Case No. S125171

IN THE SUPREME COURT OF CALIFORNIA

AMAANI LYLE,
Plaintiff and Appellant,

vs.

WARNER BROTHERS TELEVISION PRODUCTIONS et al.,
Defendants and Respondents

After a Decision By the Court of Appeal
Second Appellate District, Division 7
Case No. B160528

RESPONDENTS' OPENING BRIEF ON THE MERITS

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I

ISSUES TO BE BRIEFED

(1) Can the use of sexually coarse and vulgar language in the workplace constitute harassment based on sex within the meaning of the Fair Employment and Housing Act ("FEHA") (Gov. Code § 12900 *et seq.*)?

(2) Does the potential imposition of liability under FEHA for sexual harassment based on such speech infringe on defendants' rights of free speech under the First Amendment or the state Constitution?

II

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1998, the United States Supreme Court analyzed Title VII's prohibition of harassment "because of . . sex," and unanimously ruled:

> We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.

Oncale v. Sundowner Offshore Services, Inc. (1998) 523 U.S. 75, 80. Although this case turns on the Fair Employment and Housing Act's identical prohibition of workplace harassment "because of . . .sex," the Court of Appeal wholly ignored the guidance of the U.S. Supreme Court. Respondents urge this Court to adopt and reinforce the Oncale standard, leaving sexual language actionable under the FEHA ***only*** if it is discriminatorily targeted at an employee or group of employees "because of . . . sex."

This case arises out of the use by comedy writers of alleged sexually themed language during creative writing sessions for the television series *Friends*, an adult-oriented television program that often features sexual dialogue and themes. The Court of Appeal held that Amaani Lyle, a writers' assistant on *Friends*, could present to a jury her claim of sexual harassment

under the California Fair Employment and Housing Act ("FEHA"), even though, as demonstrated in this brief, (1) none of the alleged speech was targeted at Lyle or any other employee "because of . . . sex"; (2) the writers' discussions were not sufficiently severe or pervasive so as to alter Lyle's conditions of employment; and (3) allowing such a case to go to a jury will cast a creative chill over all communicative workplaces[1] in violation of the First Amendment of the United States Constitution and Article I, section 2(a) of the California Constitution. The Court of Appeal's opinion -- reversing summary judgment in favor of Respondents -- suffers from several fundamental statutory and constitutional defects.

First, the Court of Appeal erred in finding a triable issue of fact concerning whether Lyle suffered harassment "because of . . . sex" in violation of the FEHA, solely because Lyle witnessed the male and female writers' creative, sexually-charged discussions. The Court of Appeal acknowledged that *Friends* is "a show about the lives of young sexually active adults" (Slip. Op. at 3) and that explicit sexual discussions among the writers (including

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[1] "[A] 'communicative workplace'...produces or supports the production of expression that is ordinarily protected by the First Amendment," such as a museum, art gallery, newspaper, or concert hall. McGowan, *Certain Illusions About Speech: Why the Free-Speech Critique of Hostile Work Environment Harassment is Wrong* (2002) 19 Const. Comment. 391, 393.

recounting of their own sexual experiences) led to story lines used on the show. Id. at 35. The Court of Appeal recognized that none of the speech about which Lyle complains was targeted at her. Id. at 25. Nevertheless, the Court of Appeal ruled that the mere utterance of certain sexually-themed words and ideas -- ***standing alone*** -- can create an "atmosphere of hostility and degradation" constituting harassment "because of . . .sex." Id. We refer to the Court of Appeal's standard as the "Per Se Discriminatory Speech Theory" of workplace harassment (hereinafter the "Per Se Discrimination Theory") .

The Court of Appeal's novel reading of the "because of . . . sex" requirement is at odds with the plain text, legislative history and administrative interpretations of the FEHA, as well as judicial decisions interpreting analogous federal and state anti-harassment laws. These sources confirm that only language used in a discriminatory manner, targeting its victim because of his or her status as a male or female, or because of gender or sex related attributes (including pregnancy), is actionable under the FEHA.

Second, the Court of Appeal erred in ruling that Lyle could produce evidence that the complained-of conduct was sufficiently severe or pervasive so as to alter Lyle's conditions of employment in violation of the FEHA. In evaluating speech under this standard, state and federal courts

uniformly have ruled that attention must be paid to the context in which the language was used. In cases where no employee or group of employees is targeted by sexually-themed language, and its use is integral to the employer's business and a part of an employee's job, the use of such language, as a matter of law, cannot effect the requisite alteration of the plaintiff's conditions of employment.

This case does not involve workers who pepper their speech with vulgarity to intimidate other employees. Rather, in this case, the record demonstrates that neither Lyle, nor female employees as a group, were singled out or targeted by the speech about which Lyle complains. Sexual language was a part of the *Friends* show since the first season of the series (years before Lyle was hired), was used by both female and male writers in mixed-sex, group settings, and did not result in any complaints until Lyle filed an administrative charge almost one year after she was terminated for poor performance. Furthermore, given the context in which the speech was used -- the creative process on an adult-oriented television situation comedy -- such sexual discussions in no way reflected a hostility to the presence of women in the workplace, or an alteration in Lyle's conditions of employment. Because the undisputed evidence demonstrates that the speech upon which Lyle's claims are predicated was neither discriminatory, nor an alteration of the

conditions of her employment, the speech cannot, as a matter of law, constitute unlawful harassment under the FEHA.

Third, in the event the FEHA were construed to permit the imposition of liability based upon these undisputed facts, such liability under the FEHA unconstitutionally abridges freedom of speech in violation of the United States and California constitutions. The Court of Appeal's decision, if allowed to stand, not only will permit writers and their employer(s) to be punished under state law based solely upon the expressive content of the writers' speech, but it also will require prudent employers to quash any speech that poses even the risk of offending others. To balance the interests here in favor of the Court of Appeal's strikingly broad interpretation of anti-harassment law and against constitutional rights of free speech would cast a chill over creative expression in workplaces as diverse as theaters, universities, bookstores, and even newsrooms.

For all of these reasons, Respondents urge this Court to reverse the Court of Appeal and order entry of summary judgment for Respondents.[2]

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[2] Although this Court did not request briefing on Lyle's cause of action for racial harassment, that claim can be summarily adjudicated based on the same statutory and constitutional analysis as Lyle's sexual harassment (continued...)

III

PROCEDURAL HISTORY OF CASE

The operative pleading, Lyle's First Amended Complaint ("FAC"), asserts eight causes of action: (1) racial discrimination in violation of the FEHA; (2) wrongful termination in violation of public policy; (3) gender discrimination in violation of the FEHA; (4) wrongful termination in violation of public policy; (5) retaliation in violation of the FEHA; (6) wrongful termination in violation of public policy; (7) racial harassment in violation of the FEHA; and (8) sexual harassment in violation of the FEHA. CT 0042 *et seq*. The FAC names as defendants Warner Brothers Television Productions ("WBTV"); Bright, Kauffman, Crane Productions ("BKC"); NBC Studios ("NBC Studios"); Todd Stevens ("Stevens"); Adam Chase ("Chase"); Gregory Malins ("Malins") and Andrew Reich ("Reich"). CT 0042.

The trial court granted summary judgment in favor of all defendants. CT 3371-3380; 3651-3652; 5254-5257; 5265-5266; 5344-5346. By Order dated April 21, 2004, the Court of Appeal affirmed in part and reversed in part. The Court of Appeal affirmed the complete grant of summary judgment to NBC Studios and Stevens. Although the Court of Appeal also

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[2](...continued)
claim.

affirmed summary adjudication in favor of Respondents on all claims other than Lyle's two harassment claims, it reinstated Lyle's harassment claims against Respondents WBTV, BKC, Chase, Malins and Reich.

On May 6, 2004, Respondents filed their Petition for Rehearing, listing important misstatements and omissions of issues and facts by the Court of Appeal, thereby ensuring that this Court would not be forced to accept the Court of Appeal's statement of the issues and facts. See California Rule of Court 28(c)(2). Respondents' Petition for Rehearing was denied on May 14, 2004.

Respondents and Lyle both petitioned this Court for review. On July 23, 2004, the Court granted Respondents' petition and denied that of Lyle, and specified the issues to be briefed and argued.

IV

STANDARD OF REVIEW

This Court conducts a *de novo* review of the lower court's decision to reverse the trial court's grant of summary judgment for Respondents. Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317, 334.

V

STATEMENT OF FACTS

A. *Friends* is an Adult Situation Comedy Featuring Sexual Story Lines and Humor.

Friends is an adult situation comedy. "The characters in the show are young adults, mid to young adults," and "a lot of the humor is clearly geared for adults." CT 0638. The show, as aired, frequently uses sexual and anatomical language, innuendo, plays on words, and physical gestures to create humor concerning such matters as oral sex, anal sex, heterosexual sex, gay sex, talking dirty during sex, premature ejaculation, pornography, pedophiles, and so-called "threesomes." CT 0867-0871.

For example, in one *Friends* episode two female characters, Rachel and Monica, engage in a discussion with a male character, Chandler, about female orgasms. Rachel and Monica show Chandler how to bring a woman to orgasm, creating a diagram of the seven female erogenous zones and then showing him the "combinations" that would lead to the desired result. As they point to particular zones, Monica feigns sexual arousal and ultimately orgasm. CT 0868.

