S125171

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

AMAANI LYLE,

Plaintiff and Appellant

v.

WARNER BROTHERS TELEVISION PRODUCTIONS, INC. ET AL

Defendants and Respondents

Appeal from Court of Appeal, District No. 2, Div. No. 7
Case No. B160258

Los Angeles County Superior Court Case No. BC 239047
Hon. David Horowitz, Judge

REQUEST FOR PERMISSION TO FILE AMICUS BRIEF; AMICUS BRIEF OF THE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION 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 Amaani Lyle. 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:

- The extent to which the First Amendment to the United States Constitution prevents California from regulating workplace speech that is sufficiently severe or pervasive so as to constitute employment discrimination;

- The extent to which the First Amendment to the United States Constitution prevents California from regulating workplace speech that is sufficiently severe or pervasive so as to constitute employment discrimination when that speech is made in an artistically creative context;

- The legal standards under the Fair Employment & Housing Act for proving unlawful harassment; and

- Whether Warner Brothers has waived any right to assert a First Amendment defense in this case.

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

Respectfully submitted,

Date: February 4, 2005 LAW OFFICES OF JEFFREY K. WINIKOW

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

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SUMMARY OF ARGUMENT:

> "Sticks and stones may break my bones, but words can never hurt me."

The problem with a "sticks and stones" defense is that words ***do*** hurt. When words falsely malign another's professional reputation, words cause injury. When words make another reasonably fear imminent bodily contact, words cause injury. And when words create hostility severe or pervasive enough to affect one's working conditions, words cause injury. Anti-harassment law addresses injury, not words.

While the Constitution is never entirely irrelevant when analyzing misconduct rooted in words, the First Amendment's impact on harassment law is generally no greater than in a private figure, private matter defamation case. Or in a case of verbal assault. California's constitutional interest in eliminating workplace discrimination simply trumps any arguable restraint on one's right to discuss an actress's dried up vagina around the water cooler. This Court should continue to recognize what the United States Supreme Court first recognized nearly 20 years ago: that sexual harassment is not about mere words, but about "arbitrary barriers to equality in the workplace."

While there is undoubtedly a creative context to this case which sets it apart from a garden variety harassment matter, this just begs the question: "Was the sex talk at issue here truly part of a bona fide creative process, or was it just sex talk"? If Appellant's claim arises from purely personal communications severe or pervasive enough to alter working conditions, then the First Amendment does not bar States from

enacting and enforcing anti-discrimination laws. If, however, the conduct at issue truly reflects collaborative artistic creativity, then that may give rise to an additional level of constitutional scrutiny not present in other types of cases. Regardless, existing law already incorporates sufficient constitutional safeguards to pass muster under the First Amendment.

Just as one analyzes speech about matters of public concern differently from speech about private interests, the Court can adopt different frameworks for analyzing verbal harassment claims based upon the nature and constitutional significance of the speech. Speech rooted in the creative process may warrant a higher degree of protection than other forms of offensive speech, but not absolute protection. Indeed, in the defamation context, courts impose a sliding scale of constitutional safeguards depending on whether one is a private or public figure and on whether the statements embrace public interests or private interests. While one may liken a garden variety harassment case to a case of private figure/private matter defamation, in the creative context, the constitutional issues may be more analogous to private figure/public interest defamation, which still allows for liability.

Respondents misconstrue discrimination law in contending that the Fair Employment and Housing Act ("FEHA") bars only harassment targeted at a specific victim on account of their sex. Non-targeted forms of harassment, whether through words or iconic images, can send just as strong a message as targeted ones, destroying civil rights just as effectively. A hangman's noose; a swastika; a sign declaring that "Irish Need Not Apply." Does one really need to target any of these to a specific individual in order to impact workplace equality?

Leaving all else aside, however, Warner Brothers has contractually waived any right to assert a First Amendment defense in this case. An employer simply cannot promise to provide a harassment-free workplace, induce reliance, and thereafter run for cover under the cloak of constitutional immunity. While the individual defendants may not have knowingly and voluntarily waived their own First Amendment rights, Warner Brothers did. Although a media defendant may not want to advertise or promote the fact that it offers no protection against environmental harassment in the workplace, it cannot misrepresent this fact either.

