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WARNING: This mediation brief is for a sexual harassment case and contains strong, foul language.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

[redacted],

Plaintiff,

vs.

[redacted]; and DOES 1 to 25, inclusive;

Defendants.

Plaintiff's Mediation Brief

Date: September 17, 2015

1. PROCEDURAL POSTURE OF THE CASE

DFEH Notices of Case Closure were served on Defendants. Defendants' counsel then contacted Plaintiff's counsel to see if Plaintiff was interested in doing an early mediation of the case. The parties agreed to an informal document exchange prior to mediating.

If the case does not resolve at the early mediation, a lawsuit will immediately be filed in court and litigation will proceed. Attached is a copy of the lawsuit that will be filed if the case is not resolved at the mediation. [Exhibit 37]

2. INTRODUCTION

This is a sexual harassment and retaliation case under the Fair Employment and Housing Act. Plaintiff [redacted] was a high-level project manager at [redacted]. While working on an important project to increase the company's network storage, she was subjected to vulgar verbal and some physical sexual harassment by a supervisor, [redacted], over a period of three to four months. [redacted] told Plaintiff that complaining about the harassment would do her no good, as he was favored by the Vice President of Human Resources, [redacted].

Worse, [redacted] did not get along with another high-level employee, [redacted], in part because [redacted] had accidentally sent [redacted] an email in which he called [redacted] incompetent. Neither [redacted] nor [redacted] hid their disdain for the other from Plaintiff. In fact, [redacted] asked Plaintiff for information on [redacted], which put Plaintiff in a very uncomfortable position, especially as a new employee trying to prove herself.

When Plaintiff disclosed to [redacted] a legitimate concern that [redacted] was potentially sabotaging the company's infrastructure, which would jeopardize the safety of customers' confidential information, [redacted] notified the Chief Operating Officer, [redacted] [redacted] deferred the matter to [redacted]. [redacted] summoned Plaintiff, attacked her as a "liar," and suspended her, refusing to hear details about the sabotage or about the sexual harassment, which Plaintiff intended to disclose during the same meeting.

The overwhelming stress, which had been ongoing for some time, put Plaintiff over the edge. She went out on medical leave and was eventually diagnosed with post-traumatic stress disorder. While Plaintiff was out she sent a detailed written complaint about the sexual harassment. [redacted] was initially charged with the investigation, despite being named in the letter as being part of the problem. A third-party attorney, [redacted], took over, but conducted a flawed investigation that dragged out for months. It ultimately ended with the unsurprising conclusion that Plaintiff's allegations could not be substantiated.

[redacted] left the company of his own accord at the end of August of 2014. In December, Plaintiff was ready to return to work with accommodations. The company refused to accommodate her, or to engage in a timely, good-faith, interactive process, resulting in the de facto termination of

Plaintiff's employment. In additional to massive medical bills and general damages for severe emotional distress, Plaintiff has tens of thousands of dollars of past and future lost earnings and earning capacity.

3. FACTS

A. General Background

Plaintiff started at [redacted] on January 27, 2014, as an IT Project Manager, with a starting salary of $100,000 a year. In that position, Plaintiff reported to [redacted], the Manager of the Project Management Group.

The Project Management group was one of five groups under the umbrella of Information Technology (IT). The other groups were Development, Quality Assurance, IT Security and Risk, and Infrastructure. Defendant [redacted] was the Director of Infrastructure. In that position, he reported to [redacted]a, the Vice President of IT, who, in turn, reported to [redacted], the Chief Operating Officer.

B. The "[redacted] Project"

In about February of 2014, Plaintiff's manager, [redacted], assigned Plaintiff to an infrastructure project. The goal of the project was to upgrade the company's storage area network [redacted]. In an initial meeting related to the project, Plaintiff met [redacted] for the first time.

As part of the '[redacted] project," Plaintiff was to meet weekly with [redacted] and [redacted], her primary points of contact for the project. But after the third such meeting, [redacted] instructed Plaintiff to cancel the weekly meetings because he did not want [redacted] to participate in them. Plaintiff did as she was told and canceled the weekly meetings.

C. [redacted] Sexually Harasses Plaintiff

Although Plaintiff had canceled the weekly meetings with [redacted] and [redacted], she still had to interact with him while working on the project. Thereafter, [redacted] began engaging in inappropriate and unwelcome conduct of a sexual nature with Plaintiff, which was severe and pervasive, and which consisted of comments and conduct, including, but not limited to, the following:

- Telling Plaintiff he wanted only her to manage all of his projects, stating he would have another employee removed from his existing projects and have her assigned. [redacted] told

Plaintiff that this would demonstrate how much power he had at the company. Shortly thereafter, [redacted] called Plaintiff in and told her that she would, indeed, be assigned to more of [redacted] projects.

- Referring to [redacted], stating that [redacted] wife has to wear a strap-on and fuck him in the ass before he goes to work every day because he doesn't have any balls," or words to that effect;
- Telling Plaintiff that if she wanted to keep her position, she needed to "play by the [redacted] rules," or words to that effect. [redacted] explained that women at the company had made their way up the corporate ladder by providing sexual favors to other males in management. As examples, he told Plaintiff that [redacted], the COO, had a sexual relationship with a receptionist. He said another employee named [redacted] was married to a vice president who had gained her status via sexual favors. Specifically, [redacted] said she was supposed to "hook up" with another employee named [redacted] one night, but instead "got [redacted]." [redacted] then said, "[redacted] must have dropped a load because she came up pregnant and they had to get married," or words to that effect. [redacted] then said that [redacted] had "dodge a bullet on that one," or words to that effect. [redacted] also referred to a female developer in the IT department who had been sexually passed around the office and provided explicit details of her relationship with an employee named [redacted]. [redacted] further stated that since that employee had recent gotten married, "we will need to find another one to take her place around here," or words to that effect.
- Telling Plaintiff that he was the [redacted]'s "golden boy," and that [redacted] would fire [redacted] before him. [redacted] said that [redacted] was "just one step from the door," and that [redacted] "had no power." Further, [redacted] said, "Once [redacted] is out, [redacted] will probably put me in that seat, which means I will have total control over the IT department," or words to that effect.
- Referring to [redacted] as a "bitch," and telling Plaintiff of a meeting he attended with [redacted] and [redacted] during which "[redacted] was crying like a little bitch," or words to that effect.
- Approaching Plaintiff at her desk and standing behind her and staring.
- Putting his hand on Plaintiff's lower back about two or three times a week.
- Invading Plaintiff's personal space.

- Demanding that Plaintiff follow him outside to secluded areas where he could be alone with her.
- Commenting on Plaintiff's heels, saying she could "put a hurtin' on" him and that he would like for her to grind them into this back.
- Telling Plaintiff that he did not need to be in good shape because "you don't need to be in good shape when you've got a dick as big as mine."
- Telling Plaintiff he makes "all the women squirt."
- Telling Plaintiff to wear a certain pair of shoes because they made her calves look sexy.
- Telling Plaintiff in graphic detail about sex he had with strippers.
- Telling Plaintiff that strip clubs were like his "second home."
- Telling Plaintiff he had his favorite strippers.
- Telling Plaintiff that when strippers "ride" him, they should pay him.
- Telling Plaintiff about driving around with a stripper who performed oral sex on him while he drove.
- Telling Plaintiff it was a stripper's job to make a guy "cum quickly," but that it was a challenge with him.
- Telling Plaintiff that a certain vice president, who was married to another employee named [redacted] was not "the sharpest tool in the shed, but she knew how to blow really good, or words to that effect.
- Telling Plaintiff how another male employee "tried to put his small dick into that, but it had been rooted out so he just fell in."
- Referring to various female employees, making comments about "big breasts," having "tits " that "would swallow me up," having to "tie on a board to keep from falling in," saying "my dick could get lost in there, but her ass is flat," or words to that effect, among other comments.
- Telling Plaintiff that a male vendor wanted him ([redacted]) to set him up, to which [redacted] responded that he knew of a "sure thing that would make a hard dick ache," referring to a

female developer in the IT department. [redacted] told Plaintiff that the vendor said, "My dick could get lost in those big tits, but I don't do flat asses," or words to that effect.