In another episode, in which Rachel and Ross simulate sexual intercourse in a museum, Rachel says to Ross "put your hands on my butt," "just one cheek," and "will you just grab my ass." Later, as Ross and Rachel become physically intimate on the museum floor, Rachel rolls over a juice box and makes comments manifesting her belief that Ross has prematurely ejaculated. CT 0870. The record contains many other examples of *Friends* episodes featuring sexually-charged dialogue and themes. CT 0867-0871. The record also contains a videotape with excerpts from various episodes of the show, evidencing the show's sexual content.

B. The *Friends* Creative Process.

The creative discussions among *Friends* writers were not structured and orderly. In Lyle's words, they were "stream of consciousness," which often included "yelling and things being thrown and pencils being tossed up into the ceiling." CT 0476, 0696. The heart of the creative process, and the genesis of script development, for *Friends* were "random story discussions . . .when writers congregate to come up with ideas that aren't necessarily specific to any show." CT 0477. As writer Chase testified, this was like "brainstorming with a big group of people, and the conversation can become very silly and go all over the place, but oftentimes those conversations are the ones that lead to really interesting, surprising story line, jokes." CT

1781. This creative process took place in the writers' room, but often spilled over into the hallways and break rooms. CT 0848, 0859, 1823.

Art does imitate life. Many story lines used on television programs, including *Friends*, originate in and are based on actual life experiences of the writers. As a result, the writers frequently discuss events from their own personal lives when generating scripts for the program. CT 0847, 0858-0859, 1816-1817,1985, 2005-2006, 2026-2029, 4123-4125.

Moreover, because *Friends* is a show in which the active sex lives of a group of young adults features prominently, the process of creating ideas and scripts for the show naturally included discussions and jokes with express and implied sexual content. Marta Kauffman, one of the creators, writers and executive producers of *Friends* (and a woman), confirmed that frank discussions of sexual matters by the writers led to scripts for the show; among these were discussions by women as to what men do not understand about sexuality, which led to the episode in which Monica attempted to explain women's erogenous zones to Chandler, CT 4123-4125, and discussions about misrepresentations made by men in order to seduce and have sex with women. CT 4124. Kauffman testified "it is not uncommon that the writers will discuss

- both male and female - their sexual experiences" as part of the creative process. CT 4126.

Shana Goldberg-Meehan and Ellen Plummer, two other female writers on *Friends*, were present during sexual discussions in the writers' room which they regarded as nothing other than a natural part of the creative process for the show. Neither woman was offended by such discussions. CT 0855; CT 4129-4131.

During her deposition, Lyle testified about statements and jokes in the writers' room concerning "blow jobs," cheerleaders, variations of the Yiddish word "schlong," penis, masturbation, and "tits," which Lyle claimed to have personally found offensive. Each of those subjects indisputably was incorporated into the story lines, jokes and dialogue throughout the ten years of the *Friends'* broadcast. CT 0871.

C. Lyle's Brief Employment on The *Friends* Production.

In June 1999, Malins and Chase interviewed Lyle for the position of writers' assistant for the sixth production season of *Friends*. During the interview, they told Lyle that the show dealt with sexual matters and that, as a result, the writers told sexual jokes and engaged in discussions

of sex. CT 0848, 0859. Lyle told Malins and Chase she had worked at Nickelodeon, where "things got very racy in the [writers'] room at times." CT 0499. She added "you know, I'm not a complete babe in the woods. I have been around writers that have said things before." CT 0499.[3] She understood that Malins and Chase "were trying to forewarn me that these are the things that I was going to be encountering there [on the *Friends* production]." CT 0499.

In June 1999, Lyle was hired as a writers' assistant for *Friends*. CT 0630, 0854. That position required her to be present in the writers' room and to take detailed notes of the writers' discussions, as they "brainstormed" and created story lines, jokes, and dialogue for episodes of *Friends*. CT 0464, 0466, 0849, 0860. Lyle spent at least 50%, and some times as much as 75%, of her working time in the writers' room typing notes as the writers created stories. CT 0466-0467. The very nature of Lyle's job thus required her to be exposed to and, indeed, to memorialize, discussions with sexual content and themes, much of which might not get incorporated verbatim in a particular

[3] Indeed, Lyle had previously worked as a production assistant on the situation comedy, *Dream On*, where she had been exposed to sexual discussions and even nudity in the course of performing her job. CT 0822-0823.

script, but rather would be the impetus of episodic storylines and form the backbone and contours of others.

Lyle identified sixteen writers to whom she provided assistance while working on *Friends*. Five of those writers were women: Marta Kauffman; Shana Goldberg-Meehan; Gigi McCreery; Sherry Bilsing; and Ellen Plummer. CT 4338-4339. Lyle claims that she was harassed by virtually all of the writers, ***including female writers Bilsing and Plummer***, because they talked about sexual matters. CT 0802-0804.

Yet, it was not until a year ***after her termination*** that Lyle first complained that she had been harassed during her employment on *Friends*. CT 0594-0595, 0665-0671.[4] Furthermore, the record contains no evidence that any of the Respondents, or for that matter any person working on the *Friends* production, knew or suspected that Lyle believed herself to be the victim of sexual harassment; in no manner did she convey that she regarded sexually-related words, stories, pictures, and gestures in the writers' room to be

[4] Lyle's Employee Handbook informed her that any employee subjected to harassment should "immediately" notify a supervisor, department manager, or representative of the Human Resources Department; the Handbook also stated that "employees are encouraged to use the hotline ... to report any harassment or discrimination." CT 0511, 0519. Lyle did not use that hotline, or report to anyone, that she was being harassed. CT 0594-0595.

offensive. CT 0594-0595. To the contrary, Lyle used sexually explicit terms and profanity in her own speech, and actively discussed with the Respondent writers and others a dildo/vibrator sex aid that Lyle had purportedly designed. CT 0850, 0861, 0864, 0866; see also CT 0488-491, 0495 (Lyle has "no recollection" of these events).

D. Lyle Was Not Touched, Propositioned, Threatened, Demeaned, or the Subject of Offensive Statements.

During her employment on *Friends*, no employee ever asked Lyle out on a date, physically threatened her, sexually propositioned her or demanded sexual favors of her. CT 0688- 0689. No employee ever touched Lyle in a manner that offended her; indeed, she could not recall "ever being touched by anybody." CT 0482. No employee ever said anything offensive about Lyle directly to her. CT 0483. No employee ever made an offensive comment about Lyle to another person. CT 0614. Lyle acknowledged that the statements she found objectionable "would never refer to me." CT 0806. Instead, statements in the writers' room to which she objected were "addressed to the room ... in general" and not to particular persons. CT 0805-0806.[5]

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[5] See also CT 0808 (there was at least one other male writer present when jokes, comments or gestures were made); CT 2129-2130 (five writers, both male and female, were present when Respondent Reich purportedly referred to "schlongs" and made masturbatory gestures in October (continued...)

E. Lyle Regarded Chase, Malins and Reich as Juveniles Engaged in Locker Room Humor.

At her deposition, Lyle described Respondents Chase, Malins and Reich as "pimply-faced teenagers" and "silly little boys" who engaged in "very juvenile, counterproductive behavior." CT 0484, 0658, 0799. She described the writers' room as "like being in a junior high locker room," and the writers as "boys in the locker room" and "teenagers in the locker room." CT 0484, 0658, 0795-0796. She variously characterized their conduct as "insulting," "stupid," "juvenile," "inappropriate," and "ridiculous." CT 0485, 0486, 0602, 0795-0796.

F. Lyle's DFEH Complaints.

In November 1999, shortly after being terminated, Lyle filed complaints with the California Department of Fair Employment and Housing ("DFEH"). CT 0659-0664. In those complaints, she did not state that she had been harassed. Instead, she stated "I believe I was fired and denied promotion because of my sex race & ancestry." Id. In October 2000, Lyle filed amended DFEH complaints and, for the first time, claimed that she had been "harassed" during her employment on *Friends*. CT 0665-0672.

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[5](...continued)
1999); CT 2137-2138 (two female writers and three male writers were present when Respondent Malins purportedly told a "blow job story").

VI

ARGUMENT

ISSUE NO. 1.

Can the use of sexually coarse and vulgar language in the workplace constitute harassment based on sex within the meaning of the Fair Employment & Housing Act (FEHA) (Gov. Code, § 12900 *et seq.*)?

A. Respondents Are Entitled to Summary Judgment Because the Alleged Uses of Sexual Speech, Standing Alone, Do Not Constitute Harassment "Because of . . . Sex" under the FEHA.

Lyle seeks to hold the writers of *Friends*, and their employer, liable under the FEHA for using alleged "sexually coarse" and "vulgar" language in the workplace. Lyle concedes that no jokes or comments were ever directed at, or about, her. CT 0483, 0614. Nevertheless, Lyle complains, "I think any kind of discussion of anything sexual outside the confines of the script is sexual harassment." CT 0623.

Based upon its Per Se Discrimination Theory, the Court of Appeal held that Lyle had presented a triable issue of fact concerning the "because of. . .sex" requirement with evidence of "crude sex-related jokes, disparaging remarks about women and pretend[ing] to masturbate in her presence." Slip Op. at 26. Thus, although *Friends*, as broadcast on the NBC

Network, used the word "penis" in Episode #465256 [CT 4154], the Court of Appeal would permit damages to be awarded against the writers for using the word "schlong" in the workplace. Similarly, Episode #457305 contained a thinly-veiled reference to oral sex (referred to as getting the "job") [CT 4153], yet the Court of Appeal would allow Lyle to argue that the writers violated the FEHA by telling "blow job" stories in the writers' room. Episode #225554 contains a sequence of physical humor creating the impression of masturbation [CT 4155]; according to Lyle, and now the Court of Appeal, the writers who created that storyline had no latitude to make "masturbatory gestures" during the creative process. Slip Op. at 35, n. 74.

