ASCDC
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

2520 Venture Oaks Way, Suite 150 • Sacramento, CA 95833
(800) 564-6791 • (916) 239-4082 • (916) 924-7323 – Fax
ascdc@camgmt.com • www.ascdc.org

August 6, 2020

Via Truefiling

Acting Presiding Justice Elena J. Duarte
Associate Justice Andrea Lynn Hoch
Associate Justice M. Kathleen Butz
Court of Appeal of the State of California
Third Appellate District
914 Capitol Mall, 4th Floor
Sacramento, CA 95814

Re: Request for Publication of *Arnold v. Dignity Health* (July 17, 2020, C087456)

Honorable Justices:

Pursuant to Rules 8.1105 and 8.1120 of the California Rules of Court, the Association of Southern California Defense Counsel ("ASCDC") writes to urge the Court to order publication of its opinion in this case.

Interest of the Requesting Organization

ASCDC is the nation's largest and preeminent regional organization of lawyers who specialize in defending civil actions. It has over 1,000 attorneys in Central and Southern California, among whom are some of the leading trial and appellate lawyers of California's civil defense bar. The ASCDC is actively involved in assisting courts on issues of interest to its members. In addition to representation in appellate matters, the ASCDC provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas. It has appeared as amicus curiae in numerous cases before both the California Supreme Court [*e.g., Perry v. Bakewell* (2017) 2 Cal.5th 536; *Howell v. Hamilton Meats & Provisions* (2011) 52 Cal.4th 541; *Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal.4th 913; *Reid v. Google, Inc.*

(2010) 50 Cal.4th 512] and the Courts of Appeal [*e.g., Burlage v. Superior Court* (2009) 178 Cal.App.4th 524].

Why The Opinion Deserves Publication

Publication of this opinion would be appropriate and helpful in the development and clarification of important legal principles relating to the burdens of proof and applicability of *Code of Civil Procedure* § 437c as applied to cases arising out of the California Fair Employment and Housing Act ("FEHA") The Court's opinion meets the standards for publication in multiple ways.

The decision "…explains with reasons an existing rule of law," (Cal. Rules of Court, rule 8.1105(c)(3)), as it addresses the several important FEHA and summary judgment related concepts. First, as discussed recently in a Law360 article entitled "Calif. Employment Cases Actually Favor Summary Judgment" (copy attached), it reaffirms that summary judgment is an entirely appropriate remedy based on the totality of the evidence. Thus, this opinion is consistent with, among others, the *Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 354 and *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 and contrary to the later *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 248 and *Abed v. Western Dental Services, Inc.* (2018) 23 Cal.App.5th 726, 739 decisions. The idea that summary judgment can "never" be granted in employment cases is a popular, yet fundamentally flawed, argument made by plaintiffs in virtually every summary judgment opposition. The decision importantly reaffirms a key holding from *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 that the "great weight of federal and California authority holds that an employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory."

Second, the decision reiterates the *McDonnell Douglas* burden-shifting test for employment summary judgment motions as demonstrated in *Harris*, *i.e.* that the opposing evidence must show that the discrimination at-issue is a substantial motivating factor in the adverse employment decision, and that evidence must

support the above-noted rational inference that illegal, intentional discrimination was the true reason for the employer's action.

Third, the decision importantly demonstrates that purportedly ageist comments by individuals not materially involved in the adverse employment action are insufficient to raise a triable issue of material fact per *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433. *See also Nesbit v. Pepsico, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993) (comments by non-decision-maker that "we don't necessarily like gray hair" and "we don't want any unpromotable 50 year-olds" are "stray remarks" having no probative value) and *Nidds v. Schindler Elevator Corp.* 113 F.3d 912, 919 (9th Cir. 1996) (comment that is not directly tied to an adverse employment action is not direct evidence of discrimination).