- Telling Plaintiff he had access to all her personal information and knew everything about her, including her home address. To prove it, he pulled up her resume on the screen in front of him.
- Acting jealous if he saw Plaintiff in the elevator with another male, saying, "Don't *ever* do that to me again."
- Calling Plaintiff into his office, where his lights were dimmed, and telling her to close the door. On one of these occasions, [redacted] handed Plaintiff a slip of paper with a network directory path written down on it. He told Plaintiff to go to that folder and look at the "evidence." He said that Lee had asked him to get "dirt" on a developer so the company could fire him. [redacted] said the developer was having an affair with a woman who at the time was the Manager of the Project Management group. [redacted] said the woman was on drugs, as well, and that [redacted] was interested in having a relationship with her, which was why he needed to get rid of the male developer.
- Telling Plaintiff to stop being "cold" with him and letting her know that he could make her lose her job by withholding information that she needed to report back to [redacted] at the project management meetings.
- Telling Plaintiff that she was going to the [redacted] Datacenter with him, where other employees had never been. Plaintiff believes this was an effort to get her alone. Further, [redacted] told Plaintiff to wear loose clothing.
- Referring to certain male employees as "faggots," commenting that they walk a certain way because they "take a dick up the ass," and telling Plaintiff he got rid of a certain employee because "I don't let anyone who takes a dick in the ass in my department," or words to that effect. When Plaintiff told [redacted] that such comments were unprofessional, he said something like, "That's the way it is at [redacted]."

In about April of 2014, [redacted] told Plaintiff that she would never be able to report him because he had "HR eating out of my hand." [redacted] told Plaintiff that [redacted], the Vice

President of Human Resources, hated [redacted] and wanted him gone, which meant that [redacted] would be gone, as well. [redacted] told Plaintiff that if she cooperated, "I will make sure you get [redacted]'s job." To prove his comments about [redacted], [redacted] said something like, "[redacted] is back on the market after her divorce, and all I need to do is say 'yes' and she will be all over me," or words to that effect. He also made a reference to [redacted]'s black leather clothing and sexual domination. Further, he told Plaintiff that if she said anything to [redacted], [redacted] would believe him over Plaintiff and that she would lose her job.

D. Plaintiff's Initial Attempts to Report the Harassment

In the beginning of May of 2014, [redacted] told Plaintiff that [redacted] had stopped the [redacted] purchase. Without the purchase, the system could not be upgraded and would be at capacity in terms of storage. Plaintiff urged [redacted] to let [redacted] know that if the system crashed, it would be vulnerable to hackers. [redacted] threw his hands up in the air and said, "[redacted] deserves what he gets." Plaintiff had no choice but to inform [redacted], given that [redacted] appeared not to care. When Plaintiff told [redacted], he appeared taken aback and asked Plaintiff to keep him apprised of what was happening in [redacted]'s department.

The next day, [redacted] told Plaintiff he was going to report the issue to Human Resources. Plaintiff expressed reluctance because of what [redacted] had said about [redacted], the Vice President of Human Resources. Plaintiff also tried to tell [redacted] about the sexual harassment, but could not because she was so humiliated and because she feared retaliation. [redacted] responded that he would take the matter to the COO, [redacted].

E. [redacted] Attacks Plaintiff

On or about May 28, 2014, [redacted] summoned Plaintiff to her office. Plaintiff was relieved because she thought that, in addition to being asked about what she had reported to [redacted], she could also provide details about the sexual harassment and have it stop. When Plaintiff arrived, not only was [redacted] there, but also [redacted], the Senior Vice President of Service Operations. Instead of asking about what Plaintiff had reported to [redacted], [redacted] questioned Plaintiff in a hostile manner about a document that she would not show to Plaintiff, which she referred to as a "disturbing report from [redacted]." [redacted] then asked Plaintiff what she had told [redacted] about her. Plaintiff said she was

not comfortable telling her that. [redacted] then asked if Plaintiff was married and had kids. When Plaintiff said she was married and had four teenagers, [redacted] sarcastically said that Plaintiff had been around and should therefore have no problem telling her what she had told [redacted]. [redacted] terminated the meeting, saying she would be talking to [redacted] and [redacted], and then get back to her.

Later that same day, [redacted] again summoned Plaintiff to her office. [redacted] was again present. [redacted] told Plaintiff that both [redacted] and [redacted] had called Plaintiff a liar. Plaintiff tried to tell [redacted] about the potential crash of the [redacted], but [redacted] was not interested in hearing it. [redacted] was angry, and she told Plaintiff she had known [redacted] for five years, and he would not say the things he was accused of. [redacted] said that Plaintiff, on the other hand, had been at the company for five months and created a mess. Plaintiff started crying and tried to tell [redacted] about the sexual harassment, but [redacted] refused to listen and called Plaintiff a liar multiple times. She then sent Plaintiff home for the remainder of the week. Before she left, she said to [redacted], "I think I'm ready to make my decision." She also told Plaintiff, "Lil Missy, you brought this on yourself." Plaintiff discovered that all her belongings had been removed from her desk and placed in a cardboard box. [redacted] said she intended to meet with Plaintiff the following Monday.

F. Plaintiff Reports the Sexual Harassment to [redacted] and Goes Out on Leave

On May 30, 2014, during her suspension, Plaintiff contacted [redacted] and complained about the sexual harassment, given that [redacted] had shown no interest in hearing about it. [Exhibit 1 (P bates 13)] [redacted] said he would notify [redacted], who would reach out to her. [Exhibit 2 (P bates 3-7)]

As a result of the sexual harassment and the way Plaintiff was treated in her attempts to initially report it, Plaintiff had such severe symptoms that she was diagnosed with Post-Traumatic Stress Disorder and went out on a medical leave on June 2, 2014. [Exhibit 3 (P bates 8-13)]

G. Plaintiff's Detailed June 16, 2014 Complaint Triggers An Investigation

On June 16, 2014, she wrote a lengthy letter to [redacted], [redacted], and [redacted] detailing the sexual harassment. [Exhibit 4 (P bates 18-24)]

According to documents produced pre-mediation by [redacted], the company hired [redacted] of [redacted] & [redacted], LLP, to conduct an investigation. [redacted] indicates in her

final report that she did not receive a copy of Plaintiff's June 16, 2014 complaint until June 24, 2014. [Exhibit 5 (January 5, 2015 Investigation Report, p. 3)] That same day, she contacted Plaintiff to set up an in-person interview. Due to Plaintiff's medical condition, she was unable to meet [redacted] until September 2014. There were numerous emails between [redacted] and Plaintiff. [Exhibit 32 (P bates 32-34, 37-45, 47, 51-59, and 65)] Due to the severity of Plaintiff's psychological condition, she could not even meet with [redacted] for a period of time. [redacted] proceeded to conduct the following interviews:

- [redacted] COO, and [redacted] a, Manager of Project Management, on July 9, 2014
- [redacted], VP of IT, and [redacted], Sr. VP of Service Operations, on July 14, 2014
- [redacted], VP of HR, on July 16, 2014

Plaintiff was interviewed in-person on September 19, 2014, and again by phone on October 21 and 29, 2014.

[redacted] was interviewed telephonically, in the presence of his attorney, [redacted], on October 29, 2014. [redacted] had left the company and apparently moved to Houston, Texas.

[redacted] also reviewed two memoranda created by [redacted], some emails and text messages between Plaintiff and [redacted], a statement from [redacted] that was not dated, a statement from [redacted] dated May 30, 2014, and [redacted]'s anti-harassment policy. [redacted] concluded that none of Plaintiff's allegations could be substantiated.

The investigation file reveals the following:

- On July 1, 2014, [redacted]'s lawyer notified [redacted], [redacted], and [redacted] that she represented [redacted]. In this representation letter, [redacted]'s lawyer states that Plaintiff's written complaint was "provided to him" on June 24, 2014, but that he was not allowed to keep a copy. She demanded a copy of that document and also a document that was shown to [redacted] in May of 2014 that "started the allegations." [Exhibit 6 (D bates 110)]
- On July 14, 2014, [redacted]'s lawyer stated that she refused to produce [redacted] for an interview unless she received the previously-requested copy of the allegations. [Exhibit 7 (D bates 109)]