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. The Interplay Between the First Amendment and Harassment Law Is Inherently Contextual: Even if Certain Cases Required Different Legal Standards, FEHA Meets Those Standards

This case raises two distinct legal issues: (a) whether the First Amendment bars all forms of sexual harassment liability based on vulgar words and coarse language; and (b) whether the First Amendment bars sexual harassment liability when vulgar words and coarse language are used in an artistically creative context. In neither case, however, is the First Amendment absolute in its application.

As discussed more fully below, not all speech is of equal First Amendment importance. Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 758-759 (1985) (the "heart of the First Amendment's protection" is speech directed at "matters of public concern"). While creative rights undoubtedly touch upon more significant constitutional interests than ordinary workplace settings, the First Amendment simply does not prohibit States from enforcing their own constitutional and statutory schemes to eradicate workplace discrimination. Even if the First Amendment were to require somewhat different liability standards for different types of cases, existing law meets or exceeds those standards.

1. Discrimination Law Does Not Regulate Speech; It Regulates Discriminatory Working Conditions

Discrimination law neither mandates civility nor proscribes speech. Rather, the purpose of discrimination law is to ensure equal opportunity across many types of legally protected classes by removing

barriers to equality in the workplace. Gov't Code Sections 12920 and 12920.5. Sexual harassment, a form of workplace discrimination, is not unlawful because certain words are distasteful, but because workplace hostility can create "arbitrary barriers to equality in the workplace." Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

Discrimination law does not regulate speech per se; it regulates working conditions and other terms, conditions and privileges of employment. Gov't Code Section 12940. Words, no matter how coarse or vulgar, are not themselves actionable. Only where words are severe or pervasive enough to alter one's working conditions can one sue for unlawful harassment. Fisher v. San Pedro Peninsula Hospital, 214 Cal.App.3d 590 (1989). As noted in Robinson v. Jacksonville Shipyards, Inc., 760 F.Supp 1486, 1535 (M.D. Fla 1991): "***pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment.***" (Emphasis added; citations omitted). See also Baty v. Willamette Indust. Inc., 172 F.3d 1232, 1246 (10th Cir. 1999) (endorsing Robinson).

Moreover, even though harassment law may be tethered to speech, it only seeks to address the secondary effects of speech, not speech itself[1]. See, e.g., R.A.V. v. St. Paul, 505 U.S. 377 (1992). In other words,

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In terms of "secondary effects" analysis, this case is substantially different from Aguilar v. Avis Rent a Car System, Inc., 21 Cal.4th 121 (1999), which seemingly rejected the "secondary effects" doctrine in the context of a remedial injunction targeted at discriminatory epithets. In Aguilar, the speech at issue was in fact specific words, whereas here the threshold standard of "severe or pervasive" harassment extends *beyond the words themselves*, applying only where the secondary effects of the words are substantial enough to alter one's terms and conditions of employment. Speech merely having an "emotive impact" is not

working conditions, a harm separate and apart from the communicative impact of the speech, become the analytical focal point in a harassment case. While this does not exempt harassment law from constitutional scrutiny, it does affect the prism through which one views the time, place and manner restrictions at issue here.

Finally, to the extent that Appellant bases her claims on Respondent's failure to prevent and remedy harassment, the claim targets acts and omissions separate and apart from speech itself.

2. Harassment Laws Are Similar to Other Legal Wrongs Rooted in Speech: California Has a Compelling Interest in Eradicating Workplace Discrimination

Discrimination law is not the only area where the law regulates conduct that is premised, in whole or in part, on speech. Defamation involves speech. Assault involves speech. Harassment, like defamation and assault, regulates conduct, not speech -- even though claims may often involve speech to some degree. The following is just a short list of the types of matters that survive First Amendment scrutiny notwithstanding their relationship to speech.

- ***Defamation Touching Upon Matters of Public Concern***: Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

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proscribed by harassment law; speech altering working conditions is. Cf. Boos v. Barry, 485 U.S. 312 (1988) (ordinance prohibiting signs bringing foreign governments into "public disrepute" was not directed toward secondary effects of speech).

