Case Number S127921

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

HELGA CARTER,

Plaintiff and Respondent,

v.

CALIFORNIA DEPARTMENT OF VETERANS AFFAIRS,

Defendant and Appellant

Appeal from Judgment and Order of the Superior Court, State of California,
County of San Bernardino
Superior Court Case No. BCV003693
Hon. John P. Van der Feer, Judge

After a grant of review by the Supreme Court of California and retransfer to the
Court of Appeal with Instructions, Supreme Court Case No. S117253,
and a decision on remand by the Court of Appeal, Fourth Appellate District, Division Two
Case Number E030908

APPLICATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER HELGA CARTER

[PROPOSED] BRIEF OF AMICUS CURIAE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT HELGA CARTER

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APPLICATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND STATEMENT OF INTEREST

The California Employment Lawyers Association (CELA) requests permission to file a brief as amicus curiae in support of Plaintiff and Respondent Helga Carter. CELA is a statewide organization of attorneys primarily representing employees in employment termination and discrimination cases.

CELA has appeared as amicus curiae in *Salazar v. Diversified Paratransit*, 117 Cal. App. 4th 318 (2004); as well as in numerous Supreme Court cases including *Gantt v. Sentry Insurance*, 1 Cal. 4th 1083 (1992), *Fermino v. Fedco*, 7 Cal. 4th 701 (1994), *Scott v. Pac. Gas & Elec.*, 11 Cal. 4th 454 (1995), *Lazar v. Superior Court*, 12 Cal. 4th 631 (1996), *Stevenson v. Superior Court*, 16 Cal.4th 880 (1997), *City of Moorpark v. Superior Court*, 18 Cal.4th 1143 (1998), *Reno v. Baird*, 18 Cal.4th 840 (1998), *White v. Ultramar, Inc.*, 21 Cal.4th 563 (1999), *Lane v. Hughes Aircraft Company*, 22 Cal.4th 405 (2000), *Armendariz v. Foundation Health Psychcare Service, Inc.*, 24 Cal.4th 83 (2000), *Richards v. CH2M Hill, Inc.*, 26 Cal.4th 798 (2001), *Advanced Bionics Corporation v. Medtronic, Inc.*, 29 Cal.4th 697 (2002), and *Schifando v. City of Los Angeles*, 31 Cal.4th 1074 (2003).

CELA, through its undersigned attorney, is familiar with the questions involved in this case and the scope of their presentation and believes that there is necessity for additional argument on the following points:

In light of the Legislature's statement of legislative intent, the 2003 amendments to the Fair Employment and Housing Act,

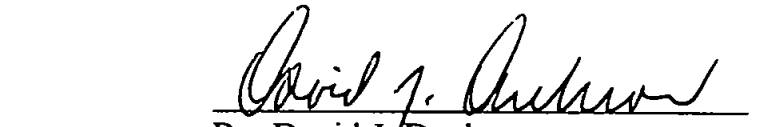
AB 76, Stats. 2003, ch. 671, construe or clarify, rather than change, Government Code § 12940(j), and, therefore, apply to the case before the Court.

If this request is granted, the following brief in support of Plaintiff and Respondent is respectfully submitted.

Date: April 19, 2005

Respectfully submitted,

For Amicus Curiae CELA:
Law Office of David J. Duchrow



By: David J. Duchrow

I. INTRODUCTION

In *Carter v. California Department of Veterans Affairs*, 121 Cal. App. 4th 840 (2004), the Court of Appeal erred in holding that the amendments to the Fair Employment and Housing Act substantively changed the statute and therefore could not be constitutionally applied to the Defendant / Appellant.

The opinion below rejected the majority decision in *Salazar v. Diversified Paratransit, Inc.*, 117 Cal. App. 4th 318 (2004) (*Salazar II*) which held that the amendment to the Fair Employment and Housing Act ("FEHA"), Government Code § 12940, clarified rather than changed subsection (j), stating that the amendment "is a clarification of existing law and therefore governs this case."

As will be shown, the amendments were a restatement of existing law, and the legislative history supports application of the amendments to the present case. Accordingly, this honorable Court is respectfully requested to reverse the Court of Appeal, consistent with the majority holding of *Salazar II.*

II. ARGUMENT

The 2003 Amendments to the FEHA Simply Clarified Existing Law Regarding the Employer's Responsibility for Third-Party Harassment

The FEHA was amended following *Salazar v. Diversified Paratransit, Inc.* (2002) 103 Cal. App. 4th 131 (*Salazar I*), for which the California Supreme Court granted review. Within two months of *Salazar I*, AB 76 was introduced in the Legislature to abrogate that holding.

