S 115154

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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**ELYSA J. YANOWITZ,**

*Plaintiff and Appellant*

*v.*

**LOREAL USA, INC.,**

*Defendant and Respondent*



---

Appeal from Court of Appeal, District No. 1, Div. No. 5
Case No. A095474
San Francisco Superior Court Case No. 304908
Hon. Ronald Quidachay, Judge

# REQUEST BY CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION FOR PERMISSION TO FILE AMICUS BRIEF AND AMICUS BRIEF IN SUPPORT OF PLAINTIFF/APPELLANT

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REQUEST FOR PERMISSION TO FILE AMICUS BRIEF:

TO THE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

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

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:

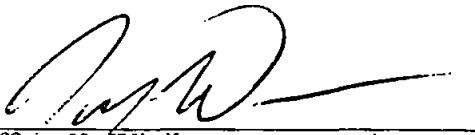
- Whether FEHA's Prophylactic Duty to Prevent Discrimination Requires the Court to Broadly Construe "Adverse Employment Action" to Include Any Form of Retaliation That Would Reasonably Deter Victims and Others From Reporting Suspected Misconduct?

- Whether The Existence of Substantial or Material Damages is a Predicate to Seeking FEHA Relief?

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

Respectfully submitted,

Date: March 2, 2004 LAW OFFICES OF JEFFREY K. WINIKOW



By: Jeffrey K. Winikow
Attorney for Amicus Curiae
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## SUMMARY OF ARGUMENT:

California's Fair Employment & Housing Act ("FEHA") is a comprehensive scheme which not only seeks to remedy discrimination, but to prevent it. Indeed, FEHA's express statutory mandate to prevent discrimination immediately distinguishes California law from federal law, and the laws of many sister states. Meaningful prevention, however, requires meaningful protection for those who come forward to complain about unlawful conduct.

The linchpin of FEHA is prophylaxis. Employers must publish anti-discrimination policies, and communicate those policies throughout the workplace. Anti-discrimination training and investigation are now cottage industries. The law does merely encourage proactive behavior, it demands it. Yet, the defense proposes to erect a statutory threshold that conditions FEHA protection on substantial or material harm, regardless of malicious intent and regardless of any chilling effects on others. Quite simply, to tolerate unregulated retaliation that deters others from complaining is to undermine the policies of early intervention that this Court previously adopted.

While damages are a critical part of most civil cases, they are just that: damages. Damages neither determine liability nor circumscribe injunctive relief. Indeed, the concept of nominal damages for civil rights violations is firmly embedded in the legal landscape. As analytical constructs, damages and liability are separate and distinct.

For liability purposes, the only meaningful question one should ask is "***why should the law tolerate any form of retaliation,***

***substantial or otherwise, which is borne out of unlawful animus?***" In other words, once one satisfies the "motivating factor" standard for causation, i.e., that an act or omission was actually motivated by retaliatory spite, then measuring the harm as substantial or insubstantial should only affect the magnitude of damages, not an employer's underlying liability.

To prove retaliation, one must show unlawful motive (either directly or through inference). Retaliation claims are not like harassment claims where one's liability is determined solely by the effect on a reasonable victim regardless of intent. With harassment claims it may make sense to require a "severe or pervasive" threshold before permitting legal action, but retaliation claims are completely different. There are no well meaning, but misunderstood, perpetrators of retaliation.

CELA does not suggest that the Court adopt a completely open-ended standard for determining what is an "adverse employment action" for FEHA purposes. But drawing the line at "substantial" or "material" harm is grossly under-inclusive to the extent that this definition permits retaliatory acts that are reasonably likely to deter victims and others from asserting their civil rights. For FEHA's statutory duty to prevent discrimination to have any meaning, the Court must broadly construe "adverse employment action" to include all forms of retaliatory conduct that are (i) motivated by unlawful animus, and (ii) reasonably likely to impede FEHA enforcement. Those that have been victimized by retaliation demand nothing more; a civilized society should insist on nothing less.