- ***Regulation of Physician Conduct***: Shea v. Board of Medical Examiners, 81 Cal.App.3d 564 (1978);
- ***Regulation of Commercial Advertising***: Warner-Lambert Co. v. F.T.C., 562 F.2d 749 (D.C. Cir. 1978);
- ***Regulation of Workplace Speech Interfering With Union Elections:*** NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) (rejecting contention that the First Amendment bars the NLRB from regulating employer speech in the context of union elections);
- ***Regulation of Workplace Speech That Does Not Touch Upon Matters of Public Concern***: Connick v. Myers, 461 U.S. 138 (1983);
- ***Regulation of Disruptive Workplace Speech That Touches Upon Matters of Public Concern***: Hyland v. Wonder, 972 F.2d 1129 (9th Cir. 1992).

As noted above, harassment claims focus on the collective impact on one's working conditions given the "totality of circumstances," not on mere words. Fisher v. San Pedro Peninsula Hospital, 214 Cal.App.3d 590, 608-610. Sporadic epithets are not unlawful. Isolated jokes are not unlawful. Occasional teasing is not unlawful. But when language is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," the law affords relief as a form of workplace discrimination. Meritor, 477 U.S. 57, 67.

California's interests in eradicating workplace discrimination are of the highest order. Although California's comprehensive civil rights scheme strongly denounces all forms of workplace bias, including harassment, the State's interests here extend beyond legislative fiat: they are grounded in the California Constitution. See Cal. Const. Art. 1, § 8; Gov't Code §§ 12920, 12920.5, 12921; 12940; 12950; 12950.1.

3. Garden-Variety Harassment Claims Do Not Involve Constitutionally Protected Speech: The Lower Court Properly Recognized a Factual Dispute Central to this Case, i.e., Whether the Conduct Arose in a Bona Fide Creative Context

Under the Constitution, not all speech is of equal significance. For example, the law protects speech about private matters differently from speech directed at issues of public concern. See, e.g., Connick v. Myers, *supra*. In a garden variety harassment case, coarse and vulgar language are not directed at issues affecting the public interest, but at private interests and desires. In those cases, the Constitution simply does not trump the compelling state interests in curbing workplace discrimination.

What sets this case apart from the garden variety case, however, is Respondents' contention that the speech itself arises in a constitutionally protected context. But this contention just begs the threshold factual question: "Was a hostile environment for women created by conduct that was entirely personal in nature, or was the conduct actually part of a bona fide creative process?" The record allows for competing inferences, which makes the matter particularly ripe for factual

determination at trial[2].

There is simply no right to create a sexually charged workplace under the guise of free speech – especially where one acts merely out of a personal need to express private fantasies[3]. The Constitution protects this form of speech about as much as it protects speech that defames a private figure on a matter of private interest, which is to say minimally. See Savage v. Pacific Gas & Electric Co., 21 Cal.App.4th 434, 445 (1991), quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760 (1985): "While such speech is not totally unprotected by the First Amendment, its protections are less stringent' [than that applying to speech on matters of public concern]." As the Court of Appeal recently recognized in Brekke v. Wills, __ Cal.App.4th ___, 2005 WL 170783 (Jan. 25, 2005) (citations and internal quotations omitted) (affirming restraining order enjoining defendant from contacting plaintiff's daughter and family):

> "Here, defendant's speech was between purely private parties, about purely private parties, on matters of purely private interests. Thus, this case is wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling."

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2 Questions over the bona fide creative purpose of the comments at issue are nothing more than questions over pretext, i.e., whether the stated reason for conduct is merely a smokescreen to cover up an unlawful (or unprotected) reason. Giving the Appellant the benefit of all reasonable inferences, the record evidence shows conduct unrelated to artistic creativity.

3 This case does not involve evidence of politically motivated speech, or speech that involves the expression of ideas. It involves sexually charged speech that is viewpoint neutral in content. To this end, Respondents' reliance on DeAngelis v. El Paso Muni. Pol. Officers Ass'n, 51 3d 591 (5th Cir. 1995) is entirely misplaced.