Fourth, the decision reiterates that speculation and conjecture is not sufficient to raise any triable issue of material fact (*King, supra*, 152 Cal.App.4th at 433) regarding a plaintiff's burden to proffer substantial responsive evidence that the employer's showing was untrue or pretextual. *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal. App. 4th 1718, 1735.

Fifth, the decision importantly notes that neutral, benign, or even complimentary comments allegedly made in an "intimidating" or "aggressive" tone only raise a "weak suspicion of discriminatory animus" and is insufficient to defeat summary judgment. *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 867-868.

Sixth, the decision demonstrates that an employee's assertion that an employer failed to follow its own internal disciplinary processes, without any evidentiary connection to illegal motive (here age or associational discrimination), does not support the denial of summary judgment.

The decision is thus an excellent primer on the proper analysis and application of commonly raised factual and legal standards in the content of FEHA-related summary judgment motions.

Finally, the decision "[i]nvolves a legal issue of continuing public interest" (Cal. Rules of Court, rule 8.1105(c)(6)) because summary judgment, alternatively summary adjudication, motions are filed in virtually every employment case, and the number of cases pending before the courts is skyrocketing. Proper guidance for litigation and trial counsel on these important evidentiary and statutory matters is essential.

For these reasons, ASCDC urge this Court to certify its Arnold opinion for publication.

Respectfully submitted,

By: _____
ERIC C. SCHWETTMANN (SBN 188764)
BALLARD ROSENBERG GOLPER & SAVITT, LLP
Attorneys for Requesting Party
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 15760 Ventura Boulevard, Eighteenth Floor, Encino, CA 91436.

On August 6, 2020, I served true copies of the following document(s) described as **REQUEST FOR PUBLICATION** on the interested parties in this action as follows:

☒ **BY USING THE TRUE FILING, WEB-BASED, E-SERVICE AND E-FILING SYSTEM:** I caused to be served the foregoing document(s) on all interested parties listed on the TrueFiling e-service system with regard to the matter of *Arnold v. Dignity Health* (July 17, 2020, C087465).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 6, 2020, at Encino, California.

/s/ Karen J. Thomson
Karen J. Thomson

SERVICE LIST

Attorneys for Plaintiff and Appellant
Virginia M. Arnold

Richard A. Lewis
Law Offices of Richard A. Lewis
2020 L Street, Suite 220
Sacramento, CA 95811

Attorneys for Defendant and Respondent

Thomas L. Riordan
Porter Scott
350 University Avenue, Suite 200
Sacramento, CA 95825

Courtney De Groof
Porter Scott
350 University Avenue, Suite 200
Sacramento, CA 95825

David P.E. Burkett
Porter Scott
350 University Avenue, Suite 200
Sacramento, CA 95825

Portfolio Media. Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Calif. Employment Cases Actually Favor Summary Judgment

By **Scott Dixler and Sarah Hamill** (June 25, 2020, 4:59 PM EDT)

Scott Dixler

Sarah Hamill

Summary judgment is a procedural mechanism courts use to cut through the parties' pleadings to determine whether a trial is necessary to resolve their dispute.

Under Section 437c, Subdivision (c) of the California Code of Civil Procedure, a summary judgment motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

California courts' attitudes toward summary judgment motions have shifted over recent years. Summary judgment was once considered a disfavored remedy in California.

California's approach contrasted with that taken by federal courts, which adopted a more permissive view of summary judgment in a trilogy of cases decided by the U.S. Supreme Court in 1986.[1]

In one of those cases, Celotex Corp. v. Catrett, the court explained that summary judgment "procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules," especially because it "isolate[s] and dispose[s] of factually unsupported claims or defenses."[2]

While California courts initially lagged behind their federal counterparts in removing summary judgment from disfavored status, the Legislature amended the summary judgment statute in the early 1990s to bring California more in line with the federal approach.[3]