The Court of Appeal also rejected Respondents' argument that the speech and conduct about which Lyle complains was not discriminatory because it was not targeted at any particular person and had been used by, and occurred in the presence of, both men and women (which the Court of Appeal characterized as treating Lyle "just like one of the guys"). According to the Court of Appeal, "[b]ecause the FEHA, like Title VII, is not a fault based tort scheme, unlawful sexual harassment can occur even when the harassers do not realize the offensive nature of their conduct or intend to harass the victim." Slip Op. at 26.

There is a compelling statutory basis for rejecting both the Court of Appeal's Per Se Discrimination Theory and Lyle's harassment claim: the plain terms of the FEHA provide that only discriminatory speech -- that which singles out a particular employee or group of employees "because of" their biological "sex" status as men or women, gender or related attributes -- can constitute unlawful harassment. As discussed below, over the last two decades, the California Legislature, the FEHC and the federal courts all have wrestled with variations on the Per Se Discrimination Theory and uniformly have rejected it in favor of a traditional disparate treatment analysis of hostile work environment harassment claims.

1. The Plain Language of the FEHA Precludes Lyle's Claim.

As this Court has observed, the FEHA establishes that "freedom from discrimination in employment on specified grounds, including sex, is a civil right (§ 12921) and such discrimination is against public policy (§ 12920)." Peralta Community College Dist. v. Fair Employment & Hous. Comm'n (1990) 52 Cal.3d 40, 44. "The stated purpose of the FEHA is to provide effective remedies that will eliminate discriminatory practices." Id. at 48. The law declares discrimination or harassment on the specified grounds to be unlawful employment practices.

To that end, the FEHA Section 12940(a) prohibits discrimination by employers "because...of sex" in terms of hiring, firing, compensation and conditions of employment. Likewise, the FEHA Section 12940(j) prohibits harassment "because of...sex":

> It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: . . .(j)(1) For an employer. . .or any other person, because of . . . sex. . . to harass an employee. . . . (2) The provisions of this subdivision are declaratory of existing law, except for new duties imposed on employers with regard to harassment.

Gov. Code § 12940(j). Both subsections (a) and (j) prohibit forms of discrimination, with the former covering conduct that adversely affects the "terms, conditions or privileges" of employment and the latter addressing conduct that results in no "loss of tangible job benefits." Mogilefsky v. Superior Court (1993) 20 Cal. App. 4th 1409, 1414.

Webster's Dictionary defines "because of" as "by reason of" or "on account of." Webster's 3d New Internat. Dict. (1968) p. 194. When joined with the word "sex," it is clear that Section 12940(j)(1) prohibits harassment that is ***discriminatory*** because it is ***motivated by*** a person's sex. See Reno v. Baird (1998) 18 Cal.4th 640, 645-646 (harassment consists of conduct

"presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives"); see also Price Waterhouse v. Hopkins (1989) 490 U.S. 228, 241 ("[t]he critical inquiry, the one commanded by the words of [Title VII], is whether gender was a factor" in the employment decision or action).

The FEHA goes on to provide that harassment because of "sex" includes "sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions." Gov. Code § 12940(j)(4)(C). When read in conjunction with subsection (j)(1), the FEHA thus prohibits harassment ***motivated by*** the victim's sex, gender or related attributes. See Accardi v. Superior Court (1993) 17 Cal. App. 4th 341, 348 (the FEHA prohibits only discriminatory harassment, which requires evidence that "gender is a substantial factor in the discrimination, and that if the plaintiff had been a man she would not have been treated in the same manner") (quotation marks, citation omitted); Birschtein v. New United Motor Manufacturing (2001) 92 Cal. App. 4th 994, 1001 (applying exactly the same test); Herberg v. Cal. Institute of the Arts (2002) 101 Cal. App. 4th 142, 152 (expressing "serious doubts" that non-targeted, overtly sexual expression is actionable under the FEHA, the Court of Appeal observed that, "Sexual

harassment may involve conduct, whether blatant or subtle, that ***discriminates*** against a person solely because of that person's sex.") (Emphasis in original.)

Although the Court of Appeal in this case relied extensively on Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal. App. 3d 590, as authority for its Per Se Discrimination Theory, Fisher actually supports a contrary view. In both Fisher and Beyda v. City of Los Angeles (1998) 65 Cal. App. 4th 511, the courts opined that conduct not targeted at the plaintiff, ***but targeted at others of the same gender in the plaintiff's workplace***, theoretically could contribute to her hostile work environment.[6]

Thus, Fisher began the unifying thread that runs through Accardi, Beyda, Birschtein and Herberg: whatever evidence a female plaintiff relies upon to demonstrate harassment in violation of the FEHA, the plaintiff always must prove that either she or some other employee in the direct work

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[6] In Fisher, supra, the Court of Appeal suggested that unlawful sexual harassment ***targeted*** at three other nurses that was witnessed by the plaintiff could contribute to the plaintiff's hostile work environment, but rejected the claim on other grounds. 214 Cal. App. 3d at 610-611. In Beyda, supra, the Court of Appeal held that unlawful sexual harassment ***targeted*** at other women about which the plaintiff became personally aware (but did not witness) was relevant to the plaintiff's hostile work environment claim, but that its exclusion by the trial court was not prejudicial -- never reaching the issue of whether such conduct could itself establish a violation of the FEHA. 65 Cal. App. 4th at 521.

environment, was subject to ***targeted discriminatory harassment because of her status as a female.***

Speech that is not targeted at an employee or group of employees because of their sex is not actionable under the plain terms of the FEHA, regardless of its sexual content. The FEHA's prohibitions against harassment are not a "civility code" and "are not designed to rid the workplace of vulgarity." Sheffield v. Dept. of Social Services (2003) 109 Cal. App. 4th 153, 161 (citing Aguilar v. Avis Rent-A-Car Systems (1999) 21 Cal.4th 121, 130-131); Birschtein, supra, 92 Cal. App. 4th at 1001, 1007-08. Any other interpretation would wrest the prohibition against harassment from its textual underpinnings.

2. The Legislative History of the FEHA Precludes Lyle's Claim.

The California Fair Employment Practices Act ("FEPA") was enacted in 1959 (former Lab. Code. § 1410 *et seq.*) and recodified in 1980 as part of the FEHA. See Dyna-Med v. Fair Employment & Housing Comm. (1987) 43 Cal.3d 1379, 1383-1384 (discussing the FEHA's legislative history). Although prohibitions against unlawful employment *discrimination* "because of . . . sex" have existed since 1969, the prohibitions against workplace

harassment "because of . . . sex" were added to the FEHA by amendment in 1982.[7]

Assemblyman Patrick Johnston authored Assembly Bill 1985, which amended the FEHA expressly to prohibit harassment (hereinafter "AB 1985"). See Stats. 1982, ch. 1193, § 2. Early versions of AB 1985 prohibited only "sexual harassment," which was expressly defined to include "verbal or physical conduct of a sexual nature" that "had the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment." Assem. Amend. to Assem. Bill No. 1985 (1981-1982 Reg. Sess.) Jan. 7, 1982. Such a sweeping definition of "sexual harassment" had the potential to encompass all sexual speech that offended other employees, regardless of whether the speech targeted a person or group "because of . . . sex." In other words, the definition would have codified the Per Se Discrimination Theory.

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[7] See Stats. 1969, ch. 609, § 1 (amending Labor Code Section 1420 to add discrimination "because of . . . sex" to the list of protected categories). The FEHA's harassment provisions were initially enacted in 1982 as Government Code Section 12940(i) (Stats. 1982, ch. 1193, § 2), and then renumbered, without substantive change, as 12940(h) in 1987 (Stats. 1987, ch. 605, § 1) and 12940(j) in 2000 (Stats. 2000, ch. 1047, § 1).

However, AB 1985 subsequently was amended in Conference to (1) prohibit harassment "because of" sex, race and other categories already protected from discrimination under Section 12940(a), and (2) delete the broad definition of sexual harassment that had existed in earlier versions of the bill. See Conf. Amend. to Assem. Bill No. 1985 (1981-1982 Reg. Sess.) Aug. 26 and 31, 1982. The Legislature thus rejected statutory language prohibiting all sexual speech in the workplace that offended others, and instead opted to send the Governor legislation that expressly required evidence of discriminatory treatment. "The rejection by the Legislature of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the omitted provision." Beverly v. Anderson (1999) 76 Cal. App. 4th 480, 485-486 (quoting Rich v. State Board of Optometry (1965) 235 Cal. App. 2d 591, 607).