Given the compelling State interests at stake, the First Amendment is simply not a barrier to most sexual harassment cases -- even where the discrimination is predicated upon vulgar words and coarse language[4]. See Aguilar v. Avis Rent a Car System, Inc, *supra*; R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 390 (1992) ("sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices"); Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 Rutgers L. Rev. 461 (1995).

4. Constitutionally Protected Speech May Be Treated Differently From Lesser Forms of Speech, But Any Additional Requirements Do Not Preclude States From Regulating Severe or Pervasive Discriminatory Working Conditions

The First Amendment may indeed protect speech incident to artistic creativity to a greater degree than offensive speech generated for

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[4] If the Court were to hold that the individuals here have a protected First Amendment interest attaching to their workplace speech, then one must query whether these same individuals can be fired for exercising that same First Amendment right. In other words, is the First Amendment a double-edged sword in this context? It is not clear whether Respondents' position, taken to a logical conclusion, would give rise to a claim of wrongful termination in violation of public policy should Warner Brothers actually fire one or more writers for making the type of untargeted comments that it now seeks to embrace with constitutional significance.

personally gratuitous reasons[5]. The law has always recognized constitutional distinctions in the content and character of speech. A public figure suing a media defendant for defamation on a issue of public concern bears a higher burden of proof than a private figure suing a private actor for defamation on a purely private matter. Compare New York Times v. Sullivan, 376 U.S. 254 (1964) with Dun & Bradstreet, Inc., *supra*. Similarly, a public sector employee's First Amendment rights attach only where he or she is retaliated against for speaking out on a matter of "public concern." Connick, *supra*. In neither case does the Constitution create a wholesale immunity for all constitutionally protected speech separate and apart from "content, form and context." Id.

Even when speech takes on constitutional importance, there are varying degrees to which the Constitution protects speech. Respondents suggest that quid pro quo harassment would survive First Amendment scrutiny under the "threat" doctrine, but do not offer any type of analytical framework for examining other forms of workplace

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This brief does not specifically address whether speech incident to the creation of television programming is on par with speech relating to matters of public concern for purposes of constitutional analysis. CELA merely assumes for the sake of argument that speech uttered in a bona fide creative context is treated somewhere close to speech touching upon public interests. See, e.g., Berger v. Battaglia, 779 F.2d 992 (4th Cir. 1985) (off duty police officer's public "blackface" performances were entertainment speech protected by the First Amendment) ("We do not disagree with the general assessment that entertainment ranks lower on the scale of first amendment values than does pure political debate...[but it should be] accorded a great deal of weight, certainly not far below the value accorded political and social commentary and debate."). By treating artistically creative speech as a matter affecting public concern, CELA presents an analytical framework that arguably gives more protection to the speech at issue than that actually afforded under the First Amendment.

harassment[6] – except to note that "offensive, sexually-themed speech that is directed at another person in the workplace because of her sex may create liability for sexual harassment without abridging the First Amendment...". Respondent's Opening Brief, pg. 55. Why?

a. The First Amendment Does Not Guarantee The Right to Use "Fighting Words"

As noted above, in R.A.V., *supra*, the United States Supreme Court noted that the First Amendment did not immunize sexually derogatory "fighting words" from Title VII liability. R.A.V., *supra*, 505 U.S. at 390[7]. The Court, however, did not offer any guidance as to what constitutes a sexually derogatory fighting word. To many, referring to a woman's vagina as a "dried up pussy" may very well cause the type of heated reaction embraced by the "fighting words" doctrine. CT 1659, 2146.

b. The First Amendment Does Not Necessarily Protect All Manners of Expression That Cause Disruption in the Workplace

One of the lessons gleaned from public sector First

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6 Not all threats constitute quid pro quo harassment. The United States Supreme Court treats unfulfilled threats as a form of environmental harassment. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 754 (1998).

7 The Court actually referenced "sexually derogatory fighting words, among other words," which suggests that words less significant than "fighting words" may also support a Title VII claim. R.A.V., *supra* at 390.