- On August 1, 2014, [redacted] emailed [redacted]'s lawyer requesting a date and time for his interview, and agreed to provide a copy of the complaint letter prior to the interview. [Exhibit 8 (D bates 114)] The letter was emailed to [redacted]'s attorney on August 15, 2014, at a time when his interview was scheduled for August 21, 2014. [Exhibit 9 (D bates 123)] On August 20, 2014, however, [redacted]'s lawyer canceled the interview because [redacted] did not send all statements or complaints that she believed existed. [Exhibit 10 (D bates 130)] On August 21, in response to [redacted]'s requests for clarification of what other documents [redacted]'s lawyer was referring to, the lawyer, [redacted] referred to documents created by [redacted] referring to the alleged affair between [redacted] and [redacted]. [redacted]'s August 21 email to [redacted] said, in part, as follows: "[redacted] would not let [redacted] read the document. She referred to it as very detailed and she said [redacted] wrote it. **This is the same document [redacted] confronted [redacted] about when she was getting ready to fire her at the end of May.** This is referenced in your document." [Exhibit 11 (D bates 142) (emphasis added)]
- On September 2, 2014, [redacted]'s lawyer, [redacted], emailed [redacted] to let her know that there would be no interview until they get [redacted]'s notes of Plaintiff's complaint. Further, she said the interview must occur in Houston since [redacted] was no longer employed. [Exhibit 12 (D bates 147)]
- [redacted]'s interview was thereafter scheduled to occur by phone on September 18, 2014. But late in the day, [redacted] informed [redacted] that [redacted] had a job interview and would need to reschedule. [Exhibit 13 (D bates 163)] [redacted] said she was not thereafter available until the week of October 20, 2014. After [redacted] asked for anything sooner, and offered an evening or weekend, [redacted] said "maybe," but that they might need to limit the duration of the interview to an hour and a half. [redacted] responded that she preferred not to wait a month, but would if that was the only way to speak with [redacted] for at least two hours. [Exhibit 14 (D bates 175)]
- After stating in a subsequent email that she wanted to come to Houston for the interview [Exhibit 15 (D bates 178)], [redacted] settled for a phone interview that finally occurred on

October 29, 2014. The interview may not have lasted a full two hours, as [redacted]'s interview notes indicate that "[n]ear 11:00 a.m., both Mr. [redacted] and Ms. [redacted] indicated that their cell phones were losing charge and it was necessary to wrap up the interview." [Exhibit 16 (D bates 219-225)] [redacted] denied the allegations against him and, further, told [redacted] that he did not know how Plaintiff came up with historical employee information and instead suggested that [redacted] could have provided it to her. He further told Talley that Plaintiff "seemed like she had an agenda." Specifically, Plaintiff wanted to implement [redacted], but did not get the resources, equipment, or server to support her. [redacted] speculated that the lack of movement on that project could have motivated her animosity toward him, as though he were preventing her from succeeding. [redacted] also told [redacted] that [redacted] had said she was going to fire Plaintiff for making the allegations up. **He also said that [redacted], the COO, and [redacted] met with him on or around June 24, 2014, during which meeting [redacted] told him that there was too much history in the letter, such that [redacted] must have said some of the things. [redacted] also admitted that he sent [redacted] an email once at 2:00 a.m., to which she responded, "Meow."** [Exhibit 16]

- During [redacted]'s interview of Plaintiff's manager, [redacted] S[redacted] confirmed that it was possible he did reassign some projects to Plaintiff, taking them away from another employee named [redacted] Further, [redacted] was concerned that Plaintiff knew certain confidential information, but he never asked her where she was getting it from. Moreover, he confirmed that Plaintiff told him that [redacted] was trying to sabotage the [redacted] project and that he, in turn, told [redacted]. [redacted] also knew that [redacted] was reading emails, as he told [redacted] that [redacted] had written a letter to [redacted] in late March with a timeline of his conversations with Plaintiff. [redacted] also confirmed that [redacted]s wife used to work for [redacted] and that it was [redacted]l whose wife still works at the company. [redacted] also told [redacted] about rumors involving a developer named [redacted]. The rumor was that she was having an affair with a male employee named [redacted]. [redacted] then said it was true on the basis that [redacted] and [redacted] were close, and [redacted] had told him about the affair. Because it happened before Plaintiff was employee, someone obviously told

her about it. Further, [redacted] also confirmed two other employees dated, and that it did not work out. But he said there was a rumor that the two were having an affair. This, too, happened before Plaintiff started, so obviously someone had told her this information, as well. [redacted] thought Plaintiff was a good employee, a "high caliber person" who had opportunities to grow at the company. [Exhibit 17 (D bates 226-234)]

- During [redacted]s interview of COO [redacted], [redacted] revealed that he learned that [redacted] was unhappy with [redacted]'s management style. This likely arose out of an email that [redacted] accidentally sent to [redacted] in which [redacted] described [redacted] as incompetent. [redacted] also felt that [redacted] micromanaged him, according to [redacted] thought [redacted] was reading his emails, which led to [redacted]'s resignation. To try to salvage things, [redacted] had a meeting with both [redacted] and [redacted] after which [redacted] said, "If you ask me to stay, I'll stay." [redacted] decided to stay, but as an independent contractor who would report to [redacted] and no longer would report to [redacted]. They brought in [redacted] in May to help execute the change in status. [redacted] also confirmed that a married male developer had accused his female manager of sexual harassment. They had had an affair. But when the developer received a reprimand due to his work performance, he mentioned the harassment. The female manager was fired for concealing the relationship. [redacted] thought Plaintiff would not have known about this unless she had been told, and thought [redacted] must have been gossiping. [redacted] also confirmed that [redacted] was, in fact, divorced, and that [redacted] was, in fact, married to [redacted] who works in a different department. [redacted] told [redacted] that [redacted] had told him he was concerned that [redacted] was going to sabotage him, and [redacted] brought in HR. [redacted] said it appeared that Plaintiff was playing both sides and pitting [redacted] and [redacted] against each other. After [redacted] received Plaintiff's June 16, 2014 complaint letter via email, he forwarded it to [redacted] for further handling. [redacted] and [redacted] met with [redacted], who wanted to know what he was being accused of. [redacted] read some of the letter, but not all of it. [redacted] admitted there was some truth in the letter, i.e., monitoring tool regarding the developer, and that he had talked to Plaintiff about it. But he denied the allegations of harassment, saying, "You know me. Would I say those filthy things?" [Exhibit 18 (D bates 235-239)]

- During [redacted]'s interview of [redacted], Sr. VP of Service Operations, [redacted] revealed that she and [redacted] met with [redacted] and [redacted] together. They came to an agreement that they were going to work on their relationship. **Then there was a discussion about what to do about Plaintiff. Although [redacted] was concerned that they were considering some type of action against Plaintiff, he was not against it.** Later that same day, [redacted] and [redacted] met with Plaintiff. **After that meeting, [redacted] and [redacted] were told about the meeting. Although [redacted] denies that [redacted] and [redacted] were given details of the meeting with Plaintiff, [redacted] did admit that they were advised that there were alleged inconsistencies with Plaintiff's story.** [Exhibit 19 (D bates 240-244)]
- During [redacted]'s interview of [redacted], VP of HR, [redacted] admitted that [redacted] gossips. She told [redacted] that Plaintiff was "tattling" on [redacted], sharing a lot of information to [redacted]. [redacted] did confirm that there was "friction" between [redacted] and [redacted], and that [redacted] had resigned. [redacted] told [redacted] that she believed that Plaintiff was trying to capitalize on that friction. [redacted] confirmed that [redacted] is married to [redacted], a VP at the company, and that [redacted], the COO, is married to a former receptionist. [redacted] told [redacted] that she suggested a meeting with [redacted] and [redacted], during which she told them that they were both saying things and that they should bury the hatchet and move on. [redacted] told [redacted] that she and [redacted] had met with [redacted] during which the only thing he admitted was that he had told Plaintiff that [redacted] had nice hair. [redacted] told [redacted] that she had a joint meeting with [redacted] and [redacted]. She told [redacted] that she thought he was saying unflattering things about [redacted] to Plaintiff. She told [redacted] that she thought he was trying to "gather more dirt about Leon." She told them that Plaintiff had "figured out the dynamics" and was using it against them both. [redacted] told [redacted] that at [redacted]'s request, she and [redacted] met with [redacted], during which meeting [redacted] read some of the allegations from Plaintiff's June 16, 2014 letter. [redacted] asked [redacted] if he had said anything about [redacted] and [redacted], and [redacted] said, "I could have." He admitted he could have told Plaintiff some of the "historical stuff." [redacted]'s notes state that [redacted] thought [redacted] was credible, but then

say, "She did not believe that [redacted] said ***some*** of the filthy things." (emphasis added)