As part of the 1982 amendment to the FEHA, the Legislature expressly declared the new anti-harassment provisions to be "declaratory of existing law." Gov. Code § 12940(j)(2).[8] Then-existing state and federal law

[8] Amendment in 1984 added the italicized words: "declaratory of existing law, *except for the new duties imposed on employers with regard to harassment.*" Stats. 1984, ch. 1754, § 2. The referenced "new duties" included requiring employers to take reasonable steps to prevent harassment and discrimination from occurring. Ibid.

prohibited discrimination "because of" sex, race and other protected categories, which prohibitions had been construed by the FEHC and federal courts to encompass ***targeted discriminatory*** harassment. See discussion, infra, note 9 and Section VI.A.3. Prior to passage of AB 1985, these administrative and federal decisions were brought to the Legislature's attention. For example, the California Department of Fair Employment and Housing ("DFEH") wrote AB 1985's author, Assemblyman Johnston, explaining why the DFEH believed the bill was unnecessary as duplicative of existing state and federal prohibitions on discrimination "because of . . . sex":

> A statute which singles out sexual harassment is an unnecessary safeguard. It is well established that sexual harassment is a condition of employment ***that affects one sex and not the other, and therefore violates the laws prohibiting sex discrimination***.

DFEH Letter dated May 4, 1981 to Assemblyman Patrick Johnston, from the legislative bill file of the Assembly Committee on Labor and Employment on AB 1985 (hereinafter "May 4, 1981 DFEH Letter").[9] Likewise, the FEHC

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[9] The DFEH brought three federal appellate decisions to Assemblyman Johnston's attention. See May 4, 1981 DFEH Letter. One of the three cases, Tomkins v. Public Serv. Elec. & Gas. Co. (3rd Cir. 1977) 568 F. 2d 1044, 1047 n. 4, had ruled that sexual harassment was a form of discrimination and a sexual harassment plaintiff must show that "gender is a substantial factor in the discrimination, and that if the plaintiff 'had been a man she would not have been treated in the same manner' [citations omitted]" -- the precise rule applied decades later by the California Courts of Appeal in (continued...)

distributed a letter to the Legislature discussing existing FEHC precedent. See May 10, 1982 Letter from FEHC to Senator Bill Greene (copying various members of Assembly and Senate, and raising the FEHC's decision in Dept. Fair Empl. & Hous. v. Ambylou Enterprises, Inc. (1982) No. 82-06, FEHC Precedential Decs. 1982-1983 [CEB 3, p. 6] discussed infra). It can thus be presumed that the Legislature was aware of the FEHC's construction of the FEHA at the time it drafted and passed AB 1985. See J. E. Robinson v. Fair Employment & Hous. Comm'n (1992) 2 Cal.4th 226, 235 n.7.

In the final analysis, the legislative history of Section 12940(j) confirms what the plain terms of the statute state: that ***discriminatory***

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[9](...continued)
Accardi, supra, 17 Cal. App. 4th 341, and Birschtein, supra, 92 Cal. App. 4th 994. See discussion, supra, Section VI.A.1. A second of the cases, Barnes v. Costle (D.C. Cir. 1977) 561 F.2d 983, 990, applied a similar causal test, commenting that "[b]ut for [plaintiff's] womanhood. . . her participation in sexual activity would never have been solicited. . . . Put another way, she became the target of her superior's sexual desires because she was a woman, and was asked to bow to his demands as the price for holding her job. The circumstance imparting high visibility to the role of gender in the affair is that no male employee was susceptible to such an approach by appellant's supervisor." Finally, in the third of the three cases, Miller v. Bank of America (9th Cir. 1979) 600 F.2d 211, 212 n. 1, the defendant conceded that sexual harassment was a form of discrimination, which the Ninth Circuit assumed to be correct for the purposes of the case -- citing to Tomkins and Barnes to support the assumption.

harassment -- that which is motivated by a person's status as a male or female, gender or pregnancy -- is unlawful in California.[10]

3. The FEHC's Interpretation Of The FEHA Precludes Lyle's Claim.

Since the early 1980's, the FEHC has taken the position that harassment must be targeted based on its victim's sex (or other protected status) in order to be actionable under the FEHA. See Rojo v. Kliger (1990) 52 Cal.3d 65, 73, n.4 (observing that "[t]he Commission has defined sexual harassment as 'verbal, physical, or sexual behavior ***directed at any individual because of her, or his, gender***'" and citing Dept. Fair Empl. & Hous. v. Ambylou Enterprises, Inc. (1982) No. 82-06, FEHC Precedential Decs.

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[10] In 1993, the Legislature passed Assembly Bill No. 675, which amended the FEHA to define harassment "because of . . . sex" to include sexual harassment, gender harassment, harassment based on pregnancy and related forms of harassment. Stats. 1993, ch. 711, § 2. The intent of the amendment was to confirm that harassment "because of . . . sex" was not limited to overtly sexual conduct, but included non-sexual forms of harassment motivated by the gender, sex and sex related characteristics (such as pregnancy) of the victim. Ibid. The Assembly Committee on Labor and Employment noted that "[t]he issue of sexual harassment has been the primary focus in cases of harassment on the basis of sex. As a result, there is some confusion regarding harassment that is clearly premised on the gender of an employee but is not of a sexual nature. Both gender harassment and harassment on the basis of pregnancy are clearly encompassed by FEHA, yet many employers and employees express ignorance regarding prohibition of such forms of harassment." Assem. Comm. on Labor and Employment, 3d reading analysis of Assem. Bill No. 675 (1981-1982 Reg. Sess.) as amended April 12, 1993.

1982-1983 [CEB 3, p.6]; 1982 CAFEHC LEXIS 7, *9) (emphasis added). The FEHC's interpretation should be accorded "great weight" by this Court. Reno, supra, 18 Cal.4th at 660.

For example, in Dept. Fair Empl. & Hous. v. Hubacher Cadillac/Saab, Inc. (1981) No. 81-01 FEHC Precedential Decs. 1980-1981 [CEB 19, pp. 15-16]; 1981 CAFEHC LEXIS 20, *1, the FEHC evaluated whether evidence of the supervisor's conduct towards other women was relevant to the Complainant's harassment claim under the FEPA. The FEHC concluded that the evidence should have been admitted:

> In evaluating whether Banister's treatment of other female Hubacher employees is a main or a collateral issue, it is important to view the question in the context of discrimination law. "***The central focus of the inquiry in a case such as this is always whether the employer is treating 'some people less favorably than others because of their color, sex, or national origin***.'"

Id. at *16-17 (citations omitted; emphasis added). The FEHC went on to apply disparate treatment analysis to the Complainant's sexual harassment claim, finding that "[t]here was no suggestion that Banister's sexual advances to Kendall constituted anything other than ***disparate treatment*** of females compared to males." Id. at *32 (footnote omitted; emphasis added).

More recently, the FEHC has rejected the Per Se Discrimination Theory, finding that the use of vulgarities like "fuck" and "ass" did not, in and of themselves, establish conduct "because of . . . sex." In Dept. Fair Empl. & Hous. v. Tim Stewart Heating & Air Conditioning, Inc. (2003) 2003 CAFEHC LEXIS 7, the FEHC found that a supervisor's use of vulgar language was not "because of" the complainant's sex. The FEHC cited to and quoted from the United States Supreme Court's decision in Oncale, and found that "[u]nder these circumstances and in this social context,...[the supervisor's]...hugging, touching complainant's buttocks, and crude language constitutes the type of roughhousing which, under the Act, is not sufficient to create a hostile or abusive work environment within the meaning of Government Code section 12940, subdivision (j)(1)." Id. at *14.

4. Federal Courts Construing Title VII Have Required Proof of Targeted Harassment "Because of" Sex, And Have Rejected The Per Se Discrimination Theory.

"[I]n general, 'The language, purpose and intent of California and federal antidiscrimination acts are virtually identical. Thus, in interpreting FEHA, California courts have adopted the methods and principles developed by federal courts in employment discrimination claims arising under' the federal acts." Reno, supra, 18 Cal.4th at 659 (citation omitted).

In Oncale, supra, the U.S. Supreme Court made clear that the use of sexual language in the workplace does not constitute unlawful harassment unless it is used in a discriminatory manner, emphasizing that Title VII's "because of. . .sex" requirement will permit only legitimate disparate treatment claims:

> Respondents and their amici contend that recognizing liability for same-sex harassment will transform Title VII into a general civility code for the American workplace. But that risk is no greater for same-sex than for opposite-sex harassment, and is adequately met by careful attention to the requirements of the statute. Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at 'discrimination...because of...sex.' ***We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.***

523 U.S. at 80 (citation omitted; emphasis added).

In reaching this conclusion, the Supreme Court disapproved of the Seventh Circuit's holding in Doe v. City of Belleville (7th Cir. 1997) 119 F.3d 563, that "workplace harassment that is sexual in content is always actionable, regardless of the harasser's . . . motivations." Oncale, supra, 523

U.S. at 79; see also City of Belleville v. Doe (1998) 523 U.S. 1001 (vacating Court of Appeals' decision). The Supreme Court emphasized that "[t]he prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace." Oncale, supra, 523 U.S. at 81.

In its Oncale opinion, the Supreme Court suggested several methods by which a plaintiff could prove discriminatory harassment "because of...sex." First, a plaintiff could offer evidence of "explicit or implicit proposals of sexual activity." Second, a plaintiff could offer evidence of harassment targeted at an employee that is sex-specific and derogatory so as to make it clear that the harasser is motivated by "general hostility to the presence of women in the workplace." Third, a plaintiff could offer direct comparative evidence "about how the alleged harasser treated members of both sexes in a mixed-sex workplace." Oncale, supra 523 U.S. at 80-81. Underlying each of these three methods of proof, however, is the requirement of ***targeted and discriminatory disparate treatment*** -- conduct motivated by the sex or gender of the victim. Indeed, the Court cautioned that "[w]hatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '***discrimination***. . .because of. . .sex.'" Id. at 81 (emphasis in original).