Amendment employment cases is that constitutionally protected speech on matters of public concern does not give one license to run amuck in the workplace. Instead, questions over First Amendment protection often involve balancing respective interests as opposed to imposing rules of absolute application. Connick, *supra*. Indeed, as noted in Waters v. Churchill, 511 U.S. 661, 681 (1994):

> "Even if Churchill's criticism ...was speech on a matter of public concern--something we need not decide--the potential disruptiveness of the speech as reported was enough to outweigh whatever First Amendment value it might have had"

While some government employers may chose to tolerate workplace disruption caused by inflammatory language, as a matter of First Amendment analysis, they are not required to do so. See Hyland v. Wonder, 149 F.3d 1129 (9th Cir. 1992) (analyzing First Amendment cases seeking to balance the interests of free speech and efficient government operation). The relevant point stressed here is that disruptive speech, even when delivered in a constitutionally protected context, is afforded far less protection than non-disruptive speech. And a State's compelling interests in eradicating workplace discrimination is ***at least*** on par with a State's interest in ensuring collegiality and order in a government agency's administrative offices.

In the harassment context, CELA does not suggest that the mere potential for workplace disruption trumps any and all legal protection attaching to speech. Emotive impact, however, is not entirely irrelevant either. Even speech rooted in the most significant constitutional significance is subject to interest balancing when made in a workplace setting. Connick, *supra*.

setting. Connick, *supra*.

The court should regard the legal threshold of "severe or pervasive" harassment as a form of constitutional safeguard, ensuring that FEHA liability only reaches that conduct which, by its very nature, has actually altered one's terms and conditions of employment. Indeed, the standard itself embraces the very type of interest balancing test used in workplace speech cases. FEHA seeks to regulate only the truly disruptive[8], and not the mildly disruptive forms of speech.

If the First Amendment does not prohibit the government from firing disruptive workers for protected speech touching upon matters of public concern, then how can the First Amendment preclude private liability for injuries caused by disruptive speech of similar constitutional significance? First Amendment rights either trump workplace rights, or they do not.

In any event, the notion that one can exceed the scope of protected conduct by the time, place and disruptive manner of his or her speech is not unique. See Connick, *supra*., 461 U.S. at 152

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The effects of workplace disruption are not confined to the plaintiff. "It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for [reasons identified in FEHA] foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interest of employees, employers, and the public in general." Gov't Code §12920.

c. The Captive Nature of the Workplace Allows For Reasonable Regulation of Viewpoint Neutral Sexual Speech

The captive nature of the workplace also factors into the constitutional calculus. Where, as here, Appellant alleges that the workplace was so heavily punctuated with sexual innuendo and graphic discussion that she could not avoid the conduct, the "captive audience" doctrine comes into play. See R.A.V., *supra*.

Leaving aside other types of harassment claims, the conduct at issue here is viewpoint neutral, i.e., it pertains to the topic of sex without ascribing any judgments one way or another. In this respect, the claim differs from other types of viewpoint-discriminatory cases where one side of a debate is permitted to express a viewpoint that the other is not, e.g., allowing "pro affirmative action comments" while stifling the "con" position as hostile and offensive speech. In the context of this case, commentary about one's allegedly "dried up pussy" is treated on par with any opposing viewpoint. While the speech at issue here may be content-specific, it is nonetheless viewpoint neutral.

At bottom, the law permits one to regulate speech more closely in a "captive audience" context than in other contexts. See Aguilar v. Avis Rent a Car, 21 Cal.4th 121, 160-162 (Werdeger, J., concur.) (analyzing United States Supreme Court "captive audience" cases). See also Deborah Epstein, *Can a 'Dumb Ass Woman' Achieve Equality*, 84 Geo. L. J. 399 (1996) (discussing how the "captive audience" doctrine extends to the workplace). The First Amendment, when applied to captive workplaces, does not place an inflexible straight-jacket upon the enforcement of State anti-discrimination law.

d. Existing Law Already Incorporates Any Arguable Constitutional Requirements Pertaining to Civil Liability For Speech-Related Injuries

This case involves civil liability, not criminal prosecution. See United States v. Liddy, 354 F.Supp. 208, (D.D.C. 1972) ("First Amendment values will weigh differently in civil and criminal actions"). While the First Amendment controls both civil and criminal law, the civil nature of this case is nonetheless an additional factor which should color the Court's analysis.