- [redacted]'s last day at [redacted] was to be August 29, 2014. [Exhibit 20 (D bates 245-250)]
- [redacted]'s interview with [redacted], VP of IT, appears to have been very brief. Although his notes of his conversations with Plaintiff were a centerpiece of [redacted]'s investigation, [redacted] appears not to have asked him about the notes at all. During her interview of [redacted] O[redacted] said his relationship with [redacted] changed when he became [redacted]s direct manager. "He had to pull in the reins and make sure that [redacted] was doing what he was supposed to do." [redacted] said [redacted] needed to improve in some areas. Although everyone else interviewed by [redacted] said [redacted] and [redacted] had issues, [redacted] said he and [redacted] got along well; that he "didn't feel the [redacted] versus [redacted] thing;" and that he was "very comfortable with" [redacted]. Ota did admit to [redacted] that Plaintiff told him that [redacted] was trying to sabotage the company in terms of the network's storage space. [Exhibit 21 (D bates 251-252)]
- In her investigation report, [redacted] concluded that, although she found [redacted] to be credible with respect to his denial of the harassment allegation, she found him to be less than credible with respect to his denial that he had provided Plaintiff with the "historical employee information," i.e., gossip. Further, [redacted] omits to discuss the propriety of having [redacted] investigate any of Plaintiff's allegations, considering that Plaintiff had alleged an improper relationship between [redacted] and [redacted] [Exhibit 5 (Investigation Report, p. 21)]

H. <u>Plaintiff's Medical Leave and Request for Accommodation to Return to Work</u>

On June 2, 2014, Plaintiff notified her manager, [redacted], that she had been placed on medical leave. On June 3, 2014, [redacted], HR Manager, emailed Plaintiff to inform her that she did not qualify for FMLA due to her tenure and suggested that she apply for state disability benefits. She told Plaintiff that the company would hold her job open during her absence, even though the company was not obligated to do so. [redacted] indicated that Plaintiff was expected to return to work on June 23, 2014. [Exhibit 22 (P bates 14-17)]

On June 20, 2014, Plaintiff notified [redacted] that her leave had been extended to July 28, 2014, and requested that the company hold her job open. [Exhibit 23 (P bates 27-28)] [redacted] responded that the company would not terminate her on June 23, 2014. She further told Plaintiff that

she (Plaintiff) would be responsible for paying her share of the full monthly health insurance premiums ($753.46). [Exhibit 24 (P bates 29-31)]

On July 25, 2014, Plaintiff requested an additional extension of her leave to September 2, 2014, without being terminated. [Exhibit 25 (P bates 35-36)] Plaintiff's leave continued to be extended thereafter. [Exhibit 26 (P bates 48-50)]

On October 21, 2014, Plaintiff emailed [redacted] to advise that her doctor, Dr. [redacted], anticipated that Plaintiff should be able to return to work on December 1, 2014. [Exhibit 27 (P bates 61-63)]

On November 12, 2014, Plaintiff emailed P[redacted] and requested asked that the company accommodate her mental health condition by permitting her to work remotely when she returned to work on December 1. [Exhibit 28 (P bates 69)] Plaintiff's treating physician, Dr. A[redacted], completed the necessary paperwork for her.

On December 1, 2014, Plaintiff spoke with an employee named D[redacted] about her request for accommodation. D[redacted] informed Plaintiff that her request was being denied because Plaintiff allegedly did not have the knowledge required to manage the new projects in a virtual environment and because she did not have the proper system backup to be successful in a virtual environment. Plaintiff emailed A[redacted] that same day, requesting additional information in support of the company's decision so she could challenge it. She also requested to speak with her manager, V[redacted] about the matter. [redacted] responded on December 2, stating that, as far as she knew, there had been "no definitive decision," and that the company would be in touch. [Exhibit 29 (P bates 76-79)]

On December 16, 2014, Plaintiff sent a detailed email to V[redacted], B[redacted], Y[redacted], [redacted], and [redacted] in which she complained about retaliation. [Exhibit 30 (P bates 80-82)] Plaintiff is uncertain whether this complaint was ever investigated. Plaintiff never returned to work and is uncertain of her employment status to this day.

In April of 2015, Plaintiff received a letter from [redacted] advising her that she owed more than $3,000 in premiums. The company advised that if she did not make a payment by May 31,

2015, her insurance coverage would be discontinued and she would have to reinstate it through COBRA. [Exhibit 31 (P bates 83)]

4. ANALYSIS

A. Hostile Work Environment Sexual Harassment (Gov. Code, § 12940(j))

The FEHA prohibits any employer or person from engaging in sexual harassment. *Government Code* §12940(j)(1), (j)(4)(C). To be actionable, harassment must be "sufficiently severe or pervasive" to alter the conditions of the victim's employment and create an abusive working environment. *Fisher v. San Pedro Peninsula Hospital* (1989) 214 al.App.3d 590, 609; *Beyda v. City of Los Angeles*, (1998) 65 Cal.App.4th 511, 516-517. "Sexual harassment creates a hostile, offensive, oppressive, or intimidating work environment" violating the FEHA "when the sexually harassing conduct sufficiently offends, humiliates, distresses or intrudes upon its victim, so as to disrupt her emotional tranquility in the workplace, affect her ability to perform her job as usual, or otherwise interferes with and undermines her personal sense of well-being." *Id.* at 517. The plaintiff must prove that the defendant's conduct would have interfered with a reasonable employees' work performance and would have seriously affected the psychological well-being of a reasonable employee and that he was actually offended. *Fisher* at 609-610.

Most importantly, whether the harassment creates an unlawful hostile working environment is determined by the "totality of the circumstances." The factors that can be considered in evaluating the totality of the circumstances are (1) the nature of the unwelcome sexual acts or words (generally, physical touching is more offensive than unwelcome verbal abuse); (2) the frequency of the offensive encounters; (3) the total number of days over which all of the offensive conduct occurs; and (4) the context in which the sexually harassing conduct occurred. *Fisher, supra at* 610; *Pereira v. Schlage Electronics* (N.D. Cal 1995) 902 F.Supp. 1095, 1101-1102; *Beyda v. City of Los Angeles*, supra, 65 Cal.App.4th 511.

Following the U.S. Supreme Court's lead that evidence should not be viewed too narrowly, the California courts have stressed that:

> "the objective severity of the harassment should be judged from the perspective of a reasonable person *in the plaintiff's position*, considering all the circumstances," an inquiry that "requires careful consideration of the social context in which particular

> behavior occurs and is experienced by its target. ...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. Common sense, and an appropriate sensibility to social context, will enable courts and juries to distinguish between simple teasing and roughhousing...and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." *Beyda*, supra, 65 Cal.App.4th at 517-518, quoting *Oncale v. Sundowner Offshore Services Inc.*(1998) 523 U.S. 75.

The required showing of severity of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct; i.e. the more incidents the less severe they need to be to establish a hostile environment. *Harris v. Forklift Systems, Inc.* (1993) 510 US 17, 23; *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 878; *Oncale v. Sundowner Offshore Services Inc.*(1998) 523 U.S. 75. To be actionable, the abusive conduct need not be both severe and pervasive; one or the other will do. *Quantock v. Shared Mktng Services, Inc.* (7th Cir. 2002) 312 F3d 899, 904 and fn.2.

In *Harris v. Forklift Systems* (1993) 510 US 17, 22-23, the Court held that the harassing conduct need not have seriously affected the employee's psychological well-being as long as the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment. *Id.* at 21. While psychological harm, like any other relevant factor, may be taken into account, no single factor is required. *Id.* at 23. "Employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation." Although an isolated epithet may fail alone to support a cause of action for a hostile environment, sexual harassment is noted to have occurred long before the point where psychological assistance is actually required. *Ellison,* supra, 924 F.2d at 878. The Court went on to explain: "Sexual harassment is a major problem in the workplace. Adopting the victim's perspective ensures that courts will not sustain ingrained notions of reasonable behavior fashioned by the offenders." *Id.* at 880-881.

Here, when viewed in its totality, it is clear that the sexual harassment Plaintiff was subjected to was sufficiently pervasive to alter her working conditions. Plaintiff was subjected to a repeated

pattern of sexual behavior. It went on for many months and affected Plaintiff's working conditions enough. The bottom line is that Defendants failed to take reasonable actions to protect Plaintiff, allowing her to be subjected to sexual harassment and the resulting severe emotional distress.

Defendants will be strictly liable for [redacted]'s harassment of Plaintiff. "[T]he FEHA provides that an employer is strictly liable for the harassment of an employee by an agent or supervisor, while the employer is liable for harassment of an employee by non-agents or non-supervisors if the employer, its agents or supervisors know or should know of the harassing conduct and the employer fails to take immediate and appropriate corrective action." *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1328. "'Supervisor' means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Gov. Code, § 12926(t). [redacted], as Director of Infrastructure, was a supervisor within the meaning of the FEHA because he had the authority, in the company's interest, to direct his subordinate employees, including Plaintiff. Further, he had the authority to recommend the transfer of employee, which he did when he effected the removal of R[redacted] from his projects and had him replaced with Plaintiff.