The Court of Appeal in this case cited to five pre-Oncale federal decisions in support of its Per Se Discrimination Theory. Slip. Op. at 30 and n.61. However, in ***every one*** of the five decisions cited by the Court of Appeal, the plaintiff had offered evidence of conduct targeted at the victim because of her or his sex (or race). Furthermore, to the extent that any of these pre-Oncale decisions can be read for the proposition that a plaintiff need not show ***discriminatory*** harassment targeted at her because of her sex, they have been overruled by Oncale.[11]

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[11] The Court of Appeal also ruled that sexual harassment can occur "even when the harassers do not realize the offensive nature of their conduct or intend to harass the victim," citing Ellison v. Brady (9th Cir. 1991) 924 F. 2d 872, 880. Although it is correct that no ***specific intent to harass*** need be shown, Oncale (as well as the plain terms of Title VII and the FEHA) make clear that a plaintiff must demonstrate a ***general intent to discriminate*** "because of . . . sex" in order to establish a claim for harassment. Indeed, following Oncale, in an unpublished opinion, the Ninth Circuit retreated from its earlier position staked out in Brady that Title VII requires no proof of an intent to harass "based on...sex":

> Holmes challenges the district court's interpretation of the intent standard in Title VII hostile work environment cases, claiming that the intent of her harassers is irrelevant. However, the district court correctly held that Holmes must show she was harassed ***on the basis of her sex***, and not merely for other personal motivations that are not related to her membership in a protected class."

Holmes v. Runyon, (9th Cir. 2002) 30 Fed. Appx. 716, 717 (emphasis added); see also Downing v. Board of Trustees of Univ. of Alabama (11th

(continued...)

Indeed, in the wake of Oncale (and even before), federal courts have repeatedly rejected the Per Se Discrimination Theory, ruling that sexually-charged comments and gestures are ***not*** actionable under Title VII ***unless*** they were targeted at the victim because of his or her status as, or gender-based attributes of, a man or woman. See, e.g., Hocevar v. Purdue Frederick Co. (8th Cir. 2000) 223 F.3d 721, 737 (affirming summary judgment on harassment claim based on co-worker's use of vulgarities, such as "fat fucking bitches," the Eighth Circuit ruled that "[t]he use of foul language in front of both men and women is not discrimination based on sex"); Johnson v. Hondo, Inc. (7th Cir. 1997) 125 F. 3d 408, 412 (affirming summary judgment on harassment claim, the Seventh Circuit observed, "[m]ost unfortunately, expressions such as 'fuck me,' 'kiss my ass,' and 'suck my dick,' are commonplace in certain circles, and more often than not, when these expressions are used. . .their use has no connection whatsoever with the sexual acts to which they make reference -- even when they are accompanied, as they sometimes were here, with a crotch-grabbing gesture."); Brown v. Henderson (2nd Cir. 2001) 257 F.3d 246 (co-workers' "steady stream of obscene

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[11](...continued)
Cir. 2003) 321 F.3d 1017, 1024 ("the elements of a sexual harassment claim under Title VII" require "that the employee must prove that the [defendant] intended to discriminate because of the employee's sex.")

conversation" and "vile" talk, posting of two sexual pictures, and drawing of a vulgar picture, did not constitute harassment "because of...sex"); Davis v. Coastal Int'l Security, Inc. (D.C. Cir. 2002) 275 F.3d 1119, 1123 (co-workers' use of "vulgar comments and gestures" and "lewd conduct," such as grabbing their crotch and describing oral sex, did not constitute harassment "because of...sex."); Crawford v. Bank of America (N.D. Ill. 1998) 181 F.R.D. 363, 1998 U.S. Dist. LEXIS 8393 (stories of sexual exploits not actionable where plaintiff not singled out to hear the stories).

The foregoing authorities leave no doubt that the Per Se Discrimination Theory has no traction under federal law.

5. Sister States Have Required Proof of Harassment Targeted "Because of" Sex.

Many of California's "sister states" have statutes, like the FEHA, that prohibit unlawful sexual harassment. In virtually all of these states, courts have rejected the Per Se Discrimination Theory. See Bowen v. Dept. of Human Servs. (Maine 1992) 606 A.2d 1051, 1053-54 (affirming summary judgment, Supreme Judicial Court of Maine ruled that "[t]he constant use of vulgar language in the workplace is without question offensive and unprofessional conduct. Nonetheless, the record does not support [plaintiff's]

assertion that the vulgar language was used in her presence or directed at her because she was a woman. It was directed at, and used by members of both sexes."); Webster v. Coastal Transp., Inc. (Wash. 1999) 95 Wash. App. 1066, 1999 WL 360625 (affirming summary judgment for the defendant where the plaintiff alleged hostile work environment harassment based on co-workers' frequent use of vulgar language, such as "fuck," cunt" and "bitches," holding that "[s]imple vulgarity does not give rise to a cause of action. 'It is not any and all harassment that is actionable under laws against discrimination ... but (for the purposes here) only harassment that is in some way linked to the plaintiff's sex'")(brackets omitted); Connors v. Bridgestone Tire and Rubber Co. (Ohio 2001) 2001 WL 1561817 (affirming summary judgment for the defendant, finding that co-worker's sexually graphic comments were not made because the plaintiff was a female); Lack v. Wal-Mart Stores, Inc. (4th Cir. 2001) 240 F.3d 255, 262 (directing entry of summary judgment for the defendant on plaintiff's harassment claim under West Virginia law, the court observed that "the evidence compels the conclusion that Bragg was just an indiscriminately vulgar and offensive supervisor, obnoxious to men and women alike.")[12]

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[12] In a few states, courts have not required a showing of disparate treatment. However, the linchpin of these decisions was the inclusion in the state legislation of an express definition of "sexual harassment" that broadly prohibited virtually all verbal or visual conduct of a sexual nature, requiring no linkage to sex or gender and no showing that harassment was "because of" (continued...)

6. Due Process Requires That the FEHA Be Construed to Prohibit Only Discriminatory Harassment Targeted at an Employee or Group of Employees "Because Of" Sex.

There is an additional reason why this Court should reject the Court of Appeal's Per Se Discrimination Theory. As applied to communicative workplaces, like the writers' room on *Friends*, where use of sexual language and ideas is an inherent part of the job, requiring proof of targeted and discriminatory harassment "because of. . .sex" will provide a standard that can be easily understood and followed (in stark contrast to the Per Se Discrimination Theory's vague proscription of unspecified words and ideas that reflect "hostility or degradation" of women). Employees will be on clear notice concerning what sexual language is permissible and what is unlawful, satisfying Due Process concerns. Cf. Giaccio v. Pennsylvania (1966) 382 U.S. 399, 402-03 (finding a state civil statute unconstitutionally vague, and ruling, "[i]t is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without

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[12](...continued)
sex. Furthermore, all such cases involved conduct targeted at the plaintiff. See, e.g., Melnychenko v. 84 Lumber Co. (Mass. 1997) 424 Mass. 285, 290; 676 N.E.2d 45; Cummings v. Koehnen (Minn. 1997) 568 N.W.2d 418, 421-422.

any legally fixed standards, what is prohibited and what is not in each particular case").[13]

The Court of Appeal's Per Se Discrimination Theory, however, provides no such requisite notice, leaving employees and their employers unsure regarding the line between permissible and impermissible speech. Similar uncertainty would bedevil the trial judge and jury assigned to this case, who would be tasked with sifting through voluminous evidence of sexual discussions in the writers' room and determining which particular words, jokes or stories evidenced presumptive "hostility or degradation" of women, and which were "creatively necessary" for the production of the *Friends* program. The absence of a clear and logical legal standard could lead a jury to impose damages on the *Friends* writers, in part, for use of the word "bitch" during their non-targeted creative discussions, despite the fact that the word "bitch" has actually been aired on the *Friends* show. CT 0867. In other instances, the jury might arbitrarily decide that use of one word for male or female genitalia (for example, "schlong") evidenced gender "hostility" because the writers

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[13] Employers, upon whom the FEHA imposes an affirmative obligation to prevent known harassment, likewise would be unable to discharge their legal obligations absent clarity about which sexual words and concepts they must prohibit. See Gov. Code § 12940(j)(1) ("An entity shall take all reasonable steps to prevent harassment from occurring").

could have used a more clinical Latin term (like "penis"). CT 0867. And, in other instances, the jury might find a sexual word or story degrading and unnecessary because it was never used in a *Friends* script -- leading to severe financial consequences for any writer whose material ended up on the editor's "cutting room floor."

7. Lyle Cannot Establish That She Was Unlawfully Harassed "Because of" Sex.

Examination of the record demonstrates that the language upon which Lyle premises her harassment claims never was used in a discriminatory manner, and thus, cannot constitute harassment "because of" sex within the meaning of the FEHA. In analyzing whether the *Friends* writers' use of sexually charged words and ideas was discriminatory "because of" sex, their speech cannot be divorced from the context in which it occurred. As the Court of Appeal in Accardi eloquently explained:

> 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 not concentrate on individual incidents, but on the overall scenario.'