As noted above, the nature and extent of constitutional protection relating to speech is analyzed on a sliding scale, protecting speech relating to matters of public concern to a greater extent that speech relating to private matters. Near the top of this scale is a media outlet's right to comment upon a public figure in a matter relating to his or her official conduct. New York Times v. Sullivan, *supra*. But even there the law allows for liability when words cause actual injury.

Respondents seem to suggest that in the harassment context only direct and targeted malice survives constitutional scrutiny. Bunk. Even when speech warrants the highest level of protection, the law still permits one to sue for unlawful defamation under a "reckless disregard" standard of proof. See Sullivan, 376 U.S. at 279-280 (holding that public officials can sue for defamation on matters relating to the public interest where one publishes statements with knowledge of falsity or with reckless disregard for falsity). The type of "targeted malice" argument advanced here seeks to protect sitcom writers' sexual banter to a greater degree than the New York Times' right to comment on the Bush Administration.

The issues raised in this case hardly rise to the level of New York Times v. Sullivan, *supra*, let alone exceed them. A Writers' Assistant on a television show is not a "public figure," nor is she akin to being a public figure.

The reason why the First Amendment restricts defamation claims brought by private figures to a lesser extent than those brought by public figures applies equally well to claims involving sexual harassment. As recognized in Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974): "***Private individuals are not only more vulnerable to injury than public officials and public figures, they are also more deserving of recovery***[9]." (Emphasis added). Regardless of whether the Respondents are acting in any type of constitutionally protected capacity, the Court must consider the Plaintiff's status and injuries when balancing rights.

At its outer limit, the First Amendment does not encroach upon a State's right to enact and enforce anti-discrimination law to a greater degree than in a private figure defamation case. Indeed, if anything, the ***First Amendment presents less of an obstacle to civil liability in a harassment context than in a defamation context.*** Whereas defamation claims involve "strong and legitimate" state interests in compensating individuals for damage to their reputation (Gertz, *supra* at 348-349), sexual harassment claims trigger "compelling" state interests in eradicating workplace discrimination. Cal. Const., Art. 1, §8; Gov't Code §§ 12920; 12920.5, 12921. Defamation law, therefore, provides a frame of reference for the strictest level of First Amendment scrutiny, recognizing that the compelling interests here only tip the scales in favor of Appellant's recovery rights.

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In addition to finding that private individuals have a greater risk of injury from defamation, the Court also recognized that private figures "generally lack effective opportunities for rebutting" defamatory contentions. Gertz, 418 U.S. at 343. In the harassment context, this latter concern is analogous to the "captive" nature of the workplace, where harassment victims generally lack effective opportunities for avoiding injurious misconduct.

Using a defamation analogy, there is simply no support for the Respondents' position regarding targeted animus – even when speech is delivered in a constitutionally protected context. Although private plaintiff/public issue defamation law requires some notion of "fault," it does not need to rise to the level of actual malice[10]. Gertz, *supra*, 418 U.S. at 347. In California, the standard used for private figure/public matter defamation cases is "negligence." Khawar v. Globe Internat., 19 Cal.4th 254, 275 (1998) ("Because in this defamation action Khawar is a private figure plaintiff, he was required to prove only negligence, and not actual malice, to recover damages to actual injury to his reputation").

Accordingly, as an analytical paradigm, if sexual harassment consists of solely of words that do not relate to any constitutionally protected manner, then the First Amendment does not interfere at all with state anti-discrimination law. Savage, *supra*. If, however, sexual harassment arises in a constitutionally significant context involving matters of public concern (or artistic expression), the First Amendment may require something more – but not more than the type of minimal notions of "fault" required under defamation law. Given that FEHA already requires a showing of "fault," the First Amendment does not interfere with a victim's ability to recover for her actual injuries.