In 2000, the California Supreme Court held in Guz v. Bechtel National Inc., that an employer is entitled to summary judgment if the evidence does not support a rational inference of discrimination.[4] The following year, in Aguilar v. Atlantic Richfield Co., the California Supreme Court confirmed that the Legislature intended the amendments to California's summary judgment statute to liberalize the granting of summary judgment motions.[5]

And the California Supreme Court recently reaffirmed that summary judgment is no longer disfavored. In Perry v. Blakewell in 2017, the California Supreme Court explained that summary judgment was once disfavored but that it "is now seen as 'a particularly suitable means to test the sufficiency' of the plaintiff's or defendant's case."[6]

Nonetheless, even after Guz, Aguilar and Perry, California's courts of appeal still disagree as to whether summary judgment is an appropriate mechanism for resolving employment disputes specifically.

On the one hand, several courts of appeal have held that summary judgment is generally not a suitable vehicle to dispose of employment cases, particularly where — as is often the case — liability

turns on the motive of the employer.

Prior to Perry, in 2009, Division Two of the First District Court of Appeal in San Francisco recognized in Nazir v. United Airlines Inc. that summary judgment "is no longer called a 'disfavored remedy,'"[7] but nonetheless reasoned "that many employment cases present issues of intent, and motive, and hostile working environment, [which are] issues not determinable on paper." Such cases, the court cautions, "are rarely appropriate for disposition on summary judgment, however liberalized it be."[8]

Cases decided after both Nazir and Perry have followed in Nazir's footsteps. For example, in Abed v. Western Dental Services Inc., Division One of the First District Court of Appeal echoed Nazir's reasoning that

> although summary judgment is no longer a disfavored procedure, "many employment cases present issues of intent, and motive, and hostile working environment, issues not determinable on paper ... [and] rarely appropriate for disposition on summary judgment, however liberalized it be."[9]

But other appellate courts have gone a different route, emphasizing the suitability of summary judgment in employment disputes. In Caldwell v. Paramount Unified School District, Division Five of the Second District Court of Appeal in Los Angeles stated that California's "summary judgment law, Code of Civil Procedure section 437c, provides a particularly suitable means to test the sufficiency of the plaintiff's prima facie case and/or of the defendant's nondiscriminatory motives for the employment decision."[10]

Similarly, the Third District Court of Appeal in Sacramento recently observed in an unpublished decision that courts routinely "assess evidence concerning an employer's intent or motive on summary judgment."[11]

This split of authority regarding the appropriateness of summary judgment in employment cases risks confounding trial courts and litigants. The risk of confusion is particularly acute because the majority of published and precedential appellate cases decided after Perry have reversed summary judgment granted to an employer on discrimination, harassment, retaliation, hostile working environment and similar claims.[12]

But once unpublished, and therefore nonprecedential, opinions are considered, the vast majority of appellate decisions following Perry have affirmed summary judgments for the employer on those same claims. We have reviewed approximately 130 appellate decisions evaluating employment discrimination and retaliation claims under California's Fair Employment and Housing Act,[13] that were decided after Perry, and 99 of those cases affirmed summary judgment for the employer.

Only 31 reversed summary judgment for the employer. But only two of the 99 cases affirming summary judgment are published, while nine of the 31 cases reversing summary judgment are published.

This imbalance between published and unpublished opinions could create the misimpression that summary judgment remains disfavored in employment cases, as the courts in Nazir and Abed held. But the facts on the ground are different — in fact, the majority of employment cases in which an employer won summary judgment in the trial court are affirmed on appeal.

Ultimately, the First District Court of Appeal's decisions in Nazir and Abed — which state that summary judgment is disfavored in employment cases — are doctrinal outliers. The Third District Court of Appeal recently summarized the majority view, albeit in an unpublished opinion: "[W]hen ... an employer has made a sufficient showing of innocent motive, and the employee has not placed that showing in material dispute, a court may grant summary judgment in the employer's favor."[14]

Because Nazir and Abed are published, precedential decisions, their skeptical view of summary judgment in employment cases will continue to influence trial courts and litigants. Ultimately, the California Supreme Court may be called on yet again to clarify that summary judgment is not a disfavored remedy in any type of case.