Accardi, 17 Cal. App. 4th at 351 (quoting Andrews v. City of Philadelphia (3rd Cir. 1990) 895 F.2d 1469, 1484).

This case does ***not*** involve employees without bona fide, business-related reasons for using sexual words and discussing sexual ideas. And, the record is devoid of evidence that the language used by the writers on *Friends* was motivated by hostility towards Lyle or women as a group, or by sexual desire. Instead, the record demonstrates that the "sexually coarse" and "vulgar" language about which Lyle complains was part of the creative comedic writing process, through which the male ***and*** female writers generated the scripts for the *Friends* situation comedy. To create humorous themes and dialogue for a television show that has sexually-suggestive components, writers need the freedom to tell sexual jokes and stories, and make sexual comments -- even those which some may find offensive, hostile or degrading.[14]

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[14] For centuries, comedy has been rooted in discussions of sexuality, bodily functions and violations of societal norms. See Taflinger, Richard F. PhD, *Sitcom: What It Is, How It Works: A Theory of Comedy*, http://www.wsu.edu/~taflinge/sitcom.html (1996); Alexander Bain, *Emotion and the Will* (4th ed. 1899), p. 257 (humor involves the "[d]egradation of some person or interest possessing dignity.") According to Aristotle, ancient comedy originated in ribald improvisation as a prelude to the "phallic songs" in which a company of festive males apparently sang, danced, and cavorted rollickingly around the image of a large phallus. See Aristotle, *Poetics*

(continued...)

Humor associated with sexual activity has been a part of *Friends* since its first season -- years before Lyle's employment with WBTV. CT 0867-0871, 2005, 4124-4125. And, since the beginning of *Friends*, the writers on the production -- ***both male and female*** -- have participated in sexually-charged discussions and banter as part of that creative process. CT 4124-4126. Contrary to the Court of Appeal's implicit paternalism, there is nothing inherently degrading or hostile to women about stories or jokes concerning sexual intercourse and oral sex, or use of slang to describe sex acts or in reference to the male and female genitalia. See B. Lindemann & D. Kadue, *Sexual Harassment in Employment Law*, 188 (1992) ("Where men and women alike have engaged in vulgar sexual comments and activities. . . the evidence may not support a finding of sex-based conduct"). In fact, it would be discriminatory -- as well as inaccurate -- for the law to assume that women, because of their gender, are inherently offended by the same sex talk that men do not find offensive.

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[14](...continued)
(translated by Kenneth McLeish) (1st ed. 1999); see also Dunkle, Roger, *Introduction to Greek and Roman Comedy*, http://depthome.brooklyn.cuny.edu/classics/dunkle/comedy/index.htm (the first form of comedy, Old Comedy, was characterized by "obscenities and verbal abuse" by actors who wore a red leather phallus.)

The undisputed evidence shows that Lyle was exposed to the same comments and stories as the other two writers' assistants, both of whom were male, as well as those male and female writers whom she has not named as defendants in her lawsuit. There is no evidence that any of these other persons complained about or found the language or conduct offensive, and considerable evidence to the contrary. See, e.g., CT 0855, 4129-4130, 4131. Indeed, the fact that Lyle never complained about the sexual speech and conduct during her employment, or even in the first administrative charge that she filed with the DFEH following her termination, speaks volumes.

The context in which the language was used -- the comedic writing process on a situation comedy that features the sexual exploits of six young adults -- does not reflect any hostility to the presence of women (or any other group) in the workplace; it reflects the process of comedy writing, where rough-hewn, sexually-tinged stories, jokes and gags are massaged and refined until they are suitable for broadcast on network television. Although explicit sexual references often were replaced with literary devices, such as innuendo, imagery, simile, allusion, pun and metaphor in order to convey the sexual theme in a form acceptable to the television broadcasters and regulatory agencies, the message and substance remains unchanged. See CT 0867-0871

(The vulgarity "motherfucker" was replaced with "motherkisser;" "testicles" with "balls;" and "anal sex" with "in the stern").

In short, because Lyle cannot demonstrate that the alleged sexually coarse and vulgar speech was targeted at anyone, much less at her, "because of" biological "sex," gender, pregnancy or related attributes, the Court of Appeal should have affirmed summary judgment for the Respondents.

B. Respondents Are Entitled To Summary Judgment Because, Judging the Evidence in the Light Most Favorable To Lyle, Lyle Cannot Show Severe or Pervasive Conduct That Altered the Conditions of Her Employment.

Even the targeted and discriminatory use of language does not constitute harassment under the FEHA unless it also alters the conditions of the victim's employment:

> 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.

Carrisales v. Dept. of Corrections (1999) 21 Cal.4th 1132 (quoting Kelly-Zurian v. Wohl Shoe Co. (1994) 22 Cal. App. 4th 397, 409, abrogated by statute on other grounds) (emphasis added). This inquiry requires examination of "the frequency of the discriminatory conduct; its severity; whether it is

physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Beyda, supra, 65 Cal. App. 4th at 517 (quoting Harris v. Forklift Systems, Inc. (1993) 510 U.S. 17, 23). "The plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-being of a reasonable employee and that she was actually offended." Fisher, supra, 214 Cal. App. 3d at 609-10.

Evaluating whether language creates a hostile work environment requires consideration of the context in which the language was used. As the United States Supreme Court explained in Oncale:

> We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." [Citation]. . . .[T]hat inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field - even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The 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.

Oncale, supra, 523 U.S. at 81-82; see also Herberg, supra, 101 Cal. App. 4th at 150 (court should consider "the context in which the sexually harassing conduct occurred"); Rieger v. Arnold (2003) 104 Cal. App. 4th 451, 465 ("a finding of an offensive job environment is context specific").

In some workplaces -- where use of, and exposure to, sexual language by employees is an integral part of the business purpose and a requirement of the job -- the context should be claim dispositive absent evidence of disparate treatment. In such environments, sexual language does not "alter the conditions of the victim's employment" because the conditions of employment include exposure to such language. Consider, for example, a production crew member working on *Midnight Cowboy* (1969's Academy Award winning "Best Picture"), where actors reading their lines repeatedly used sexually explicit language. Clearly, the crew member should not be permitted to pursue a hostile work environment claim based on the actors' use of such language (even if the actors' lines were never used in the final picture), both because exposure to such language was an ordinary condition of his

employment and because the language was not targeted at him "because of" sex.[15]

Friends, at times, is a sexually-charged television show. This is beyond dispute.

> *In Episode #457305, several characters watch Joey's pornographic film, and allude to intercourse taking place which blocks the characters' view of Joey on the screen -- as the buttocks move up and down, Joey says "there I am; there I am; there I am" in cadence with the off screen sex. Ross comments, "looks to me like he is the one getting the [blow] job" in reference to oral sex taking place in the porn film.* [CT 4153].
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> *In Episode #457314, Monica discusses with the character played by Jan Claude Van Damme a "threesome with Drew Barrymore."* [CT 4154]

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[15] The Court of Appeal's "solution" in this case of requiring the Respondents to prove to a jury, under a "creative necessity" standard, that each word or idea uttered by a writer was "necessary" to the *Friends* show (Slip Op. at 36) does not comport with extant state or federal decisions. The courts in Oncale and Rieger held that context is a factor which may demonstrate that conduct has not altered the "victim's" conditions of employment, never suggesting that summary judgment could be granted only where the defendant has demonstrated that conduct was ***necessary*** in a particular context. To the contrary, the Supreme Court suggested in Oncale that certain conduct -- such as a coach slapping a player on the buttocks -- although clearly not "necessary," nevertheless does not evidence unlawful harassment.

How could the *Friends* writers have developed storylines and humor about sexual intercourse, "blow jobs" and a *menage á trois* without talking and joking about such acts?

> *In Episode #457305, Chandler calls Monica a "bitch."* [CT 4153]. *In Episode #465256, Monica offers Joey lemonade and he misunderstands and thinks she wants to have sex. He takes off his clothes, and when she turns around to give him lemonade she says "here's your . . . penis."*
> [CT 4154]

If a television show incorporates dialogue using the words "bitch" and "penis," it is axiomatic that the writers will have to use those words (and others like them).

As the writers were working on these storylines, writers' assistants had to memorialize the discussions as part of the development process. Given this context, sexual discussions that were not targeted at any employee "because of" sex clearly did not alter the conditions of employment for writers' assistants like Amaani Lyle. This point was made by the United States Supreme Court in Clark County School District v. Breeden (2001) 532 U.S. 268, where, in reinstating summary judgment in favor of the defendant, the Court found that the plaintiff had not been subjected to a hostile work environment in violation of Title VII based on her supervisor's reading of a sexual statement in a job applicant's psychological evaluation report, making

a joke about the statement, and then laughing. The Supreme Court found that "[t]he ordinary terms and conditions of respondent's job required her to review the sexually explicit statement in the course of screening job applicants." Id. at 271; see also Dawson v. Bumble & Bumble (S.D. N.Y. 2003) 246 F. Supp.2d 301, 310 (citing Oncale, court found that comments about the plaintiff's physical appearance by co-workers at a "high end" beauty salon did not give rise to a hostile work environment claim, observing that "[w]here the work environment by its very nature engenders criticism about personal mien, manner and styles, a court is well-advised to probe exactingly at challenges to such commentary arising uniquely from the social context, and to exercise corresponding caution when called upon to rule as a matter of law that remarks about a particular individual's appearance, that may be contextually grounded, give rise to a claim for sexual discrimination"); Cain v. Blackwell (5th Cir. 2001) 246 F.3d 758, 760-761 (affirming summary judgment for the employer, the Fifth Circuit ruled that in light of the plaintiff's unique work environment -- caring for patients with Alzheimer's and Parkinson's disease -- exposure to targeted racial epithets and sexual comments did not constitute severe or pervasive harassment). Indeed, the Court of Appeal has recognized that some work environments may require an employee to submit to substantial invasions of privacy, even those which clearly would be harassing in other contexts. See Feminist Women's Health Center v. Superior Court of Sacramento County

(1997) 52 Cal. App. 4th 1234 (ordering entry of judgment on plaintiff's wrongful termination in violation of public policy claim arising from a female health center's requirement that the plaintiff perform a cervical self-examination in front of customers and other employees).