B. Failure to Take All Reasonable Steps Necessary to Prevent and Correct Discrimination, Harassment, and Retaliation (Gov. Code, § 12940(k))

The FEHA requires that employers on notice of harassment must determine if the conduct violated harassment laws or policies and impose appropriate discipline if it has. Therefore, Plaintiff has brought a separate cause of action case for Failure to Take All Steps to Prevent and Correct Harassment. So long as underlying harassment is proven, failure to take steps to prevent and correct sexual harassment is an independent cause of action, carrying its own liability. *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 286.

Government Code section 12940(k) makes it an unlawful employment practice "[f]or an employer...to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." Government Code §12940(k); see also *Weeks v Baker & McKenzie_* (1998) 63 Cal.App.4th 1128, 1161. Further, once on notice of sexual harassment, an employer must conduct a prompt and effective investigation and take immediate action both to eliminate harassment and prevent its recurrence. Gov. Code 12940(j)(1)(requiring employer "to take immediate and appropriate corrective action" upon notice of co-worker harassment, and to "take all reasonable steps to prevent harassment from occurring"); *Fisher v. San Pedro Peninsula Hospital,* (1989) 214 Cal. App.3d 590, 606; see also *Fuller v. City of Oakland_* (9th Cir. 1995) 47 F.3d 1523, 1522, 1528-1529 (employers may not "stand idly by once they learn that sexual harassment has occurred"). "Such steps may include affirmatively raising the subject of harassment, expressing strong disapproval, and developing appropriate sanctions...." 2 Cal.Code Regs. §7287.6(b)(3); see also 29 C.F.R. §1604.11(f).

The employer's knowledge regarding harassment may be found through *any* means; a "formal" complaint is not required. *Meritor Sav. Bank, FSB v. Vinson (*1986) 477 U.S. 57, 72. Even if lower-level supervisors have no authority to correct or prevent harassment by a superior, they may owe a duty to report it to the employer's management... particularly where the employer's sexual harassment policy requires "all supervisors and managers to report incidents of sexual harassment to the appropriate management people." *Clark v. United Parcel Service* (6th Cir. 2005) 400 F3d 341, 350.

The duty to prevent and remedy harassment is an affirmative duty imposed on all employers, and it includes a duty to promptly and thoroughly investigate all allegations of harassment. *Northrop Grumman Corp. v. Workers' Compensation Appeals Board* (2nd Dist. 2002) 103 Cal.App.4th 1021, 1035 ("Prompt investigation of a discrimination claim is a necessary step by which an employer meets its obligation to ensure a discrimination-free work environment."); *Malik v. Carrier Corp.* (2nd Cir. 2000) 202 F.3d 97, 105 ("[A]n employer's investigation of a sexual harassment complaint is not a gratuitous or optional undertaking."). To meet its duty to prevent harassment, an employer must implement an adequate policy concerning internal harassment investigations. *DFEH v. Madera*

County (1990) FEHC Dec. No. 90-03; 1990 WL 312871, 23 ("employer should have in place, and inform its employees about, an adequate procedure for handling sexual harassment and discrimination complaints as part of its independent legal obligation to "prevent harassment from occurring" and "failure, then, to implement such a policy and procedure may itself constitute a violation of subdivisions (h) and (i)."). At the core of a reasonable investigation policy is taking all reasonable steps to conclude whether or not harassment occurred. *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 126 ("Whatever [remedial] course of action the employer chooses to take, an effective remedy is unlikely to take shape in the absence of a thorough investigation of the alleged acts of harassment.")

"Once an employer is informed of the sexual harassment, the employer must take adequate remedial measures. The measures need to include immediate corrective action that is reasonably calculated to 1) end the current harassment and 2) deter future harassment. The employer's obligation to take prompt corrective action requires 1) that temporary steps be taken to deal with the situation while the employer determines whether the complaint is justified and 2) that permanent remedial steps be implemented by the employer to prevent future harassment once the investigation is completed. An employer has wide discretion in choosing how to minimize contact between the two employees, so long as it acts to stop the harassment." *Bradley v. California Dept. of Corrections and Rehabilitation* (2008) 158 Cal.App.4th 1612, 1630. "[T]he most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified. An investigation is a key step in the employer's response. . . . An investigation is a key step in the employer's response, . . . , and can itself be a powerful factor in deterring future harassment. By opening a sexual harassment investigation, the employer puts all employees on notice that it takes such allegations seriously and will not tolerate harassment in the workplace. An investigation is a warning, not by words but by action. We have held, however, that the fact of the investigation alone is not enough. An investigation that is rigged to reach a pre-determined conclusion or otherwise conducted in bad faith will not satisfy the employer's remedial obligation." *Id.* at 1193. An employer is required to take remedial action designed to stop the harassment, even where a complaint is uncorroborated or where

the coworker denies the harassment." *Id.* at 1631.

If the employer fails to take appropriate action after learning of an employee's sexually harassing conduct, "the employer can be deemed to have adopted the offending conduct and its results quite as if they had been authorized affirmatively as the employer's policy." *Swenson v. Potter* (9th Cir. 2001) 271 F3d 1184, 1191. Additionally, *Iverson v. Atlas Pacific Engineering* (1983) 143 Cal.App.3d 219, states an employer could have direct liability as a "ratifier" if it did not take appropriate action with respect to employees who engaged in misconduct. "An employer may not employ or continue to employ the errant employee without taking action reasonably designed to protect the rights or safety of others." *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1157-1158.

Further, ratification may be established by any circumstantial or direct evidence demonstrating adoption or approval of the employee's actions by the corporate agent. Such ratification may be inferred from the fact that the employer, after being informed of the employee's actions, does not fully investigate and fails to repudiate the employee's conduct by redressing the harm done and punishing the employee. *Id.* at 801; *Fisher*, *supra*, at 623 (failure to engage in a full investigation and repudiate the employee's conduct is sufficient to demonstrate ratification.) In *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, the Court held "The issue commonly arises where the employer or its managing agent is charged with failing to intercede in a known pattern of workplace abuse, or failing to investigate or discipline the errant employee once such misconduct became known." *Id.*, at 726.

Additionally, the mere presence of an employee who has engaged in particularly severe or pervasive harassment can create a hostile work environment and that to avoid liability, **employers may even have to remove employees from the workplace if their mere presence would render the working environment hostile. "If harassers are not removed from the workplace when their mere presence creates a hostile environment, employers have not fully remedied the harassment.** When employers cannot schedule harassers to work at another location or during different hours, employers may have to dismiss employees whose mere presence creates a hostile environment." *Ellison,* supra, 924 F.2d at 883.

Here, although Plaintiff inquired about how to make a sexual harassment complaint on May 30, 2014, Plaintiff's complaint was not taken seriously until June 16, when the company received Plaintiff's detailed complaint letter. Although the company claims it set up a meeting for June 2 to obtain details about Plaintiff's allegations, this was in actuality a meeting at which the company had intended to terminate Plaintiff, which is established by the fact that Plaintiff's belongings had already been boxed up when she was escorted off the premises on May 28. Additionally, the company did not know how to respond once Plaintiff went on leave for three weeks. With Plaintiff gone, the company appears to have been content to do nothing. [redacted]'s investigation fails to reveal what, if anything, the company did between May 30 and June 16.

Once Plaintiff's complaint arrived via email on June 16, the company also responded inappropriately. First, there is no evidence that [redacted] was removed from the workplace at any time during the pendency of any investigation, whether conducted by B[redacted] or by T[redacted]. Although Plaintiff had removed herself from the workplace, the company failed to consider the possibility that B[redacted] may have harassed others. Given Plaintiff's allegations, that was a possibility. T[redacted]'s report is silent on interim corrective measures, and is also silent on whether the company took the opportunity to refresh its workforce about sexual harassment after the investigation had concluded.

Additionally, the company initially permitted S[redacted] to look into Plaintiff's June 16 complaint, even though Plaintiff had made allegations of inappropriate conduct between her and [redacted], and even though Plaintiff had made allegations of inappropriate behavior against [redacted] arising out of their May 28 meeting. Plaintiff's concerns were legitimized by [redacted]'s behavior after receiving Plaintiff's June 16 letter, but before T[redacted] was hired to conduct her investigation. As T[redacted] noted in her investigation report, it was no secret that [redacted] intended to fire Plaintiff, as both [redacted] and [redacted] said as much to T[redacted]. Further, T[redacted]'s interview of N[redacted], the HR Manager, revealed that she and [redacted] had met with [redacted] and [redacted], during which meeting there was a discussion about what to do about Plaintiff. Specifically, according to H[redacted], [redacted] was not against taking action against Plaintiff. This is akin to asking the fox what should happen to the hens in the hen house. Worse, T[redacted] learned from H[redacted] that [redacted] and [redacted] were told that there

were inconsistencies in Plaintiff's story. So much for confidentiality.