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Once again, the analogy raised herein is more deferential to First Amendment rights than that actually required by the Constitution. The Supreme Court defamation cases often address standards pertaining to presumed and punitive damages. Unlike defamation, however, the law does not presume damages for sexual harassment; actual injury is required. Furthermore, the law requires that one show clear and convincing evidence of fraud, oppression or malice to recover punitive damages for sexual harassment. Civil Code Section 3294.

e. Harassment Law Requires the Type of "Fault" Mandated in Defamation Cases: Purposefully Directed Targeted Intent is Not Constitutionally Required

FEHA is not a "no fault" statute. While one need not show malicious intent to injure, the law nonetheless requires ***some*** purposeful action. "Fault" and "Intent" are not synonymous.

For the purposes of this case, the requisite level of fault is shown in two very different ways. First, the Respondents were –at a minimum – negligent in failing to appreciate that their rampant sex talk would be offensive to a reasonable woman. See, e.g., Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) (harassment is assessed with reference to the viewpoint of a reasonable woman). Indeed, the evidence in this case appears to show a reckless disregard for the working environment given the corporate policy prohibiting harassment, the sexual harassment training and the general societal understanding of what constitutes sexual harassment in a workplace. Second, the Respondents were negligent in allowing the sex talk to punctuate workplace dealings in a pervasive manner. FEHA's threshold requirement of "severe or pervasive" harassment is, by itself, a constitutional safeguard, tethering liability to standards of fault which distinguish between isolated speech and more pervasive speech.

Because FEHA does not proscribe words themselves, this Court does not need to reach the hypothetical question of whether the First Amendment allows for strict liability due to the utterance of a single epithet. If FEHA sought to impose liability based solely on a single isolated remark, then one may legitimately question whether harassment law infringed upon free speech. But pervasive commentary is distinct from isolated remarks. All things being equal, one is more at fault for purposeful and deliberate actions than for single events.

Severe harassment involves fault. Pervasive harassment involves fault. Indifference to one's audience involves fault. FEHA already satisfies any constitutional requirements that could arguably apply to the type of workplace speech at issue in this case.

B. Harassment Law Focuses on Working Conditions, Not Targeted Intent: The Totality of Circumstances Approach to Harassment Law Allows For Distinctions Between Targeted and Non-Targeted Forms of Harassment

Respondents confuse cause and effect when arguing that under FEHA a perpetrator must target a specific victim ***because of*** that victim's status in one or more protected classes. Wrong. Aside from punitive damages, the perpetrator's intent has nothing to do with the analysis. Liability attaches when a reasonable person in the plaintiff's position suffers severe or pervasive harassment ***because of*** their protected status. Bundy v. Jackson, 641 F.2d 934, 942 n. 7 (D.C. Cir. 1981): "[T]he question is one of but-for causation: would the complaining employee have suffered the harassment had he or she been of a different gender."

The analytical focal point of any harassment case falls squarely on the victim, not the perpetrator. And that is because the courts focus on the victim's terms and conditions of employment. Viewpoints differ. Effects differ. Perspective matters. As the Ninth Circuit recognized in Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1990):

> We realize that there is a broad range of viewpoints among women as a group, but we realize that many women share common concerns which men do not necessarily share. For example, because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may

> understandably worry whether a harasser's conduct is merely a prelude to a violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.

Targeted forms of harassment undoubtedly affect working conditions; untargeted harassment, however, may affect working conditions just the same. That is precisely why the law adopts a "severe or "pervasive" test for assessing harassment claims. The difference between targeted and untargeted harassment is merely one of degree, not kind. Calling a woman a "cunt" may be received somewhat more harshly than if one were to say "all women are cunts," but if these comments persist unchecked for years at a time is there really a difference?

At bottom, the question of whether there is "severe or pervasive" harassment involves the "totality of circumstances." Fisher v. San Pedro Peninsula Hospital, *supra*, 214 Cal.App.3d at 609-610. The facts in this case support an inference that Appellant was forced to work in an atmosphere that degraded her gender, disrupted her emotional tranquility, and undermined her personal sense of well being. See Id. at 608. The fact that Appellant was not the specific target of this conduct is irrelevant, except in assessing the totality of circumstances. As the Fisher court recognized: "[t]o state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee." Id.

1. Tolerance of Some Types of Sexually Charged Language Does Not Result in a Waiver of All Forms of Unwelcome Sexual Harassment: The Totality of Circumstances Control

Respondents articulate a number of sexually-related story lines on the *Friends* television show, without linking any particular story line to the Plaintiff or to the allegations of this case. CELA recognizes, however, that on some level this evidence shows that Appellant had to tolerate – to some degree– coarse language in the writers' room as part of her job duties[11].

This case does not involve consensual speech or conduct. Even if Appellant consented to a certain degree of sexual banter in the course of writing the television show, she did not, by virtue of her consent, waive all rights to be free from unwelcome harassment in other contexts outside of the writers' room. See Swentek v. USAir, 830 F.2d 552, 557 (4th Cir. 1987): "use of foul language or sexual innuendo in a consensual setting does not waiver her legal protections against unwelcome harassment". See also Dept. of Fair Emp. & Hous. v. Livermore Joe's, Cal FEHC Dec. 90-07 at 14 (1990) (rejecting the assumption that one can automatically infer that when a woman engages in voluntary sexual conduct with some persons, she will be welcome to involuntary sexual conduct by others).

While Respondents may defend this case on the grounds of welcomeness, business necessity, or BFOQ, these are all issues for a jury. CACI Instructions 2501 and 2503.

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This evidence is undoubtedly relevant to showing whether tolerance for sexual banter rises to the level of a bona fide occupational qualification ("BFOQ") in the context of being a Writers' Assistant on the *Friends* show.

C. Warner Brothers Has Voluntarily Waived Any Arguable First Amendment Defense

There is nothing magical about a First Amendment defense: it can be waived, so long as the waiver is knowing and voluntary. D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185-187 (1972); Davies v. Grossmont Union High School Dist., 930 F.2d 1390, 1394 (9th Cir. 1991). The fact that Warner Brothers now seeks to rely on a First Amendment defense here is inconsistent with its contractual pledge to protect employees from ***all forms*** of unwelcome harassment ***regardless of the arguably constitutional context under which it arises***. CT, pg. 2086 ("The Company prohibits all forms of sexual harassment..."). See, e.g., In re Steinberg, 148 Cal.App.3d 14 (1983) (affirming contractual waiver of First Amendment right to disseminate a movie). See also Kerr v. Rose, 216 Cal.App.3d 1551, 1561-1562 (1990) (employer's recall policy constitutes binding contract); Hepp v. Lockheed-California, Co., 86 Cal.App.3d 714, 716 (1978) (same).

It would be one thing if Warner Brothers did not promise to provide a harassment free workplace, but it is quite another for it to make such a promise only to claim constitutional immunity. As shown in Appellant's Brief, Section V.B., by both words and conduct Warner Brothers[12] knowingly and voluntarily waived any right to assert a First Amendment exception to its anti-harassment obligations. See Leonard v. Clark, 12 F.3d 885, 889-891 (9th Cir. 1993). As recognized in Davies, *supra* at 1395: "it is possible to knowingly waive a general right without contemplating the specific circumstances under which that waiver will be enforced." Apparently, that is what happened here.

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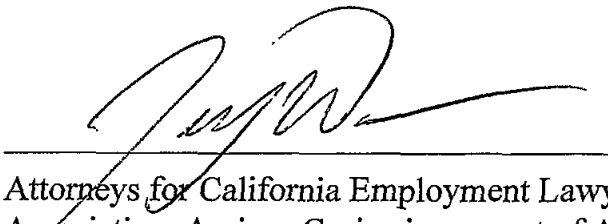
12 CELA is aware of no record evidence to suggest that the individual defendants knowingly or voluntarily waived any of their own First Amendment rights.

CONCLUSION

For the foregoing reasons and authorities, CELA respectfully requests that the Court reject Respondents' First Amendment and FEHA defenses to this case. The law should permit Appellant to present this case to a jury.

February 4, 2005 LAW OFFICES OF JEFFREY K. WINIKOW



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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 6585 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.

February 4, 2005

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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 1801 Century Park East, Suite 1520, Los Angeles, CA 90067.

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