## THE NATURE OF CELA'S INTEREST IN THIS MATTER:

The California Employment Lawyers Association ("CELA") is an organization composed of attorneys who represent primarily plaintiffs in employment discrimination and related cases. Through its undersigned attorney, CELA is familiar with the questions involved in this case and the scope of their presentation. CELA has sought leave of Court to submit this brief.

## ARGUMENT

### A. FEHA's Statutory Duty to Prevent Discrimination Requires Prophylactic Protection Against Any Adverse Employment Action That Reasonably Deters a Victim or Others From Complaining About Unlawful Conduct.

The touchstone of California anti-discrimination law is FEHA's statutory duty to prevent discrimination. Gov't Code Section 12940(k). An employer cannot simply react passively to discriminatory conduct, it must take action.

In this case, the plaintiff was not herself the object of discrimination: she opposed discrimination against another. This is precisely the type of conduct FEHA needs to protect, recognizing that harassment or discrimination victims are often unwilling to come forward.

In other contexts not applying to the case at bar, this Court has announced policies of early intervention and internal complaints in order to curb workplace harassment. See Richards v. CH2M Hill, Inc., 26 Cal.4th 798 (2001) (policy favors "informal conciliation" between employer

and employee prior to initiating litigation); State Department of Health Services v. Superior Court (McGinnis), 31 Cal.4th 1026 (2003) (importing the avoidable consequences defense to claims of supervisory harassment under FEHA). The rule established in this case will likely affect how the goals of "informal conciliation" and "avoidable consequences" operate in other situations.

At bottom, CELA expects that the rule adopted in this case will govern harassment cases. As discussed below, the Court should not tolerate any form of reasonable deterrence to the exercise of civil rights. Employees who voice internal opposition to unlawful employment practices cannot be subject to a state of professional purgatory, receiving no legal protection unless and until retaliation ripens into substantial or material harm -- however one is to define that term[1].

1. A "Deterrence" Test Dovetails With the "Avoidable Consequences" Defense: One Cannot Deem Unreasonable the Failure to Complain About Unlawful Conduct Unless the Law Prohibits All Forms of Retaliation That Reasonably Deter Complaints.

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[1] If the Court adopts a "substantial or material" test for assessing adverse employment actions, this only begs the question as to whether one would receive legal protection for complaining about retaliation at its infancy, i.e., before it ripens into actionable misconduct. This is one of the issues presently before the Court in Mackey v. Dept. of Corrections, S114097.

In State Department of Health Services, supra, this Court posed several rhetorical questions that harassment victims might ask when deciding whether to use an employer's internal complaint procedure: "Will my employer believe me? Will my employer fire me, demote me, label me a troublemaker, or transfer me to a position with no future?" Id at 1048. The Court should frame its opinion in this case with the answers to those questions in mind.

Encouraging one to report harassment is illusory without broad forms of legal protection. While there may be no difference at the core between a "substantial or material" test or a "deterrence" test, there are significant differences at the fringe. Under either test, an employer can not fire or demote a worker in retaliation for filing a harassment complaint -- but what happens should the employer label the person a troublemaker, or transfer him/her to a position with no future[2]? Is a "Scarlet Letter" substantial or material in and of itself, or do we only measure stigma by its economic consequences?

By definition, a "deterrence test" only includes retaliatory conduct which ***reasonably*** deters victims and others from complaining. Without reasonable deterrence, there is no "adverse employment action." On the other hand, a "substantial or material" test allows for so-called lesser

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Under a "substantial or material" test, a defendant could argue that labeling one a "troublemaker" has no significance without a demonstrable record of significant consequences. Likewise, suspicions of future harm from a particular lateral transfer may be too speculative to qualify as "substantial or material" even if employees generally regard such a transfer to be the death-knell for career advancement.

forms of retaliatory conduct that may nonetheless reasonably deter complaint activity.

Given that the avoidable consequences defense is grounded in a victim's ***unreasonable*** failure to complain[3], the Court should not permit any form of retaliation which -- by definition -- deters complaints. Indeed, ***the more the Court leaves a complaining party to his or her own peril, the more reasonable it becomes for victims to remain silent.*** To accept any amount of reasonable deterrence is to call into question the reasonableness of anyone's failure to complain. The "avoidable consequences defense" cannot -- and should not -- exist in a vacuum. Complaints and protection go hand-in-hand.