Additionally, T[redacted] failed to interview [redacted] in-person during that two-month window before his employment ended and he moved back to Texas. That the opportunity was lost is confirmed by the fact that, on September 2, 2014, [redacted]'s Texas lawyer stated that his interview needed to happen in Houston since he was no longer employed. At some point in October, T[redacted] emailed that she might seek to interview [redacted] in Houston, but for reasons unknown, changed her mind and conducted a phone interview instead on October 29, 2014. This deprived her of the opportunity to evaluate [redacted]'s credibility face-to-face.

Moreover, T[redacted] caved in to [redacted]'s demand for documents before he would submit to an interview. After one document was provided nearly a week before his scheduled interview and he had a chance to discuss this with his attorney and formulate responses, he then canceled his interview not once, but twice. T[redacted] finally interviewed [redacted] by phone and in the presence of his lawyer, more than four months after T[redacted] was retained to investigate.

Finally, from the investigation report, [redacted]'s interview on October 29, or a third interview of Plaintiff that same day, appears to have been the final investigatory act by T[redacted]. Yet her investigation report is dated January 5, 2015. The investigation could not have been more dilatory. It is not surprising then that no corrective action—interim or otherwise—was taken against [redacted].

C. Retaliation (Gov. Code, § 12940(h))

Section 12940 (h) of the Government Code provides that it is unlawful for any employer "to discharge, expel, or otherwise discriminate against any person because that person has opposed any practices forbidden under this part …" In order to establish a prima facie case for retaliation, plaintiff must show: (1) he engaged in protected activity, (2) his employer subjected him to adverse employment action(s), and (3) there is a causal link between the protected activity and the employer's action(s). *See Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 479, 476. Furthermore, the causal link of retaliation may be established by circumstantial evidence such as: (1) the employer's knowledge that the employee engaged in protected activity and (2) the time between the protected action and the allegedly retaliatory employment decision. *Morgan v. Regents of Univ. of Calif.* (2000) 88 Cal.App.4th 52, 69. The courts broadly interpret the meaning of adverse

employment action. The phrase "terms, conditions and privileges" must be interpreted liberally to give employees "the appropriate and generous protections against employment discrimination that the FEHA was intended to provide." *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1054. It does not need to be an "ultimate" employment act, such as termination, so long as it has "a detrimental and substantial effect on the plaintiff's employment." *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1455; *Thomas v. Department of Corrections*, (2000) 77 Cal. App.4th 507, 510-511. *The adverse employment action need not be one serious detrimental action, but may consist of a series of more subtle actions. Id.* at 1055.

Here, there is abundant evidence of retaliation. First, [redacted] was initially charged with the investigation, despite allegations of a relationship with the accused [redacted]. This suggests that the outcome would be predetermined and, obviously, there was clear bias. T[redacted]'s subsequent investigation revealed that [redacted] and [redacted] had texted in the wee hours of the morning, and that one such text from [redacted] simply said, "Meow." T[redacted] disregarded that evidence in making her findings, however, bolstering the claim that the outcome would be predetermined.

Setting aside [redacted]'s bias, [redacted] did not speak with anyone other than [redacted] and O[redacted], and, worse, revealed confidential details to them, stating that Plaintiff's story contained inconsistencies. Moreover, [redacted] appears to have recruited O[redacted] and [redacted] in an effort to bolster her decision to fire Plaintiff, as evidenced by the revelation that [redacted] was not against taking action against Plaintiff. The lack of a rigorous investigation is evidence suggesting that a defendant does not value the discovery of the truth. *Mendoza v. Western Medical Center Santa Ana* (2014) 222 Cal.App.4th 1334; *see also Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 280 (failure to interview witnesses for potentially exculpatory information evidences pretext).

T[redacted] had months to investigate, but her investigation was not rigorous either. She was retained on or about June 24, 2014, but her investigation report is dated January 5, 2015—more than two months after the final interview was completed and six months after she was retained. T[redacted] failed to secure an in-person interview with [redacted] before he moved back to Texas, settling for a phone interview of [redacted], who was represented by counsel. Further, the interview was cut short due to low cell phone batteries. Additionally, T[redacted] had given [redacted]'s lawyer relevant documents

to review months before he was interviewed. There was no follow-up interview with [redacted] at any time, either. T[redacted]'s conclusion that [redacted] was credible in his denial of the harassment allegations is no surprise, given that he and his lawyer had ample time to anticipate questions and practice the answers.

Additionally, T[redacted]'s selection of female co-workers to interview was limited to Plaintiff, [redacted], and H[redacted]. No other potential harassment victims were interviewed. T[redacted] did not attempt to contact former employees, male or female, who worked with [redacted] to find out what relevant knowledge they might have. T[redacted] did not identify or interview many other employees who worked with Plaintiff to determine if she ever appeared upset or ill at work. T[redacted] did not review [redacted]'s personnel file to confirm whether he had prior discipline against him; she took the word of [redacted] regarding that matter.

Finally, the company refused to engage in a good-faith, interactive process with Plaintiff to determine whether her mental health condition could be accommodate so she could return to work in a more protective and supportive environment. "The FEHA makes it unlawful for an employer to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1003 (internal citations and quotation marks omitted). "Section 12940, subdivision (n) imposes separate duties on the employer to engage in the interactive process and to make reasonable accommodations." *Ibid.* "Once the interactive process is initiated, the employer's obligation to engage in the process in good faith is continuous. The employer's obligation to engage in the interactive process extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed. This rule fosters the framework of cooperative problem-solving contemplated by the ADA, by encouraging employers to seek to find accommodations that really work[.]" *Id.* at 1013 (internal quotation marks omitted).

Here, Plaintiff requested to work remotely for a brief transition period, but the request was

flatly denied. When Plaintiff requested more information to evaluate the denial, she was rebuffed. [redacted] therefore violated its obligation to continually engage in the interactive process, and its obligation to act in good faith. Plaintiff has effectively been terminated without having been formally fired. Such conduct is not only retaliatory in violation of the FEHA, but also violates the provisions of the FEHA that prohibit disability discrimination and the failure to accommodate a known disability and engage in a good-faith, interactive process. Gov. Code, § 12940, subds. (a), (m), (n).

5. DAMAGES

Compensatory Damages:

Lost earnings

Plaintiff's salary was $100,000 a year, or $8,333.33 a month. Plaintiff has been off work since June 2, 2014, roughly 15.5 months. Her lost earnings to date are therefore approximately $129,166.67.

General Damages

In a FEHA harassment action, the courts may award unlimited compensatory and punitive damages, as well as attorneys' fees. Gov.Code, § 12965, subd. (c)(3); *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 215. In passing FEHA, the legislature made it clear it was necessary to pass laws to protect employees from harassers. The legislature, in its wisdom, stated that individuals who have been sexually harassed should be awarded the full measure the damages, and they made it a point to include emotional distress in general damages. "An essential aspect of the damage in any case of sexual harassment, sexual assault or sexual battery is the outrage, shock and humiliation of the individual abused. We cannot conceive of a circumstance where a cause of action for sexual assault, battery or harassment could accrue devoid of any consequential emotional distress." *Mendez v. Superior Court* (1988) 206 Cal.App.3d 557, 573.

"Sexual harassment in the workplace by a supervisor is a nightmarish experience for any employee. The employee wants a prompt end to the harassing conduct, but being known as a harassment victim can be personally humiliating, and reporting acts of harassment by a supervisor carries risks that are both professional and economic. When deciding whether to report a

supervisor's harassment to an employer, the harassment victim, who may already feel vulnerable and defenseless, is likely to wonder: Will my employer believe me? Will my employer fire me, demote me, label me a troublemaker, or transfer me to a position with no future?" *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1048, 6 Cal.Rptr.3d 441, 455.