The bill amended Government Code § 12940(j)(1), to include the following:

> "An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action."

The bill also contains a statement of legislative intent: "It is the intent of the Legislature in enacting this act to construe and clarify the meaning and effect of existing law and to reject the interpretation given to the law in *Salazar v. Diversified Paratransit, Inc.* (2002) 103 Cal. App. 4th 131."

The bill passed both houses and was signed by the Governor. The California Supreme Court then remanded *Salazar I* to the Court of Appeal, to be decided in light of AB 76. The Court of Appeal then held that the enactment was simply a clarification of existing law, so as to apply to that case. (*Salazar II*, Slip Op., p. 6)

Relying primarily upon *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, the court in *Salazar II* reasoned that although a legislative declaration of an existing statute's meaning is neither binding nor conclusive in construing the statute, an amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute. 117 Cal. App. 4th at 325.

The *Salazar II* court was persuaded by the fact that AB 76, abrogating *Salazar I*, was introduced less than two months after the issuance of that case. 117 Cal. App. 4th at 328.

In addition, the court reviewed the legislative history of the section, which it found to be ambiguous. *Salazar I* resolved that perceived ambiguity on the side of the more restrictive interpretation. The Legislature then weighed in and clarified section 12940 to eliminate the perceived ambiguity.

In fact, even before the amendments, the FEHA held an employer responsible for the sexual harassment of its employees. "When 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, the law is violated." *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal. App. 4th 397, 409.

The FEHA has always prohibited sexual harassment, because FEHA has always prohibited discriminatory "terms, conditions and privileges of employment" under Government Code § 12940(a). The purpose and effect of section 12940(j) was not to establish a new statutory obligation, but to extend FEHA's anti-harassment provisions to employers with fewer than five employees, who were not otherwise covered under the Act.

An employer's liability for third party harassment does not derive from its obligation to control the acts of third parties, but from its unwillingness to control its employees' work environment. Section 12940(j) makes it clear that the employer bears the responsibility to

control the work environment, without regard to the payroll status of the harasser: "An employer shall take all reasonable steps to prevent harassment from occurring."

The Department of Fair Employment and Housing, California's administrative agency which investigates complaints of workplace discrimination under the FEHA, had promulgated a similar directive interpreting the FEHA as barring employers from knowingly permitting third party harassment. The DFEH Enforcement Division Directive that interprets the FEHA did so in a manner consistent with the subsequent amendment to the FEHA. Enforcement Directive No. 207 states in pertinent part at section 4(A)(2):

> "The primary respondent's liability for outsider harassment is the same as that for non-supervisory harassment. The respondent is liable if it had actual or constructive knowledge of the outsider harassment, and failed to take immediate and appropriate corrective action."

The Court of Appeal did not address the foregoing authorities which show that the employer's obligation to prevent harassment by third persons, such as its clientele, was prohibited by the FEHA even before AB 76 was passed. The Court is respectfully requested to conclude that, as these authorities show, the amendment to the FEHA clarified and construed the law as it already existed, and did not create any additional obligations.

III. CONCLUSION

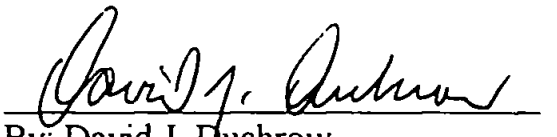
The 2003 amendments to the FEHA clarify, not change, the previous statute. Preventing third party harassment in the workplace has

been the employer's responsibility since the FEHA was enacted. Legislative history, as well as *Western Security Bank v. Superior Court, supra*, and *Salazar II's* majority decisions support reversing the Court of Appeal.

Date: April 19, 2005

Respectfully submitted,

For Amicus Curiae CELA:
Law Office of David J. Duchrow



By: David J. Duchrow

CERTIFICATE OF WORD COUNT

I certify that this application, brief, and certificate, contain 1326 words. For purposes of this certificate I rely upon the word counting feature of WordPerfect 10.0, which was used to prepare this brief.

Date: April 19, 2005

David J. Duchrow

PROOF OF SERVICE

I am employed in the County of Los Angeles at 11340 W. Olympic Boulevard, Suite 305, Los Angeles, California 90064. On the date of mailing, I am over the age of eighteen, and not a party to the above-described action. On **April 19, 2005**, I served the within:

APPLICATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER HELGA CARTER;
and [PROPOSED] BRIEF OF AMICUS CURIAE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT HELGA CARTER

by placing a true copy thereof enclosed in sealed envelopes addressed as indicated on the attached service list.

BY MAIL:

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on April 19, 2005, at Los Angeles, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

David J. Duchrow

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