Here, Lyle was aware from the outset that her employment on the "Friends" production would require her to be exposed to the writers' sexual discussions, comments and humor. CT 0499, 0848, 0859. As she had been admittedly "forewarned," sexually-themed discussions occurred throughout Lyle's employment on the production. Yet, prior to receiving criticism about the quality of her work, Lyle had no "discomfort" with the Respondent writers or their alleged conduct:

> [P]rior to that, I had no discomfort about talking to them [the Respondent writers]. . . . [I]t was a well-oiled machine from my vantage point and from the evidence in my notes.

CT 0692-0693. It was not until two or three months into Lyle's employment, only after she began to receive criticism of her work, that Lyle first became displeased with the circumstances on the *Friends* production. CT 0730.

Since the ordinary and expected conditions of Lyle's employment expressly included exposure to sexually coarse and vulgar language, they

cannot have been altered by the writers' use of such speech. For this additional reason, the language upon which Lyle bases her claim is not actionable under the FEHA.

ISSUE NO. 2.

Does the potential imposition of liability under FEHA for sexual harassment based on such speech infringe on defendants' rights of free speech under the First Amendment or the state Constitution?

A. Imposition of Liability under the FEHA Based Solely upon the *Friends* Writers' Use of Sexual Language Would Unconstitutionally Abridge Respondents' First Amendment Rights to Freedom of Speech.

If the FEHA is construed according to its plain terms ("because of . . .sex") to prohibit only targeted and discriminatory harassment that is motivated by a person's sex or gender, then the statute survives constitutional scrutiny.[16] However, if the FEHA is interpreted as a more sweeping

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[16] See Calleros, *Same-Sex Harassment, Textualism, Free Speech, and Oncale: Laying the Groundwork for a Coherent and Constitutional Theory of Sexual Harassment Liability*, 7 Geo. Mason L. Rev. 1, 22 (1998)("Even when harassment consists purely of speech, I believe that Title VII's hostile environment theory can avoid substantial conflict with the First Amendment, because that theory of liability should be interpreted to regulate harassment in a content-neutral fashion. Such an interpretation contemplates that the statutory prohibition on sex discrimination generally requires proof that the harasser selectively directed the harassment to one or more members of one sex only, without regard to the sexual content of the harassment. Such an approach is consistent with Supreme Court precedent, including *Oncale*");

(continued...)

prohibition on the use of "sexually coarse and vulgar language in the workplace," or on the mere utterance of "per se discriminatory" words or ideas, there is no avoiding a collision with the First Amendment and the California Constitution.

The Court of Appeal adopted the latter interpretation of the FEHA, holding that Lyle could proceed to trial on her harassment claims based on the Per Se Discrimination Theory. Because an award of damages to Lyle in this action would constitute state action, the First Amendment is implicated. See Intel Corp. v. Hamidi (2003) 30 Cal.4th 1342, 1364.

The First Amendment commands that there shall be no laws "abridging the freedom of speech." For this fundamental tenet to have any meaning, it must be construed to protect the *Friends* writers' non-targeted, non-discriminatory speech regardless of its sexual content.

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[16](...continued)
Volokh, *Freedom of Speech and Workplace Harassment*, 39 U.C.L.A. L. Rev. 1791, 1846 (1992) (harassment law would be constitutional if narrowly tailored to prohibit one-to-one insults which are targeted at the complainant because of a protected characteristic and which the speaker knows are offensive to the complainant).

1. The Use of Non-Targeted, Sexual Language In The Workplace Is Constitutionally Protected.

Few courts have analyzed the conflict between the constitutional proscriptions on content-based regulation of speech and anti-harassment law. In Aguilar, supra, this Court did not reach the "broad" question of the extent to which the regulation of speech that constitutes sexual harassment may violate the First Amendment. 21 Cal.4th at 131, n.3.

The United States Supreme Court has indicated, in *dicta*, that a narrow type of sexual harassment claim is consistent with the First Amendment. In R.A.V. v. City of St. Paul (1992) 505 U.S. 377, 389-90, the Court suggested that Title VII's prohibition on sexual discrimination in employment practices is consistent with the First Amendment "[w]here the government does not target conduct on the basis of its expressive content." The R.A.V. Court gave the example of "sexually derogatory 'fighting words'" as unprotected by the First Amendment. As the United States Court of Appeal for the Third Circuit explained in Saxe v. State College Area School District (3rd Cir. 2001) 240 F.3d 200, 208, R.A.V. suggests that "government may constitutionally prohibit speech whose non-expressive qualities promote discrimination." See also id. at 209 ("*R.A.V.* . . . does not necessarily mean that anti-discrimination laws are categorically immune from First Amendment

challenge when they are applied to prohibit speech solely on the basis of its express content.").

Conversely, some lower courts have recognized that anti-harassment regulation has constitutional limits. For example, in DeAngelis v. El Paso Municipal Police Officers Association (5th Cir. 1995) 51 F.3d 591, 596-597, the Fifth Circuit observed:

> Where pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize the problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech.

The DeAngelis court went on to clarify: "we do not mean that sexual propositions, *quid pro quo* overtures, discriminatory employment actions against women or 'fighting words' involve the First Amendment." Id. at 597, n.6; see also Erickson v. City of Topeka (D. Kan. 2002) 209 F. Supp. 2d 1131, 1135, 1145 (holding that the defendant's policy for the "prevention of hostile work environment" violated the First Amendment, the court observed that "a desire to stem listeners' reactions to speech is simply not a viewpoint-neutral basis for regulation" and that "the First Amendment does not countenance such

viewpoint discrimination, even for the purpose of suppressing speech that may be perceived as racially degrading or hostile").

Other courts have held that the First Amendment limits application of racial and sexual harassment policies in universities, precisely because such policies can chill protected expression. See, e.g., Cohen v. San Bernardino Valley College (9th Cir. 1996) 92 F.2d 368 (college's sexual harassment policy unconstitutionally vague as applied to professor); Dambrot v. Central Michigan Univ. (6th Cir. 1995) 55 F.3d 1177, 1182-84 (racial and ethnic anti-harassment policy at university unconstitutionally overbroad); Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ. (4th Cir. 1993) 993 F.2d 386 (First Amendment bars punishing university students for "ugly woman contest").

In Saxe, supra, the Third Circuit rejected the trial court's conclusion that "'harassment,' as defined by federal and state anti-discrimination statutes, is not entitled to First Amendment protection," and observed, "there is no categorical 'harassment exception' to the First Amendment's free speech clause." 240 F.3d 200, 204. The court limned the boundaries past which anti-discrimination laws may not intrude without running afoul of First Amendment rights:

> There is of course no question that non-expressive, physically harassing conduct is entirely outside the ambit of the free speech clause. But there is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs.... When laws against harassment attempt to regulate oral or written expression on such topics, however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications. "Where pure expression is involved," anti-discrimination law "steers into the territory of the First Amendment." [Quoting DeAngelis.]

Saxe, supra, 240 F.3d at 206, 209.

In short, while no court expressly has confronted the constitutional implications of a damage award punishing pure speech that was not targeted at another employee "because of" sex, and which arose in the context of comedic writing discussions on a sexually themed television show, a fundamental principle can be drawn from the foregoing cases. Although potentially 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, liability imposed based solely on the expressive content of non-targeted speech cannot survive constitutional scrutiny.

2. The Constitutional Infirmities of a Potential Damage Award In This Case Are Compounded by the Creative Context in Which the Challenged Speech Occurred.

This case does not involve employees plastering their work spaces with pornography, or lacing their speech with vulgarities simply to intimidate or oppress others. Here, the back-and-forth sexual accounts, jokes and discussions of the male and female *Friends* writers occurred as part of the comedic writing process for an adult-themed television situation comedy. Lyle's job required her to memorialize those accounts, jokes, and discussions for possible integration in scripts for the show.