Plaintiff initially went to a trusted doctor, Dr. C[redacted] She first told her about the sexual harassment on May 31, 2014. She then treated with her through November 2014. The bill is approximately $800. [Exhibit 33; P bates 113-142] Plaintiff also told her that she felt her employer was not protecting her and was making it worse. Plaintiff complained of stress, panic attacks, loss of appetite, migraines, diarrhea, insomnia, irritability, depression, mood swings, nervousness, tension, abdominal pain, heartburn, heart palpitations, and chest pain. She also reported that she was waking up with panic attacks during the night. Dr. C[redacted] gave her medications, including Xanax and Lexapro. She also diagnosed her with PTSD, Depressive Disorder, Generalized Anxiety Disorder, and Panic Disorder. She placed Plaintiff on medical leave as she could not return to work due to her psychological state and she also recommended therapy for Plaintiff.

In June 2014, Plaintiff had a severe reaction to medication she was prescribed for her anxiety and depression and ended up unconscious. Her husband found her like this at home and called an ambulance. The bill was $1654. [Exhibit 34; P bate 46] Plaintiff was taken to Ventura County Medical Center. There was concern that she was suicidal at that point.

In July 2014, Plaintiff started therapy with [redacted]. She had three sessions with her in July and August 2014. She reported sleep issues, severe stress, and panic attacks, all stemming from the sexual harassment. Plaintiff was diagnosed with PTSD. The bill was $450. [Exhibit 35; P bates 87-93].

In September 2014, Plaintiff started therapy with G[redacted]. She treated with him through November 2014. He diagnosed her with PTSD. She reported to him that she was having nightmares, anxiety, headaches, fatigue, nausea, vomiting, and migraines. [Exhibit 36; P bates 94-112]

Plaintiff is literally almost non-functional. She has frequent panic attacks and does not like leaving the house. She is severely depressed and has anxiety that takes over her life. She is truly

one of the most severely psychologically disabled clients we have ever had. She was completely functional and not suffering from emotional distress prior to the sexual harassment and aftermath. The complete loss of control truly set her over the edge and has completely transformed her existence.

Plaintiff is also very scared of [redacted]. He told Plaintiff that he had "people" that could "take care of any issues" that he had with anyone that crossed him. Plaintiff does not leave her house alone, she looks over her shoulder all the time in fear that he will send someone to hurt her or her family.

There are additional records from Plaintiff's current treating psychiatrist. We are still awaiting those records, so they will be produced either before or at the mediation. There will be further information regarding diagnosis, prognosis, and future treatment needs that will be forthcoming.

Attorney Fees

Additionally, Plaintiff has incurred, and will continue to incur, legal expenses and attorneys' fees and is entitled to an award of attorneys' fees and costs pursuant to Government Code section 12965(b).

Punitive Damages:

Civil Code Section 3294 applies to actions brought under the FEHA. *Weeks v. Baker & Mackenzie* (1998) 63 Cal.App.4th 1128. *Civil Code* section 3294(b) states that an employer shall be liable for punitive damages based on an employee's acts if "the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others **or** authorized or ratified the wrongful conduct for which the damages are awarded **or** was personally guilty of oppression, fraud or malice." The statute includes an additional qualification for corporate employers, who may be liable for punitive damages if there was "the advance knowledge and conscious disregard, authorization or ratification or act of oppression, fraud or malice is on the part of an officer, director, or managing agent of the corporation." In regards to punitive damages for the act of an agent, such damages are authorized if "(a) the principal authorized the doing and the manner of the act, or (b) **the agent was unfit and the principal was reckless in**

employing him, or (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or (d) **the employer or a manager of the employer ratified or approved the act.**" *Kelly-Zurian v. Wohl Shoe Co.*(1994), 22 Cal.App.4th 397. Here, there are two paths to get to punitive damages: (1) Defendants had knowledge of the unfitness of [redacted] and continued to place employees in a hostile environment in conscious disregard of the rights and safety of their employees or (2) Defendants ratified [redacted]'s conduct. Both paths will be proven here and if the case goes to trial, Defendants will be ordered to pay punitive damages.

a. <u>Managing Agents Ratified Batieste's Conduct</u>

In order to recover punitive damages, Plaintiff need not demonstrate that the actual person who engaged in the malicious conduct was a managing agent. *See Weeks, supra,* 63 Cal.App.4th 1128. **Circumstantial evidence that the act of a lower level employee was ratified by a managing agent is enough.** *See Fisher, supra,* 214 Cal.App.3d at p. 623. **Failure to engage in a full investigation and repudiate the employee's conduct is sufficient to demonstrate such ratification**. *Id.*

According to the California Supreme Court, for purposes of Civil Code section 3294, a managing agent is "someone who exercise[s] substantial independent authority and judgment over decisions that ultimately determine corporate policy." *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 573. Managing agents are ones who "in fact exercise substantial discretion in their decision-making capability." *Id.* The *White* Court cited with approval a Ninth Circuit decision to the same effect. *Glovatorium, Inc. v. NCR Corp.* (9th Cir. 1982) 684 F.2d 658, 661 (holding that "[t]he key inquiry in the determination of whether an employee is a managing agent is 'the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy' "). Thus, a regional manager who supervised eight stores and sixty-five employees was a "managing agent." *White, supra,* 21 Cal.4th at 577.

If a person acting in a managerial capacity either does an outrageous act *or approves the act by a subordinate,* the imposition of punitive damages upon the employer serves as a deterrent to the employment of unfit persons for important positions. *White, supra,* 21 Cal.4th at 571, citing Rest.2d

Torts, section 909, com. B, p.468. The term "managing agent" includes those who "exercise substantial independent authority and judgment in their corporate decision-making so that their decisions ultimately determine corporate policy." *Id.* at 566-567.

"[T]he determination whether employees act in a managerial capacity…does not necessarily hinge on their level in the corporate hierarchy. Rather, ***the critical inquiry is the degree of discretion the employees possess*** in making decisions that will ultimately determine corporate policy." *Egan* v. *Mutual of Omaha Insurance* (1979) 24 Cal. 3d 809, 822-823 (emphasis added).

In a newer case that just came down on October 8, 2013, *Davis v. Kiewit Pacific Co.* (D062388), the court found that the person who had the authority and discretion to enforce sexual harassment and retaliation policies on behalf of the company and who had the responsibility to respond to employee complaints and conduct and/or oversee investigations, had the discretion to make decisions that ultimately determine corporate policy and **could be a managing agent**.

Also, *Egan* involved a rather large sized insurance company, Mutual of Omaha, whose low-level claims manager and adjuster denied the plaintiff's claim for insurance benefits. Mutual of Omaha argued that neither employee could be considered managerial employees because neither was involved in "high-level policy making." The California Supreme Court, however, concluded that there was sufficient evidence to impose punitive damages. *Egan, supra,* at 823. The Court specifically found that the employees had disposed of the plaintiff's claim with little or no supervision and, therefore, possessed broad discretion to determine which policies to accept or deny. *Id.* The Court held that "[w]hen employees dispose of insureds' claims with little if any supervision; they possess sufficient discretion for the law to impute their actions concerning those claims to the corporation." *Id.* Indeed, such authority exercised "necessarily results in the ad hoc formulation of policy." *Id.* The Court concluded with the admonition that "Defendant should not be allowed to insulate itself from liability by giving an employee a non-managerial title and relegating to him crucial policy decisions." *Id.* (quoting *Merlo v. Standard Life & Accident Insurance* (1976) 59 Cal. App. 3d 5, 25).

In *Major v. Western Homes Insurance* (2009) 169 Cal. App. 4th 1197, the Court of Appeal held that that a local claims adjuster who had denied the plaintiffs' homeowner insurance policy

claim was a managing agent. *Major*, 169 Cal. App. 4th at 1220. The court found that the claims adjuster in question managed 35 employees in Western Home's office in Minnesota, oversaw the claims operations, supervised lower ranking supervisors, trained adjusters, worked on the budget, supervised the handling of certain files, and authorized payment of benefits. *Id.* Moreover, the claims adjuster exercised substantial discretionary authority to pay or not pay benefits owing to policy holders such as the plaintiffs. *Id.* The court held that such facts were sufficient for a jury to find that the claims representative was a managing agent. *Id; C.f. White v. Ultramar, supra,* 21 Cal. 4th at 577 (claims manager with discretionary authority to pay or deny claims exercises substantial discretionary authority over decisions that ultimately determine corporate policy).