Having imposed a fairly broad duty on harassment victims to use internal complaint procedures, law and policy not only suggest, but require, this Court to broadly construe FEHA's anti-retaliation provision.

2. Damages Do Not Dictate Liability: Courts Should Be Able to Enjoin Retaliatory Conduct That Reasonably Deters Others From Enforcing Their Civil Rights

If, as the defense suggests, one defines "adverse employment action" by the materiality of alleged damages, courts would be powerless to

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[3] Under the "avoidable consequences" defense announced in State Department of Health Services, an employer must show, inter alia, that an employee "unreasonably failed to use the preventive and corrective measures that the employer provided" Id at 1044.

issue injunctive relief in the nascent stages of a retaliatory campaign -- where such relief could be most effective in preserving the employment relationship. See, for example, Brusso v. United Airlines, Inc., 239 F.3d 848, 864 (7th Cir. 2001) (remand for injunction against further retaliation); Pecker v. Heckler, 801 F.2d 709, 710 (4th Cir. 1986) (enjoining further discrimination or retaliation against plaintiff). Indeed, once retaliatory conduct ripens into something substantial or material (i.e., termination from employment), then requests for injunctive relief are often denied outright as moot. See, for example, Amirmokri v. Baltimore Gas & Elec. Co., 60 F.3d 1126, 1132 (4th Cir. 1995) (denying injunction against future harassment where plaintiff was no longer employed at the company); Hudson v. Reno, 130 F.3d 1193, 1207 (6th Cir. 2000) (denying injunction to prevent adverse employment action where plaintiff has resigned from the job claiming constructive discharge).

Under FEHA, parties may obtain remedial injunctions. Aguilar v. Avis Rent A Car Sys., 21 Cal.4th 121 (1999) (remedial injunction barring racial epithets). It does not appear, however, that courts can issue prophylactic injunctions without at least some showing of a sustainable legal wrong. CELA anticipates that the Court's definition of "adverse employment action" will set the minimum threshold for injunctive relief, regardless of retaliatory intent and regardless of any deterrent effects on others.

a. The Concept of Nominal Damages is a Fixture of Civil Rights Law: Trial Courts Can Reduce Excessive Damages for Insubstantial Conduct

CELA believes that the record evidence shows that Ms. Yanowitz actually suffered substantial and material harm, and files this brief only to highlight points about other cases which may be impacted by the ruling in this one. In this regard, CELA wishes to stress two points about retaliation cases which do not involve substantial or material harm.

First, FEHA does not merely regulate workplace conduct; it ***establishes civil rights in this State***. Gov't Code Section 12921. As such, ***the Court should construe FEHA consistently with other types of civil rights statutes***.

In the civil rights context, it is not unusual for courts to award nominal damages (e.g., one dollar) where wrongful conduct does not result in substantial injury[4]. As noted by the United States Supreme Court in Carey v. Piphus, 435 U.S. 247, 266 (1978):

> Common-law courts traditionally have vindicated deprivations of certain "absolute" rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society

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[4] As discussed below, this rule is not unique to civil rights claims. Under California law, nominal damages are available for all forms of tortious conduct that do not result in substantial harm. CCP Section 3360.

> that those rights be scrupulously observed ; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights. (Citations and footnote omitted).

The second point CELA wishes to stress concerns the notion that one must circumscribe retaliation claims in order to guard against frivolous lawsuits seeking to make millions out of minutia. Bunk. Both CCP Section 128.5 and FEHA guard against frivolous lawsuits. See Gov't Code Section 12965(b); Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro 91 Cal.App.4th 859 (2001) (FEHA defendants may recover attorney fees where plaintiff files frivolous action). There is simply no reason to believe that expansively construing FEHA will lead to the filing of frivolous lawsuits given these sanctions.

