behavior, and [the official] could not assure [her] that [the harasser] would leave her alone." (*Ibid.*) The harasser's supervisor was informed a complaint had been made, but was not told it was for sexual harassment, nor instructed to restrict his movement in the prison. (*Ibid.*) Instead, the harasser continued to have "free range of the prison and his supervisor had difficulty keeping track of his whereabouts," and he continued to harass the plaintiff. (*Id.* at pp. 1621–1622.) The plaintiff's employment, in contrast, was terminated, ostensibly for poor performance. (*Id.* at p. 1622.)

The *Bradley* court affirmed a jury verdict in favor of the plaintiff. (*Bradley, surpa,* 158 Cal.App.4th at p. 1635.) With respect to her claim that prison officials failed to take sufficient remedial measures, the court first explained: "Once an employer is informed of the sexual harassment, the employer must take adequate remedial measures. The measures need to include immediate corrective action that is reasonably calculated to (1) end the current harassment and (2) to deter future harassment. [Citation.] The employer's obligation to take prompt corrective action requires (1) that temporary steps be taken to deal with the situation while the employer determines whether the complaint is justified and (2) that permanent remedial steps be implemented by the employer to prevent future harassment once the investigation is completed. [Citation.] An employer has wide discretion in choosing how to minimize contact between the two employees, so long as it acts to stop the harassment. [Citation.] '[T]he reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment.' " (*Id.* at p. 1630.)

The court then concluded the prison officials had abysmally failed to comply with this standard (*Bradley, surpa,* 158 Cal.App.4th at pp. 1631–1634), summarizing the situation as follows: "While we recognize that things move slowly in state government, the lack of action in this case is startling. Numerous people heard Bradley's complaints yet did nothing to protect her or to stop the harassment. Very little investigation was done, even though CDC claims it took immediate action by initiating the investigation. No one gathered any evidence other than Bradley's statement, which she was required to repeat numerous times. Each person she contacted acted like it was someone else's job to take immediate and corrective action. *Nothing* happened locally to ensure that [the harasser] would stop harassing Bradley, despite evidence that the harassment was severe, that [the harasser] was able to move freely around the institution, that physical threats had been made, and that [the harasser] had a known history for breaking rules and ignoring supervisorial direction." (*Id.* at pp. 1633–1634.)

The circumstances here are not comparable to those in *Bradley.* Bailey's claim that Larkin had used the racial epithet was promptly investigated after Bailey's supervisor reported it. Even though Larkin denied making the racial slur, she was both orally informed that "any use of the alleged language was unacceptable" and given a written copy of the City's Harassment-Free Workplace Policy. Larkin was required to meet first with the Assistant Chief of Finance (Arecelona) and then with the Chief Administrative and Financial Officer (Clendinen) who required Larkin to execute an acknowledgment of receipt of the anti-harassment policy, which acknowledgment was placed in her personnel file and a copy of which was sent to the human resources department. Unlike in *Bradley*, there is no claim the reprimand of Larkin failed to prevent further unacceptable

behavior. Measured by the employer's " 'ability to stop harassment by the person who engaged in harassment,' " the remedial action by the DA's Office and the City was effective. (*Bradley*, *supra*, 158 Cal.App.4th at p. 1630.)

We therefore also agree with the trial court that there is no triable issue that the DA's Office and the City failed to make a reasonable inquiry into Bailey's allegation or to take prompt and appropriate corrective action.

There Is No Triable Issue That Defendants Retaliated Against Bailey

Bailey also challenges the trial court's ruling that she failed to show she "suffered a resulting adverse employment action" in retaliation for reporting Larkin's racial slur.

"[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).) The term " 'adverse employment action' . . . does not appear in the language of the FEHA or in title VII, but has become a familiar shorthand expression referring to the kind, nature, or degree of adverse action against an employee that will support a cause of action under a relevant provision of an employment discrimination statute." (*Id.* at p. 1049.)

"[A] mere oral or written criticism of an employee or a transfer into a comparable position does not meet the definition of an adverse employment action under FEHA. [Citations.] . . . [T]he issue requires a factual inquiry and depends on the employer's other actions. An unfavorable employee evaluation may be actionable where the employee proves the 'employer subsequently uses the evaluation as a basis to detrimentally alter the terms or conditions of the recipient's employment.' [Citations.] Thus, although

written criticisms alone are inadequate to support a retaliation claim, where the employer wrongfully uses the negative evaluation to substantially and materially change the terms and conditions of employment, this conduct is actionable." (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1457.) "An adverse employment action refers not only to 'ultimate employment actions such as termination or demotion, but also . . . actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement.' [Citation.] That said, '[m]inor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable.' " (*Doe v. Department of Corrections & Rehabilitation* (2019) 43 Cal.App.5th 721, 734.)

Bailey bases her claim that she suffered adverse employment actions on Taylor-Monachino's "course of conduct" and on comments made by her new supervisor in her June 2015 performance review.

Taylor-Monachino's "course of conduct," according to Bailey, included telling Bailey no harassment complaint would be filed and Bailey's own comments could constitute a hostile work environment for Larkin, making faces and chuckling at Bailey, refusing to speak to her, and on one instance, mouthing the words " 'You are going to get it.' "

"[A] mere offensive utterance or even a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment." (*Yanowitz, supra*, 36 Cal.4th at p. 1054.) " ' "A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient."

[Citation.] " '[W]orkplaces are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.' " [Citation.]' For example, ' "[a] mere oral or written criticism of an employee . . . does not meet the definition of an adverse employment action under [the] FEHA." ' [Citation.] Similarly, '[m]ere ostracism in the workplace is insufficient to establish an adverse employment decision.' " (*Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 92.) Under these standards, Taylor-Monachino's "course of conduct" does not rise to the level of an adverse employment action.

Turning to Bailey's June 2015, performance review, Bailey's new supervisor noted two areas for improvement: "regular attendance, and responsiveness to supervisory requests." Bailey maintains those comments "derived directly from the emotional and psychological effects of the racial slur and the [DA's Office's] failure to properly address or remedy the situation," and thus were, in combination with Taylor-Monachino's alleged actions, an adverse employment action.

To begin with, Bailey's assertion that she suffered emotional upset due to Larkin's alleged racial slur which affected her performance, which, in turn, precipitated the improvement comments, is not an assertion that any supervisor was retaliating against Bailey for complaining about Larkin's offensive language. In addition, to the extent the noted areas for improvement could be considered criticism of Bailey's performance, mere "written criticism of an employee . . . does not meet the definition of an adverse employment action under the FEHA." ' " (*Light v. Department of Parks & Recreation, supra,* 14 Cal.App.5th at p. 92.) Indeed, Bailey's

supervisor gave her the same overall rating, "Met Expectations," that Bailey had received each of the prior two years.

We therefore additionally agree with the trial court that neither Taylor-Monachino's alleged "course of conduct," nor the improvement comments in Bailey's performance review rise to the level of an adverse employment action.

DISPOSITION

The judgement is affirmed. Costs on appeal to respondents.

Banke, J.

We concur:

Humes, P.J.

Margulies, J.

PROOF OF SERVICE (Court of Appeal)

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Court of Appeal Case Number: A153520

Superior Court Case Number: CGC 15-549675

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	Superior Court Case Number: CGC 15-549675

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Date: October 26, 2020

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Law Offices of Robert L. Rusky

Law Firm