In *Ginda v. Exel Logistics, Inc.* (E.D.Cal.,1999) 42 F.Supp.2d 1019, the plaintiff brought a lawsuit for harassment, discrimination and retaliation. The plaintiff contended he complained to the general manager, Dale Bailey, and that after complaining, the harassment worsened and he was terminated in retaliation for his complaints. Defendants filed a motion for summary judgment on the issue of punitive damages. The court indicated it was clear that Bailey had virtually unlimited authority in handling employee complaints. *Id.* at 1022. Bailey's discretion in determining whether to contact, consult with or seek permission from higher ups was particularly notable. *Id.* The court likened Bailey's authority in the area of handling sexual harassment complaints with that of the insurance claims adjusters' authority in disposing of insurance claims in *Egan*. *Id.* Moreover, the court explained that there was no evidence that employees at the Defendant company were aware of any management employee above Bailey to whom they could complain. The Court stated that Bailey, in effect, "embodied both Defendant's authority and policy regarding the handling of employee complaints for Defendant. The purposeful delegation of such discretionary authority to Bailey is sufficient to create a triable issue of material fact as to whether Bailey was a managing agent under § 3294(b)" and that a jury could determine that clear and convincing evidence exists that Bailey was a managing agent. *Id.* at 1023- 1024.

Egan and its progeny show that, in determining whether a person is managing agent under section 3294, title, company's size, and number of employees is not dispositive. What matters is whether a person exercises enough discretion such that decisions are sufficient to "make policy" for

the company; even where such policy is formulated on an ad hoc basis. *See Egan* at 823 (such authority exercised "necessarily results in the ad hoc formulation of policy.").

1. Y[redacted] and S[redacted] Are Managing Agents

Y[redacted] is the COO of [redacted]. S[redacted] is the VP of HR. They have authority to hire, fire, and discipline employees, and also the authority to investigate employee complaints and decide on corrective actions. They are the people who did the investigations and made the decisions regarding corrective actions, of the lack thereof. They had the authority to determine not only the scope of the investigation, but also when to conclude the investigation, and to make made decisions related to corrective actions. The foregoing shows that they had virtually unlimited discretion in handling sexual harassment complaints. Their authority is, and at all times relevant was on the same level or even higher than the persons deemed managing agents in *Egan* and its progeny. As in the case of *Egan*, *Major*, and *Ginda*, here, there is sufficient evidence to show that the above are managing agents under Civil Code section 3294.

2. Defendants Ratified [redacted]'s Misconduct

The facts of sexual harassment in and of themselves provide the "evil motive necessary to support punitive damages." *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 620. Moreover, the *Fisher* court held that, as a matter of law, "sexual harassment is subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights and therefore supports punitive damage allegations." *Id.,* at 621. If the employer fails to take appropriate action after learning of an employee's sexually harassing conduct, "the employer can be deemed to have adopted the offending conduct and its results quite as if they had been authorized affirmatively as the employer's policy." *Swenson v. Potter* (9th Cir. 2001) 271 F3d 1184, 1191. Additionally, *Iverson v. Atlas Pacific Engineering* (1983) 143 Cal.App.3d 219, states an employer could have direct liability as a "ratifier" if it did not take appropriate action with respect to employees who engaged in misconduct. "An employer may not employ or continue to employ the errant employee without taking action reasonably designed to protect the rights or safety of others." *Weeks v. Baker & McKenzie (*1998) 63 Cal.App.4th 1128, 1157-1158.

"An employer may not employ or continue to employ the errant employee without taking

action reasonably designed to protect the rights or safety of others." *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1157-1158. In finding against the employer on this point in *Weeks*, the court found a "failure to take corporate responsibility" for the harasser's prior, known sexual harassment; and it noted the employer's lack of "useful documentation of [the harasser's] misconduct." *Ibid.*

Further, ratification may be established by any circumstantial or direct evidence demonstrating adoption or approval of the employee's actions by the corporate agent. Such ratification may be inferred from the fact that the employer, after being informed of the employee's actions, does not fully investigate and fails to repudiate the employee's conduct by redressing the harm done and punishing the employee. *Id.* at 801; *Fisher, supra*, at 623 (failure to engage in a full investigation and repudiate the employee's conduct is sufficient to demonstrate ratification.) In *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, the Court held "The issue commonly arises where the employer or its managing agent is charged with failing to intercede in a known pattern of workplace abuse, or failing to investigate or discipline the errant employee once such misconduct became known." *Id.,* at 726. The court then went on to follow this quote by citing, *with approval*, to a number of cases wherein the courts found ratification due to an employer's failure to fully investigate a claim, redress the harm done, repudiate the misconduct, and/or sufficiently punish the wrongdoer.

In *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, the Court stated that the mere presence of an employee who has engaged in particularly severe or pervasive harassment can create a hostile work environment and that to avoid liability, employers may even have to remove employees from the workplace if their mere presence would render the working environment hostile. "**If harassers are not removed from the workplace when their mere presence creates a hostile environment, employers have not fully remedied the harassment**. When employers cannot schedule harassers to work at another location or during different hours, employers may have to dismiss employees whose mere presence creates a hostile environment." *Id.* at 883.

Here, [redacted] engaged in sexual harassment of Plaintiff. Defendants, on its part, provided the foundation for such conduct to occur. Defendants also ratified the failure to conduct a full

investigation into Plaintiff's allegations of sexual harassment and retaliation. The failure to timely and thoroughly investigate contributed significantly to Plaintiff's emotional distress.

To make matters worse, Defendants did not take actions to ensure that [redacted] was given appropriate corrective action. Defendants did not repudiate the conduct by redressing the harm. [redacted] continued to work in his same position, was not demoted, did not receive a decrease in salary, and it was Plaintiff that was forced to go on leave. Therefore, it is clear there was ratification of [redacted]'s harassment and Defendants will be liable for punitive damages. *See Id.; See White v. Ultramar* (1999) 21 Cal.4th 563.

3. Defendants Had Knowledge of the Unfitness of [redacted] and Continued to Employ Him With Conscious Disregard of the Rights and Safety of Plaintiff

"[I]inaction of even relatively low-level supervisors may be imputed to the employer if the supervisors are made responsible, pursuant to company policy, for receiving and acting on complaints of harassment." *Swinton v. Potomac Corp.* (9th Cir. 2001) (9th Cir. 2001) 270 F 3d. 794, 810. "An employer will be liable based on the knowledge of an employee, who may or may not have management authority, has an official strong de facto duty to act as a conduit to management for complaints about work conditions . . . or is responsible for relaying harassment complaints to the corporate hierarchy." *Distasio v. Perkin Elmer Corp.* (1998) 157 F. 3d 55, 64.

In *Deters v. Equifax Credit Information Services, supra,* the Plaintiff who was sexually harassed complained to a manager designated to receive sexual harassment complaints. However, said manager failed to take any action. The Court imputed the designated manager's inaction to the company.

In *Cook v. Stefani Management Services* (7th Cir. 2001) 280 F. 3d 564, 569, the court held "Where the claim [is] that the supervisor failed adequately to remedy the harassment . . . the supervisor acts on behalf of the company in enforcing (or failing to enforce) its harassment policy, and it is therefore fair to attribute his knowledge and acts to the company."

Here, Plaintiff complained about [redacted]. However, management did not take actions to stop or prevent the harassment. Their inaction is therefore sufficient to impute the knowledge and inaction to Defendants. Therefore, it is clear there was notice that [redacted] was an unfit employee

and Defendants allowed Plaintiff to work with him anyway and he continued to sexually harass her. Defendants' conduct in failing to properly investigate and take remedial actions regarding Plaintiff's complaints, substantially impacted Plaintiff' rights and safety as an employee.

Additionally, although Defendants have written policies regarding sexual harassment, that does not shield them from liability, especially when they did not implement or enforce their own policies. Had Defendants ever actually enforced or complied with their very own policies and Fair Employment and Housing Act ("FEHA"), Plaintiff would never have been subjected to sexual harassment from [redacted] and would not have been forced to suffer as much. Based on [redacted]'s pattern and propensity to sexually harass Plaintiff, which was clearly known by Defendants, they should be subject to punitive damages. *See Id.; See White v. Ultramar* (1999) 21 Cal.4th 563.

6. CONCLUSION

Plaintiff was allowed to be subjected to humiliating, degrading sexual conduct by [redacted]. The evidence is clear that Defendants did not take reasonable actions to protect Plaintiff. The laws of the State of California designed to protect her were being ignored by the managing agents of defendants. In handling thousands of psychological injury cases, many in the workplace, this is one of the worst psychological injuries we have ever seen in the workplace. This client decompensated so badly that she was basically non-functional. This is highly unusual, especially in light of a previously well- functioning worker, and because of the level of distress, disability and treatment, we believe there will be a general damage award in excess of 500K, on top of large wage loss and future therapy awards. Plaintiff thereby demands $1,750,000.

DATED: September 14, 2015

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