Moreover, trial courts have always been the primary check against excessive damages, and nothing in this case suggests otherwise. If a jury were to somehow award outrageous compensatory damages for an insubstantial injury, trial courts can remit damages to a more appropriate level. CCP Sections 657(5) and 662.5(b). The prospect of a runaway jury is simply no basis for failing to hold parties accountable for their retaliatory conduct – especially when that conduct demonstrably chills civil rights enforcement.

b. Because Retaliation Claims Involve Showing Unlawful Intent, One Should Not Impose a Threshold Level of Injury: Nominal Damages Are Available For Tortious Conduct That Does Not Cause Substantial Harm

Retaliation does not focus on the ultimate act so much as it does on motive. For example, it is not illegal, per se, to fire an employee; it becomes illegal, however, when one fires the employee out of retaliatory animus. In other words, motive drives liability. Consequences do not.

In this case, the defense seeks to erect a barrier to liability that is wholly dependent on one sustaining a threshold level of damage. The defense would ignore any showing of retaliatory intent, ignore any showing of causal relationship, and ignore any deterrent effects that an employer's retaliatory actions may have on future victims. Instead, the defense urges this Court to relegate all forms of retaliatory conduct that fall below a certain threshold of severity to that of "no harm, no foul[5]."

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5 The defense suggests that the Court examine each act of alleged retaliation separately to determine whether or not each one satisfies a threshold of severity. This approach is fundamentally inconsistent with how discrimination law exists in California, where courts assess the totality of conduct to determine impact and effect. As noted in Accardi v. Superior Court, 17 Cal.App.4th 341, 351 (1993):

> A single photograph of two sumo wrestlers engaged in combat may give the impression they are dancing a pas de deux. One must witness the entire match to appreciate its meaning and significance. A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not

As an analytical construct, fusing damages with liability is not only improper, but leaves a zone of unregulated conduct below the threshold. The proper paradigm through which the Court should analyze this case is that of a traditional tort, i.e., the four prongs of duty, breach, causation and damages. See Trujillo v. North County Transit Dist., 63 Cal.App.4th 280, 268-287 (1998) (applying tort analysis to FEHA claim alleging breach of the duty to prevent discrimination). And under a traditional tort analysis, one does not have to show substantial or material harm in order to prevail. See CCP Section 3360 ("When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages"); Hotel & Restaurant Employees and Bartenders Union, Local 28 v. Francesco's B, Inc., 104 Cal.App.3d 962, 973 (1980). One simply does not throw the baby out with the bath-water because damages do not rise to the level of substantial or material harm.

In the employment context, there is only one area where one could argue that damages affect liability: harassment. In order to be actionable under FEHA, one must show severe or pervasive workplace harassment. Fisher v. San Pedro Peninsula Hospital, 214 Cal.App.3d 590, 609 (1984). Harassment liability, however, is not predicated upon malicious intent. See, e.g., Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991) (reasonable woman standard for assessing harassment claims is not fault-based). One can be well meaning, yet still create a hostile working

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on individual incidents, but on the overall scenario. (Internal quotes and citations omitted).

environment.

Retaliation claims, on the other hand, require one to show a causal connection between motive and consequence. There is no such thing as a well intentioned perpetrator of retaliation. Neither law nor policy mandates that retaliation victims make the same type of heightened showing that harassment victims must make. Once one proves retaliation, perpetrators should be held fully accountable for the consequences of their actions. End of story.

3. Applying Esberg v. Union Oil Co., the Text of FEHA Supports a Broad Reading of "Adverse Employment Action" Because Retaliation Claims Are Not Expressly Grounded in Discrimination Based Upon "Terms, Conditions and Privileges of Employment"

Government Code Section 12940(h) makes it unlawful for an employer to "otherwise discriminate" against any person because of that person's opposition to unlawful employment practices. How does one define the term "otherwise discriminate?" Does this section bar all forms of discrimination, or only forms of discrimination that are substantial and material? Should the Court interpret the term broadly to further remedial purposes, or narrowly to constrain the flow of employment-related litigation? To a large extent, all of these questions are before the Court in this case.

As used in FEHA, the term "discriminate" does not have independent significance. One cannot say that "discriminate" means

discrimination in all terms, conditions and privileges of employment, for example, because this Court will only construe the term "discriminate" in light of the precise statutory language that accompanies it. See Esberg v. Union Oil Co., 28 Cal.4th 262 (2002) (FEHA Section 12941 does not prohibit age discrimination with regard to employment benefits). In other words, "discriminate" is not a term of art standing alone, but must be modified and qualified by other statutory language.

