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VERITAS
Association of Defense Counsel of Northern California and Nevada

ASCDC
Association of Southern California Defense Counsel

November 9, 2017

Acting Presiding Justice Laurie D. Zelon
Associate Justice John L. Segal
Judge Frank J. Menetrez
Court of Appeal of the State of California
Second Appellate District, Division Seven
Ronald Reagan State Building
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

Re: Request for Publication of *Mendoza v. Cedars-Sinai Medical Center* (October 23, 2017, B258540)

Honorable Justices:

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

Interest of the Requesting Organizations

ADCNCN is an association of approximately 900 attorneys primarily engaged in the defense of civil actions. ADCNCN members have a strong interest in the development of substantive and procedural law in California, and extensive experience with civil matters generally, including employment matters. The Association's Nevada members are also interested in the development of California law because Nevada courts often follow the law and rules adopted in California.

ASCDC is the nation's largest and preeminent regional organization of lawyers who specialize in defending civil actions. It has over 1,100 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).

ASCDC and ADCNCN are separate organizations that coordinate from time to time on matters of shared interest, such as this letter in support of publication of the *Rivera* opinion. Together and separately, they have appeared as *amicus curiae* in numerous cases before both the California Supreme Court and Courts of Appeal across the state to express the interests and concerns of the civil litigation attorneys who are the members of the Associations and their clients, a broad cross-section of California businesses and organizations.

Why the opinion deserves publication

Publication of this opinion would be appropriate and helpful in the development of the law. The Court's opinion meets the standards for publication in multiple ways.

The decision "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions," (Cal. Rules of Court, rule 8.1105(c)(2)), in that it addresses a number of specific actions claimed to be adverse employment actions.

The decision "[i]nvolves a legal issue of continuing public interest" (Cal. Rules of Court, rule 8.1105(c)(6)) because most all Californians are either an employer or an employee or both.

The decision "reaffirms a principle of law not applied in a recently reported decision" (Cal. Rules of Court, rule 8.1105(c)(8)), in fact several, most notably that an "adverse employment decision" is not anything that happens at work to which an employee may take offense, but instead must materially affect the terms, conditions or privileges of employment. "Actions that merely cause embarrassment or humiliation do not constitute adverse employment actions [or] create a triable issue of fact as to adverse employment action." (Opn., p. 22.)

In many employment cases plaintiffs' counsel try to steer the inquiry away from what the employee did that justified termination and towards how the employee felt unfairly treated at work. This can become a central focus of trial, as plaintiffs' counsel try to reach jurors, many of whom have felt unfairly treated at work at some time or another.

In reality, however, that should be legally inconsequential. The only issues ought to be whether an adverse employment action was taken, and whether it was taken for an improper reason.

The Court found that each of multiple actions were not an adverse employment action. (Opn., pp. 19-28.) These included matters of kinds that frequently come up in other cases:

> (1) Patrick's violation of Mendoza's privacy by discussing her mental state and personal problems with [other employees]; (2) Patrick humiliating and embarrassing Mendoza by pulling her out of the operating room to meet with Jun; (3) Patrick's failure to return Mendoza to her regular duties and assigning her to hall duty for one week following her return to work; (4) "[s]crutinizing, micro-managing and following Mendoza while she worked in the presence of her co-workers and other surgeons"; (5) "[h]arassing Mendoza and forcing her to request a transfer to a different operating floor (3OR) to avoid the harassment and retaliation by Patrick," which resulted in the loss of benefits associated with working on the cardiac team; ... (6) giving Mendoza "the lowest increase in pay on her performance evaluation since her hire date." (Opn., p. 21.)

As this Court recognized, these are not matters that materially affect the terms, conditions or privileges of employment, and so do not constitute adverse employment actions under the law. Even if they are subjectively perceived as not merely adverse, but hostile.

The Court's discussion of no. 6 on this list may be particularly helpful to practitioners, because it does not simply reject plaintiff's argument, but gives some examples how on a different record there might be a different result. Similarly, the discussion of no. 5 and analogy to constructive discharge could be helpful in the many other cases where an employee argues that a transfer was an adverse employment action.

Another item that the Court determined to not be an adverse employment decision was the referral of this employee to Employee Health Services. (Opn., pp. 20-21.) Employers and employees alike would benefit from the certainty of a published decision holding such an action does not provide basis for suit, in absence of evidence that the

employee was forced against her will. Especially where the employee is given to statements like "I think people think I'm crazy but I'm not. I'm an RN and I learned everything. They think I have paranoia but I don't." (Opn., p. 7.)

The decision further reiterates that summary judgment can in fact be granted in employment cases arising out of the FEHA despite the widely argued view that such a remedy is "never" or "rarely" appropriate.

Finally, the Associations believe that the time is ripe for a published opinion reiterating that workplaces are rarely idyllic retreats and, despite the possible public perception to the contrary, the FEHA is not a general civility code designed to rid the workplace of all vulgarity or unbecoming conduct.

For these reasons, ASCDC and ADCNCN urge this Court to certify its *Mendoza* opinion for publication.

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On November 9, 2017, I served true copies of the following document(s) described as **REQUEST FOR PUBLICATION** on the interested parties in this action as follows:

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☒ **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List. I am "readily familiar" with Ballard Rosenberg Golper & Savitt, LLP's practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service that same day in the ordinary course of business. Such envelope(s) were placed for collection and mailing with postage thereon fully prepaid at Encino, California, on that same day following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 9, 2017, at Encino, California.

Karen Thomson

Karen Thomson