The scripts themselves, and the shows based thereon, indisputably are protected by the First Amendment. Schad v. Borough of Mt. Ephraim (1981) 452 U.S. 61, 65; Eberhardt v. O'Malley (7th Cir. 1994) 17 F.3d 1023, 1026. The creative process by which such scripts are generated also merits First Amendment protection. As the Court of Appeal observed in Olivia N. v. National Broadcasting Co., Inc. (1981) 126 Cal. App. 3d 488, 493, "the central concern of the First Amendment in this area is that there be ***a free flow from creator to audience*** of whatever message" a film, television show, or book might convey. (Emphasis added.) That "free flow" surely would be impeded by a potential award of damages to Lyle since it inevitably would

cause writers to censor themselves lest they be charged with "harassing" those in the workplace, such as Lyle, who secretly found the writers' statements offensive. Such a chilling of free expression runs directly counter to the fundamental tenets of First Amendment law. Superior Films, Inc. v. Dept. of Education (1954) 346 U.S. 587, 589 (Douglas, J., concurring) ("in this Nation every writer, actor or producer, no matter what medium of expression he may use, should be freed from the censor").[17]

The Court of Appeal's purported "solution" to the inevitable First Amendment chill created by its decision is no solution at all. It would allow hostile work environment cases to go to a jury to determine, *post hoc*, whether the offending speech was used out of "creative necessity." Slip Op. at 31. Defendants would have to demonstrate that use of each offensive word or idea "was within the scope of necessary job performance" and "not engaged in for

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[17] The vagueness of the Per Se Discrimination Theory, see supra Section VI.A.6, is particularly problematic in light of the chilling effect that it would have on constitutionally protected speech. As the U.S. Supreme Court held, "[t]hose . . .sensitive to the perils posed by . . .indefinite language, avoid the risk . . . only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited." Baggett v. Bullitt (1964) 377 U.S. 360, 372; see also Smith v. Goguen (1974) 415 U.S. 566, 573 (flag desecration statute that subjects to criminal liability anyone who "treats contemptuously" the U.S. flag is void for vagueness because of potential for chilling effect on protected expression).

purely personal gratification or out of meanness or bigotry or other personal motives." Id. at 34.

The Court of Appeal's "creative necessity" test is problematic on two levels. First, the jury will be required to discern the motive for non-targeted, sexually-related comments in a context where the boundary between the creative process and "personal motives" is impossible to discern. See Hustler Magazine v. Falwell (1988) 485 U.S. 46, 53 (ruling that intent or motive of the speaker is not controlling for First Amendment purposes). Second, the test creates a potential for liability far broader than currently exists, including cases in which a worker's comments are not directed at the plaintiff.

The Court of Appeal's improper resolution of this issue will require an employer to gamble on a favorable outcome before a jury, a jury that will hear sexually-themed speech outside of the dynamic, free-flowing, spontaneous workplace context in which it was used. The inevitable result of such a system of speech regulation will be employer directives to curtail much sexually-themed speech. See Volokh, *How Harassment Law Restricts Free Speech*, 47 Rutgers L.Rev. 563, 568 (Winter 1995) (employer's lawyer faced with a client whose employee feels harassed by a coworker's sexual political

statements would be "committing malpractice if [he] didn't tell the client to shut the offending employee up. The downside of letting the employee talk is uncertain, but possibly huge") (footnote omitted).

The "creative necessity" test has yet another weakness: by protecting sexually-themed expression only when it is actually "necessary," writers and others in similar communicative workplaces may censor themselves whenever someone might think that some sexual (or religious or racial) reference is not really "necessary" to the topic, even when the speech is relevant and potentially valuable -- though perhaps not strictly "necessary" -- to the creative process. That sort of self-censorship will interfere with the creativity, spontaneity, and freedom that is needed for writers effectively to perform their jobs.

The concerns expressed here are far from hypothetical. Consider Herberg, supra, a case decided by the same Court of Appeal division as the case at bar. 101 Cal. App. 4th at 150. In Herberg, the Court of Appeal rejected the defendant's First Amendment defense and implied that a sexually explicit drawing entitled *The Last Art Piece,* displayed by art students in a designated gallery area, could have created a "hostile work environment" for employees had it not been removed within 24 hours by the artists, with a letter

of apology to one of the offended employees. Id. at 150. Cases such as Lyle and Herberg send a message to many employers that maintain similar communicative workplaces: If you want to avoid the risk of liability, and of expensive litigation, you had better censor employee speech promptly.

3. The *Friends* Writers' Use of Sexual Language Is Well Within The Protections Afforded By The First Amendment.

Respondents do not contend that the nature of their business confers upon them immunity -- or, what some have called a "free pass" -- from all liability under the FEHA. As in any other California workplace, Respondents can be liable under the FEHA for targeted and discriminatory harassment that is motivated by the sex or gender (or other protected status) of the victim. However, this case does not involve targeted and discriminatory harassment. There are no allegations of sexual propositions or *quid pro quo* overtures, and both of the lower courts rejected Lyle's discrimination and retaliation claims.

Nor do the challenged words fall within any recognized exception to First Amendment protection. The jokes and comments of the *Friends* writers, which Lyle characterized as "juvenile," "ridiculous," "silly," and "stupid," did not constitute "fighting words." The speech here at issue

was ***not*** "directed to the person of the hearer," Cantwell v. State of Connecticut (1940) 310 U.S. 296, or "so inherently inflammatory as to come within that small class of 'fighting words' which are 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace.'" Street v. New York (1969) 394 U.S. 576, 592 (quoting Chaplinsky v. New Hampshire (1942) 315 U.S. 568, 574).[18]

Nor does this case involve "obscenity." Lyle complained of the "juvenile" defacing of script cover pages and calendars, of orally expressed sexual fantasies, of "blow job" stories, and similar sexually-themed remarks and drawings. This kind of expression unquestionably is ***not*** obscene speech outside the First Amendment. See People v. Freeman (1988) 46 Cal.3d 419, 426 (adult film containing sexually explicit acts of sexual intercourse, oral sex, and anal sex was protected by the First Amendment; prosecution of the producer of such a film for pandering "would rather obviously place a substantial burden on the exercise of protected First Amendment rights"); United States v. X-Citement Video, Inc. (1994) 513 U.S. 64, 72 ("sexually

[18] Aguilar could be regarded as a case involving racially derogatory "fighting words," as the demeaning racial epithets at issue in that case were specifically directed at the plaintiffs.

explicit materials involving persons over the age of 17 are protected by the First Amendment").

The speech to which Lyle objects admittedly could be characterized as "coarse," "vulgar" and "crude." However, even vulgar and coarse expression is protected by the First Amendment. See United States v. Playboy Entertainment Group, Inc. (2000) 529 U.S. 803, 826 (First Amendment protects speech "that many citizens may find shabby, offensive, or even ugly"); Hustler, supra, 485 U.S. at 55 (First Amendment protected publication of parody by defendant which portrayed plaintiff as an incestuous and hypocritical drunk; "the fact that society may find speech offensive is not a sufficient reason for suppressing it"); Olivia N., supra, 126 Cal. App. 3d at 494-495 (television portrayal of young girl being raped in the shower by four others wielding a "plumber's helper" was constitutionally protected speech). No court has recognized an exception to the First Amendment (or its California counterpart) for "sexually coarse" or "vulgar" speech that one employee purportedly found offensive.

Respondents do not question the legitimate legislative goal of ensuring that employees are not subjected to a hostile working environment. However, the First Amendment will not accommodate a law that permits the

imposition of liability based ***solely*** upon the content of speech. The Court of Appeal's Per Se Discrimination Theory of liability under the FEHA simply cannot be squared with the federal constitution.

B. An Award of Damages to Lyle Also Would Violate Article I, Section 2(a) of the California Constitution.

> *In Episode #456663 of "Friends," entitled "The One With The Stoned Guy," Ross doesn't know how to talk dirty and says "vulva." Ross seeks Joey's assistance to "talk dirty." They practice. Joey says "tell me you want to caress my butt."* [CT 0871]

Article 1, Section 2(a) of the California Constitution directs: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." In fact, the California Constitution affords Respondents protection "broader" and "greater" than that provided by the First Amendment. Gerawan Farming, Inc. v. Lyons (2000) 24 Cal.4th 468, 491. Unlike the First Amendment, Section 2(a) of the California Constitution specifies a "right" to freedom of speech "explicitly and not merely by implication;" it "is unbounded in range;" and it is "unlimited in scope." Id. at 491-493. Under Section 2(a), "that some -- even a majority -- may find [a] mode of communication distasteful, ridiculous or even corrupt is irrelevant."

Spiritual Psychic Science Church of Truth v. City of Azusa (1985) 39 Cal.3d 501, 512. Surely Section 2(a) cannot be interpreted to permit an award of damages to Lyle based solely on her unexpressed objection to the male and female writers' use of sexually-themed jokes, gestures, and stories during the creative process on *Friends*.

VII

CONCLUDING STATEMENT

The Court of Appeal's interpretation and application of the FEHA to accommodate its Per Se Discrimination Theory is at odds with the statute's plain terms, legislative history, and numerous state and federal decisions. It also tramples on the Respondents' constitutionally-protected right of free speech. However, if the FEHA is interpreted to prohibit only speech that is a form of discrimination because it is targeted at a person or persons on account of their protected status -- regardless of the sexually coarse or vulgar content or message of that speech -- legislative intent is implemented, and a constitutional collision is avoided. The trial court correctly granted summary judgment for the Respondents on Lyle's harassment claims, and Respondents

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respectfully request that this Court reverse the Court of Appeal, and order that judgment again be entered in favor of Respondents.

Dated: September 17, 2004 MITCHELL SILBERBERG & KNUPP

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WORD COUNT CERTIFICATION

Pursuant to CRC 29.1(c)(1), counsel for Respondents hereby certifies that this Brief was produced using 13-point Times New Roman type and contains approximately 13,927 words (excluding the cover page, the tables and this Certification). Counsel relies on the word count of the computer program used to prepare this Brief.

Dated: September 17, 2004. MITCHELL SILBERBERG & KNUPP

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