In many ways, this case presents the flip side of Esberg. In Esberg, this Court held that FEHA did not prohibit age discrimination in all "terms, conditions and privileges of employment" in light of the differences in text between former Government Code Sections 12940 and 12941. Despite the fact that Government Code Section 12920 announced a public policy against "discrimination" on account of age, the Court narrowly construed "discriminate" to mean only that which was specifically proscribed under former Section 12941.

Here, however, the textual differences run the other way. Section 12940(a) prohibits discrimination in "terms, conditions, or privileges of employment," but Section 12940(h) is not similarly qualified. The Legislature left "discriminate" open-ended, suggesting a broader scope than that covered by Section 12940(a).

Because "discriminate" does not have an independent meaning, and must be interpreted in light of its textual modifiers, the Court should analyze retaliation claims under Section 12940(h) the same way that it analyzed age discrimination claims under former Section 12941: according to the text. To paraphrase what the Court said in Esberg, applying it to the case at bar:

> "We do not review the wisdom of the Legislature's decision not to [define "discriminate" by reference to "terms, conditions or privileges of employment" within Section 12940(h)] or the wisdom of its decision [to use different language in the different sections of FEHA]. Our role in construing the statute is simply to ascertain and to declare what is in terms or in substance contained in the statute, not to assert what has been omitted." Esberg, supra at 270.

In short, applying Esberg to the present case, this Court should broadly construe "discriminate" in Section 12940(h) to prohibit any forms of retaliatory conduct. And, like Esberg, if the Legislature disagrees with the Court's construction, it can always fix the statute[6].

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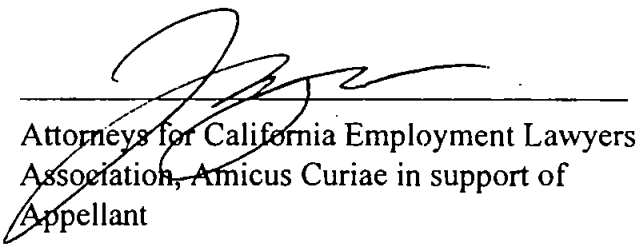
The Legislature amended FEHA in light of Esberg to prohibit age discrimination in all terms, conditions and privileges of employment. See Stats. 2002, c. 525 (A.B. 1599), which amended Government Code Section 12940.

## CONCLUSION

For the foregoing reasons and authorities, CELA respectfully requests that the Court affirm the lower court's decision, and define "adverse employment action" as any act that can reasonably deter a victim or others from complaining about unlawful conduct.

March 2, 2004 LAW OFFICES OF JEFFREY K. WINIKOW



Attorneys for California Employment Lawyers Association, Amicus Curiae in support of Appellant

## CERTIFICATE RE: WORD COUNT

I, Jeffrey K. Winikow, hereby certify that pursuant to Rule 14 of the California Rules of Court, that the Amicus Curiae brief submitted by the California Employment Lawyers Association contains 3741 words (including caption sheets and the request to file this brief). I make this representation in reliance upon the word count program accompanying the WordPerfect software that was used to create this brief.

March 2, 2004

Jeffrey K. Winikow
Attorney for Amicus Curiae
California Employment Lawyers Assoc.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California.

I am over the age of 18 and not a party to the within action; my business address is Law Offices of Jeffrey K. Winikow, 1801 Century Park East, Suite 1520, Los Angeles, CA 90067.

On March 3, 2004, I served the following document described as:

REQUEST BY CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION FOR PERMISSION TO FILE AMICUS BRIEF AND AMICUS BRIEF IN SUPPORT OF PLAINTIFF AND APPELLANT

which was enclosed in sealed envelopes addressed as follows:

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X (By Mail)

I deposited such envelope(s) in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid. I declare under penalty of perjury under the laws of the United States and of the State of California that the above is true and correct.

Executed on March 3, 2004 at Los Angeles, California.