Until the Supreme Court does so, litigants in employment disputes will need to contend with case law expressing skepticism toward summary judgment in employment cases years after the Supreme

Court took pains to reaffirm that summary judgment is no longer disfavored.

Scott Dixler is an associate and Sarah Hamill is a fellow at Horvitz & Levy LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] See Celotex Corp. v. Catrett (1986) 477 U.S. 317 [106 S.Ct. 2548, 91 L.Ed.2d 265] (Celotex); Anderson v. Liberty Lobby, Inc. (1986) 477 U.S. 242 [106 S.Ct. 2505, 91 L.Ed.2d 202]; Matsushita Elec. Industrial Co. v. Zenith Radio (1986) 475 U.S. 574 [106 S.Ct. 1348, 89 L.Ed.2d 538]; see also Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843-845 (Aguilar) ("In 1986, the United States Supreme Court handed down a trio of decisions" (Celotex, Anderson, and Matsushita) that liberalized the granting of summary judgment motions).

[2] Celotex, supra, 477 U.S. at pp. 323-324, 327.

[3] See Aguilar, supra, 25 Cal.4th at p. 849 ("we believe that summary judgment law in this state now conforms, largely but not completely, to its federal counterpart"); id. at p. 854 ("the purpose of the 1992 and 1993 amendments . . . was to liberalize the granting of motions for summary judgment").

[4] Guz v. Bechtel Nat. Inc. (2000) 24 Cal.4th 317, 361 (Guz).

[5] Aguilar, supra, 25 Cal.4th at p. 848.

[6] Perry v. Blakewell (2017) 2 Cal.5th 536, 542 (Perry).

[7] Nazir v. United Airlines, Inc. (2009) 178 Cal.App.4th 243, 248 (Nazir).

[8] Id. at p. 286.

[9] Abed v. Western Dental Services Inc. (2018) 23 Cal.App.5th 726, 739 (Abed); see Cornell v. Berkeley Tennis Club (2017) 18 Cal.App.5th 908, 925 (Cornell) (same); see also Joohong Kim v. Samsung SDS America, Inc. (2019) 2019 WL 5386835, at p. *5 [nonpub. opn.] (same); Niblett v. County of Los Angeles , (2018) 2018 WL 3599256, at p. *4 (Niblett) [nonpub. opn.] (same).

[10] Caldwell v. Paramount Unified School Dist. (1995) 41 Cal.App.4th 189, 203.

[11] Contreras v. United Airlines, Inc. (2019) 2019 WL 5485223, at p. *1 (Contreras) [nonpub. opn.].

[12] See Brome v. California Highway Patrol (2020) 44 Cal.App.5th 786; Ortiz v. Dameron Hospital Assn. (2019) 37 Cal.App.5th 568; Galvan v. Dameron Hospital Assn. (2019) 37 Cal.App.5th 549; Ross v. County of Riverside (2019) 36 Cal.App.5th 580; Mackey v. Board of Trustees of California State University (2019) 31 Cal.App.5th 640; Abed, supra, 23 Cal.App.5th 726; Cornell, supra, 18 Cal.App.5th 908; Light v. Department of Parks & Recreation (2017) 14 Cal.App.5th 75; Husman v. Toyota Motor Credit Corp. (2017) 12 Cal.App.5th 1168. But see Nakai v. Friendship House Assn. of American Indians, Inc. (2017) 15 Cal.App.5th 32; Featherstone v. Southern California Permanente Medical Group (2017) 10 Cal.App.5th 1150.

[13] Gov. Code, § 12900 et seq.

[14] Contreras, supra, 2019 WL 5485223, at p. *1; see Guz, supra, 24 Cal.4th at p. 361 ("an employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory").