

No. 99-15676

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

LESLIE FREDRICKSON,)	
)	No. 99-15676
Plaintiff-Appellant,)	
)	DC# CV-97-03644-VRW
v.)	(Northern District of California
)	(San Francisco)
UNITED PARCEL SERVICE; et. al.)	
)	Hon. Vaughn R. Walker
Defendants-Appellees.)	
_____)	

APPELLANT'S OPENING BRIEF

**Sandra J. Springs (SB # 68607)
Robert L. Kovsky (SB # 61770)
LAW OFFICES OF SANDRA J. SPRINGS
1999 Harrison Street, Suite 800
Oakland, California 94612
Telephone (510) 466-6090**

**Attorney for Appellant
Lesli Fredrickson**

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[The Table of Authorities was separately compiled.]

JURISDICTIONAL STATEMENT

On February 6, 1998, Plaintiff Lesli Fredrickson filed her complaint in the Superior Court of the State of California, County of San Francisco, in an action entitled *Leslie Fredrickson v. United Parcel Service, et. al.*, Case No. 989295. Because the controversy was founded in part on a claim arising under laws of the United States where the District Court had original jurisdiction pursuant to 28 U.S.C. §1331, defendant United Parcel Service removed the case to the United States District Court for the Northern District of California pursuant to 28 U.S.C. §1441. This appeal is taken pursuant to 28 U.S.C. §1291 from an order and judgment entered by the District Court in favor of defendants on March 8, 1999 granting defendants' motions for summary judgment. [Excerpts of Record ("ER") 165-181; Docket Nos. 67-68]

STATEMENT OF ISSUES

1. Whether, under California's Fair Employment and Housing Act, plaintiff made a prima facie showing of retaliation in a summary judgment proceeding where plaintiff's evidence showed that, while an hourly employee of defendant United Parcel Service, plaintiff had been the target of unwelcome sexual advances and remarks on and off the workplace made

by defendant Matthew Russell, the business agent for the local Teamsters Union and responsible for union members at the UPS facility where plaintiff worked; that plaintiff joined with other women in organized opposition to Russell's work-related sexual harassment and retaliation; that UPS had the women's complaints investigated by management personnel who were personal friends of Russell and who accepted his explanations; that Russell made intimidating appearances at plaintiff's work station in the company of UPS managers; that, when plaintiff complained to UPS Human Resources, her work load was increased beyond that of any other person at the facility and her requests for relief were rejected; that plaintiff thereby suffered an aggravation of an existing shoulder injury; and that, after an escalating course of public opposition to Russell by women complaining about his sexual harassment and retaliation, and after plaintiff declined to participate in an investigation on terms UPS wanted, UPS refused to follow the instructions of plaintiff's physician to transfer her to a work station where her injury would not be further aggravated (although such transfers were routinely granted when other workers requested them); and that plaintiff finally quit her job and/or was terminated.

2. Whether plaintiff's handwritten, verified charge given to the Equal

Employment Opportunity Commission that fully stated all of her complaints of sexual harassment and retaliation satisfied her obligation to initiate administrative remedies as to claims brought under the California Fair Employment and Housing Act, notwithstanding the failure and refusal of the EEOC counselor to include the operative claims in notices transmitted to plaintiff's employer, United Parcel Service.

3. Whether defendant Russell, the instigator of the hostile workplace environment at UPS and a participant in the course of harassment and retaliation against plaintiff, can be held liable California's Fair Employment and Housing Act.
4. Whether, notwithstanding any failure to exhaust administrative remedies or any shortcoming of plaintiff's evidence as to a prima facie showing under the FEHA, plaintiff made a sufficient showing in summary judgment proceedings to sustain her claims of intentional infliction of emotional distress, constructive termination and/or wrongful discharge in violation of public policy under California's common law definitions that are broader and more inclusive than the statutory causes of action.

STATEMENT OF THE CASE

Plaintiff Lesli Fredrickson filed her complaint under the name "Leslie Fredrickson" in the Superior Court of California. (ER 1-13, Docket No. 1) After removal to the District Court, defendants United Parcel Service and Russell answered. (ER 14-26, Docket No. 6 -- UPS; ER 27-35, Docket No. 9 -- Russell) Named defendant Susan Knoblich (later identified as witness Susan Knoblauch) was never served.

Thereafter, defendants United Parcel Service and Russell moved for summary judgment. (See ER 36-49, Docket Nos. 42-50) Plaintiff opposed the motions. (See ER 50-146, Docket Nos. 51-58) Defendants replied. (See ER 146-164, Docket Nos. 59-64)

On March 8, 1997, the Court entered its Order and Judgment granting defendants' motions for summary judgment. (ER 165-181, Docket Nos. 67-68) Plaintiff filed her Notice of Appeal on April 6, 1999. (ER 182, Docket No. 74)

STATEMENT OF FACTS

- A. Defendant Matthew Russell, Work Site Representative of the Local Teamsters Union, Sexually Harasses Plaintiff Lesli Fredrickson, a 27-Year-Old Hourly Employee of Defendant United Parcel Service.

In 1995, plaintiff Lesli Fredrickson, age 27, relocated to the North Bay area from Arizona where she had worked for UPS and joined the International Brotherhood of Teamsters. Plaintiff started work at the San Rafael UPS center and was then hired at the Petaluma UPS facility starting in January, 1996.

(Declaration of Lesli Fredrickson, ER 50 under Tab 5, Docket No. 55)

Plaintiff met defendant Matthew Russell while transferring her union membership. Defendant Russell was the Business Agent for Teamsters Local 624 which represents workers at the Petaluma UPS facility, and his job was to represent union members when they had problems with the company and to assist union members in other matters dealing with the union and with employment and benefits. (ER 50-51)

Between October of 1995 and January of 1996, Mr. Russell called Ms. Fredrickson frequently at home. He talked about personal matters, including crude and insulting remarks about his wife. Mr. Russell asked Ms. Fredrickson to go out for drinks or to bars or his club and he asked very personal questions that she tried to fend off. Russell also approached plaintiff at work. He asked:

"What are you doing today? When can I call you?" Plaintiff refused his overtures. Russell then approached plaintiff at work and told her that people were saying she was gay. He asked if she was gay. The next day, again: "Well, are you?" (ER 51)

Plaintiff had a problem with her trainer at work. Defendant Russell said he would take the trainer "to panel," a procedure for dealing with problems between management and a union member. He said that he had enough on the trainer to "can" her. Russell offered to drive plaintiff to Monterey or Tahoe in a union car for the panel. He told plaintiff they would "party" and that she could stay in his motel room to "rock and roll." Dismayed, plaintiff resolved her problem with the trainer without Russell's assistance. (ER 51-52)

Russell continued to call plaintiff at home and to invite her out. When plaintiff told Russell that she was moving, he demanded that she let him help her move. He said that he knew where she lived. Plaintiff was frightened and felt that was she was being stalked. After Russell found plaintiff's new number, she and her male roommate both asked Russell to stop calling and the calls ceased for the time being. Later, in the Spring of 1996, Russell gave plaintiff erroneous advice about health insurance and plaintiff concluded that Russell was retaliating against her because she had rejected his sexual advances. (ER 52)

B. Rumors Circulate at the UPS Facility About Russell's Sexual Harassment of Another UPS Hourly Employee, Veronika Froschl; UPS Investigates and Inquires About Russell's Involvement with Plaintiff.

In 1995 and 1996, Veronika Froschl was an hourly employee and a union shop steward at the Petaluma UPS facility. In July of 1996, Ms. Froschl was disciplined by UPS and Mr. Russell represented her at a grievance panel. In connection with these matters, she had numerous telephone conversations with defendant Russell. Defendant Russell constantly made gross sexual references during these conversations and solicited sex in exchange for representing her. Among other remarks, he declared "I want to get fucked" and he told Ms. Froschl to "start paying off your debt." Mr. Russell said: "I'm not going to be as responsive to you unless I'm taken care of." (Froschl declaration at ER 75-76 under Tab 6, Docket No. 56)

When Mr. Russell returned to UPS after the Froschl grievance panel, there were rumors going around the building that he had had sex with Ms. Froschl. (Exhibit 1 to the deposition of UPS investigator, Teresa Champion, at ER 113 and authenticated at ER 109-110 and 111, all under Tab 8; Docket No. 54) In August or September of 1996, Susan Knobelauch, head of UPS Human Resources at the Petaluma facility, had a conversation with Russell about rumors involving the panel hearing the Froschl grievance and Froschl's complaints about

Russell's behavior. (Knoblauch deposition, ER 123, 127-128, under Tab 8)

Russell and Knoblauch have been personal friends for 10 years and she was one of Russell's closest friends. [ER at 124 (Knoblauch deposition) and 95-96 (Russell deposition)]

Also in August of 1996, Robert Martin of UPS Human Resources, contacted Russell about the women's allegations. (ER 97-98) Martin's job at UPS was to investigate the complaints of employees, but he talked with Russell prior to taking a statement from a victim. [ER 135 (Martin deposition)] They met at a Chinese restaurant for lunch and Martin "might have" paid the bill. (ER 134-136, 99) Russell said the Froschl matter was all a political ploy, because of friction between two parties within the union, and Martin accepted that explanation. (ER 137-138) They also talked "About Leslie [plaintiff], how many times I had represented her..." [ER 102-103 (Russell deposition)]

C. The UPS Investigation Continues and Charges Against Russell are Publicized by Elaine Donlin, a Union Steward; Russell Calls Fredrickson and Seeks Her Support; Instead, Fredrickson Joins with Froschl and Donlin in Opposing Russell's Harassment and Retaliation.

In August of 1996, Froschl informed Elaine Donlin, a union shop steward at UPS, about Russell's sexual harassment. Donlin became a leader in opposing Russell's sexual harassment and retaliation against Froschl and other women

employees. Russell then terminated Donlin from her office as steward. [ER 82 (Donlin declaration)] Russell also terminated Froschl from her office as steward. [ER 76 authenticating ER 79 (Froschl declaration and letter)]

On September 5, 1996, Ms. Donlin learned that UPS was singling out and questioning friends of Froschl and of other victims of Russell's sexual harassment. (ER 82, 85) On September 7, 1996, Donlin wrote a letter to the Ethics Committee of the Teamsters Union setting forth details and protesting Russell's sexual harassment, discrimination and retaliation, describing company involvement on behalf of Russell and declaring a "fear of Company (UPS) retaliation." (ER 85) Copies of the letter were sent to Oz Nelson, the UPS national CEO, Harry Lustgaren the UPS District Manager and Robert Carr, Secretary Treasurer of Teamster Local 624 plus other national and local Teamster officials. (ER 82, 85)

On September 27, 1996, Robert Martin (who had lunched with Russell at the Chinese restaurant and discussed the Fredrickson matter with him) had a personal meeting with Teresa "Terri" Champion, UPS Human Resources Investigator; and Champion's notes reflect her knowledge about rumors of sex between Russell and Froschl, the letter from Donlin to the Teamsters Ethics Committee, the Union's response and information from "Bob," apparently Bob

Carr. Secretary Treasurer of Local 624. [ER 109, 111, 113 (Deposition of Terri Champion)] Champion was also informed that Froschl and Donlin were members of the "Teamsters for a Democratic Union." (ER 109-110)

Plaintiff Fredrickson learned about the developing scandal in early September when Russell called her at home and made nasty remarks about Veronika Froschl: "Veronika wanted to fuck me and you know me Lesli, how could I fuck her? She's going around spreading rumors I sexually harassed her." (ER 53, Fredrickson declaration) Russell told Fredrickson that he had been questioned by Susan Knobelauch (Russell's friend in UPS Human Resources). Russell instructed Fredrickson that, if questioned by Knobelauch, she should say that she and Russell were friends. Fredrickson told Russell that they were not friends. (Id.)

Fredrickson approached Froschl and they exchanged information about Russell. They learned they had both been subject to repeated personal telephone calls, obscene statements and sexual pressures from Russell. (ER 53) Froschl said that Russell had called Fredrickson a "dyke," which Fredrickson understood in terms of Russell's previous questions about Fredrickson's sexual orientation. (Id.) Fredrickson confronted Russell at the workplace about this insinuation in a scene she called a "blowout." (ER 40-41)

Froschl introduced Fredrickson to Donlin and the three women agreed to support each other in opposing Russell. (ER 53)

D. Russell and Fredrickson's UPS Supervisor Make Intimidating Appearances At Her Work Station; Fredrickson Asks for Help From UPS Human Resources Managers and UPS Becomes More Deeply Involved.

After the telephone conversation where Fredrickson told Russell that they were not friends, Russell suddenly began to appear at the UPS building. On repeated occasions, he stood a foot or two away from Fredrickson's work station staring at her with an expression that was frightening. Such appearances had not happened before. (ER 54) Sometimes Russell was with Eric Kemp, the UPS supervisor responsible for Fredrickson. (Id.)

Ms. Fredrickson sought the assistance of Don Pell, who was in UPS Human Resources under Susan Knoblauch. (ER 40, 123) Fredrickson first talked to Don Pell in September, then again two or three weeks later. "...it was at least five times by the time December came." (ER 40, 54) On one occasion, Pell said that "he would have to turn it over to Ms. Knoblauch." (ER 149-150)

"Probably in late October of 1996," Fredrickson told Pell the whole story, including the telephone calls, the earlier retaliation and Russell's appearance at her work station. She asked Pell to see that Russell did not harass her at work. (ER 54) Pell contacted Russell about Fredrickson. (ER 98) This was probably

in November or October of 1996. (ER 104) Pell told Russell that "what he stated to Leslie was to call Bob Carr," Russell's boss at Local 624. (ER 104-105)

On or about September 25, 1996, Randy Reynolds, manager of the Petaluma UPS facility, called Donlin into his office and said that the Union was pressuring UPS to change her work week and demanding that the company cancel her voice mail and e-mail accounts. (ER 83-84) On October 16, 1996, UPS Human Resources Manager Terri Champion interviewed Elaine Donlin about names and details of alleged sexual harassment involving Russell. (ER 88, authenticated at ER 82)

E. UPS Increases Fredrickson's Workload, Imposing the Equivalent of Two Jobs; She Protests to UPS Without Avail.

Fredrickson's job at UPS was as a "pre-loader." She stood at a conveyor belt facing another worker on the other side of the belt. Packages came down a chute and were deposited on the belt just above her station. She and the pre-loader opposite her "split the belt," removing some packages erroneously included and arranging the remaining packages for other workers further down the belt, who pulled the packages off the belt and loaded them into delivery trucks or "package cars." The pre-loaders also scanned barcodes on the package

labels with a handheld device. (ER 52)

About November 1, 1996, UPS increased Fredrickson's workload. In addition to scanning packages and splitting the belt, Ms. Fredrickson was told to load two package cars. That meant she had to leave the belt and go into a car and return. The steady stream of packages made this added work stressful. No one else at the facility had to scan and split and also load. UPS had tried to get other workers to do all three jobs, but had backed down after the workers complained. Fredrickson also asked for relief, but UPS made her continue to do all three jobs. (ER 54)

F. Fredrickson's Prior Injury is Aggravated by Her Workload and the Structure of Her Work Station; Her Requests for A Transfer Are Denied Although Similar Requests Are Routinely Granted to Other Workers.

Ms. Fredrickson had an immediate supervisor, John Paul or "J.P.," and a higher-level supervisor, Eric Kemp, in charge of pre-loading in general. (ER 54) When Kemp first asked Fredrickson to take on the loading task in addition to splitting and scanning, he said it would be only for a couple of days. (ER 152-153) After the two days, Fredrickson went to J.P. and said she could not take it anymore: "it's killing my back." (ER 153) Fredrickson had pulled a muscle in her back and shoulder while at work at UPS in July of 1996 and had been off work for three days. She had recovered sufficiently to return to work, but there

was a residual weakness. (ER 52-53) Fredrickson told J.P. and Eric Kemp about her pain and discomfort several times a week beginning in the second half of 1996 and continuing until she left UPS in early 1997. (ER 54)

Fredrickson's pain was aggravated by the structure of the conveyor belt where she was working. In addition to the waist-high belt used for pre-loading, there was an overhead belt that was not used for pre-loading, but that required her to lean over and stoop while she worked at the conveyor belt splitting and scanning. When she also had to load package cars, she was required to duck continually under the overhead belt and that made her condition worse. (ER 55)

There were other belts in the building used for pre-loading that did not have overhead belts. (ER 55, 76, 83) Fredrickson repeatedly asked to be transferred to a station without an overhead belt, but her requests were refused, although similar requests were routinely granted to other workers. (ER 55, 76-77, 83)

J.P. said he was discussing it with Kemp. (ER 153) J.P. told Fredrickson to see Kemp and Kemp told Fredrickson to see J.P. (ER 55)

G. Fredrickson Is Off Work Because of Her Injury; She Returns With Doctor's Instructions to Transfer Her; UPS Ignores Doctor's Instructions.

Fredrickson's back and shoulder pain became so severe that she was off work for three weeks. On December 26, 1996, her physician allowed her to

return to work but the Physician's Report stated: "Needs to work at a belt without overhang." (ER 55, 59) She gave the report to Kemp and specifically told him: "I am not to work under an overhang" and that the instructions were now from her doctor." (ER 55, 160-164) Kemp ignored the doctor's instructions. (Id.)

H. UPS Human Resources Manager Terri Champion Investigates Allegations of Sexual Harassment Involving Matthew Russell and Uncovers a Hotbed of Rumors, Some Involving Lesli Fredrickson.

On December 23, 1996, while Fredrickson was on medical leave, Terri Champion came to the Petaluma facility to conduct a further investigation of the complaints about Russell. Her seven pages of notes are filled with allegations and statements about sexual harassment by Russell. (ER 112, 115-120) Champion talked with Froschl and Donlin. (ER 115) Froschl told Champion that Russell "asked if Leslie is a dyke." (ER 116) "Leslie wants to talk with V[eronika] one day re: Matt talk about V — L tells V 'I know everything.' She said Matt said V asked M to fuck her & now since he said no, she (V) has filed SH [sexual harassment] against — M also SH Leslie in a more subtle way 'let's rock & roll, we'll have a good time.' L says she told him to stop & that he's harassing her (V feels L will T/W [talk with] me)" (ER 117)

I. UPS Human Resources Manager Terri Champion Asks To Interview Fredrickson But Withdraws After Fredrickson Asks that Donlin Attend.

After Fredrickson returned to work, in January of 1997, her supervisor Eric Kemp approached her and requested that she talk with Terri Champion about Russell's harassment. Fredrickson said that she wanted Elaine Donlin with her when she did so. Kemp left, then returned and said, "forget it." Fredrickson never refused to talk to Champion but wanted Donlin there because she did not trust the company to report correctly what was said. (ER 56) Terri Champion took no further action to re-contact either Donlin or Fredrickson to find out if Fredrickson was ready to talk to her. (ER 107-108)

J. Russell Continues Intimidating Visitations in Company of UPS Managers; Fredrickson Gives Two-Weeks Notice Citing a "Dysfunctional Workplace" But Is Terminated Before Completion of the Notice Period After Another Confrontation Over Doctor's Instructions; UPS Tells Fredrickson: "You Had Your Chance to Work Things Out With Human Resources."

On January 10, 1997, Donlin and Froschl wrote to Bob Carr, Secretary Treasurer of Local 624, filing charges against Carr and Russell for discrimination against female members of the Union and alleging company involvement. The letter stated that: "Mr. Russell has sexually harassed Petaluma UPS pre-loader Leslie Fredrickson..." (ER 82, 87-89)

Russell continued his intimidating visitations to Ms. Fredrickson's work

station. "It was more intense there towards January and February of '97." "I could see management with him ... whether it be Eric Kemp, who was my supervisor, or Randy Reynolds, who ran the place." (ER 109-110)

On February 25, 1997, Fredrickson submitted written testimony to the Union in support of the charges filed by Froschl and Donlin. (ER 56, 60-61) The next day, February 26, 1997, Fredrickson gave two-weeks' notice to UPS, stating "I will no longer work in a dysfunctional workplace." (ER 56, 45)

Fredrickson did not complete the two weeks. Lisa Gunn, who worked "across the belt" from Fredrickson, had generously taken on some of her duties to relieve Fredrickson's shoulder pain. (ER 55-56) On March 3, 1997, Gunn called in sick and Eric Kemp said that Fredrickson "had no choice" but to take on the full load. When Fredrickson protested and invoked her doctor's statement, Kemp acquiesced and had another worker take Gunn's place. (ER 56) On March 7, 1997, Randy Reynolds, the manager in charge of the facility, fired Fredrickson. (ER 57) During her final days at UPS, Kemp refused Fredrickson's renewed request for a transfer, saying that she had her chance to work out her problems with Matt Russell with Human Resources, apparently referring to the request to speak to Terri Champion. (ER 56)

K. Events Occurring After Ms. Fredrickson's Termination.

In May of 1997, Fredrickson complained to the Equal Employment Opportunity Commission about the harassment and discrimination she had suffered from Russell and UPS. (ER 35-36, 67-72) The details of her complaint and the actions taken by the EEOC are set forth in Argument of this brief.

On July 3, 1998, Fredrickson's workers' compensation application was approved and she received a 17.5% permanent disability rating from injuries suffered at UPS. The physical, emotional and financial injuries she suffered at the hands of UPS and Matt Russell were so painful that she left California and returned to Arizona. (ER 58)

Donlin suffered continuing pressures from management at the Petaluma UPS facility. In October of 1997, she transferred to the San Francisco UPS center even though the transfer cost her all of her seniority. She has a lawsuit pending before the California State Court in Sonoma County. (ER 81-82, 83-84)

SUMMARY OF ARGUMENT

The basis for the summary judgment granted by the District Court as to her claims under the California Fair Employment and Housing Act was that plaintiff had failed to exhaust administrative remedies. Plaintiff submitted a written, verified statement to the Equal Employment Opportunities Commission that fully stated her claims. The law provides that such a statement in and of itself

constitutes a charge. The failure and refusal of the EEOC to serve a notice on the parties that properly stated plaintiff's claims should not be charged against the claimant.

The District Court indirectly ruled on the merits of plaintiff's FEHA case when it granted summary judgment on plaintiff's cause of action for wrongful discharge in violation of the public policy expressed in the FEHA. In terms of the three-part procedure set forth in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089 (1981), defendants' motions were premised on a failure of plaintiff to carry her burden as to a *prima facie* case. Defendants never offered any explanation for their actions.

The burden on a plaintiff with respect to a *prima facie* case under *Burdine* is extremely light. Plaintiff need only raise an inference of intentional discrimination or retaliation. Here, the **fact** of discrimination is clear: plaintiff was required to carry a workload beyond that of any other pre-loader and, after her existing back and shoulder injury was aggravated by the overwork, her doctor's instructions to transfer her were ignored. The "elusive factual question of intent" is approached indirectly and through circumstantial evidence. Plaintiff has carried her burden of proof by setting forth the whole course of events and, particularly, by showing that the imposition of overwork occurred in close

proximity to the time she was complaining to UPS Human Resources about Russell's intimidating appearances at her work station in a workplace atmosphere poisoned by his sexual harassment of and retaliation against her and other women employees. Facts and reason support an inference that UPS sought to silence Fredrickson and to drive her from her job because, as UPS knew, she was a potential witness against Russell, whose favor UPS wanted to curry.

Fredrickson's complaints to UPS Human Resources about Russell's past and continuing acts were protected by the FEHA because he was actually harassing her and, in any event, because of a reasonable belief that his acts were unlawful.

Russell has potential liability under specific provisions of the FEHA for his sexual harassment and because of his involvement in the retaliation of UPS. Title VII does not provide for personal liability of one other than an employer, but California statutes and case law support holding him liable because his conduct was for personal gratification, because of meanness and for other personal motives.

Both Russell and UPS are also potentially liable for intentional infliction of emotional distress. California law provides that common law causes of action are independent of and supplementary of remedies under the FEHA and, even if the court should find that plaintiff failed to exhaust her administrative remedies, such

causes of action can still go forward. Because plaintiff submitted her two weeks notice but was terminated before the end of the two weeks, there are potential alternative remedies of wrongful discharge in violation of public policy and constructive termination. The evidence supports each of these cause of action.

ARGUMENT

I. Standard of Review For Summary Judgment Proceedings.

"A grant of summary judgment is reviewed de novo". *Jensinger v. Nevada Federal Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994) The appellate court follows the same standard used by the trial courts under Federal Rule of Civil Procedure 56(c) and views the evidence in the light most favorable to the party opposing the motion. *Id.* "The court must not weigh the evidence or determine the truth of the matters asserted but only determine whether there is a genuine issue for trial." *Id.* at 1131.

In *Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996), the court quoted from *Lam v University of Hawai'i*, 40 F.3d 1551 (9th Cir. 1994) and held:

"This court has set a high standard for the granting of summary judgment in employment discrimination cases. Most recently, we explained that we require very little evidence to survive summary judgment in a discrimination case because the ultimate

question is one that can be resolved through a searching inquiry — one that is most appropriately conducted by the factfinder, upon a full record." (Inner quotation marks and editing marks omitted)

The "ultimate question," the "intent to discriminate" (*Lam* at 40 F.3d 1564) is discussed below. Its existence "may be difficult to discern in depositions compiled for purposes of summary judgment, yet it may later be revealed in the face-to-face encounter of a full trial." *Id.*

II. Plaintiff Carried Her Burden and Made a Prima Facie Showing of Retaliation by UPS Under California's Fair Housing and Employment Act.

A. Plaintiff's Burden is Only to Produce Enough Evidence to Support an Inference That Defendant UPS Retaliated Against Her for Conduct Protected Under the FEHA.

This case presents unusual features that call for analysis and application of both general, primary authorities and also those more fact-specific. Chief among the unusual features is the prominent role played by Russell who was not employed by UPS but who was present in the workplace as an agent of the Union and pursuant to the Union's agreement with UPS. Fredrickson and the other women opposed Russell primarily.

These are important considerations that will be addressed. They should, however, be seen as intermediate events and circumstances leading to the injuries inflicted on Fredrickson by UPS through an excessive workload and by the

willful disregard by UPS of instructions of Fredrickson's physician that she be transferred to a work station that would not aggravate her injuries. Substantial evidence supports the inferences that UPS allied itself with Russell in waging a war of attrition against the women who were opposing him and that the excessive workload imposed on Fredrickson and the refusal to transfer her were carried out by UPS because she was a potential witness against Russell and as retaliation against her for opposing him. Fredrickson submits that she is protected by the Fair Employment and Housing Act because Russell's sexual harassment and retaliation were work-related, because Fredrickson was reasonable in opposing Russell by complaining to UPS Human Resources personnel, because UPS had a legal duty and an obligation under its own policies to stop Russell's work-related harassment and retaliation, and because UPS became deeply involved in the course of events through its participation and acquiescence in his actions and in the course of its investigation. These matters are addressed below. Here we focus on the overarching procedural context and guidelines for dealing with these matters that have been established by the Supreme Court and this Circuit.

In *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715-716, 103 S.Ct. 1478, 1482 (1983), the Court quoted from *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093 (1981)

and identified "the ultimate question" in discrimination cases as "whether the defendant intentionally discriminated against the plaintiff." Here, the **fact** of discrimination is clearly shown. Plaintiff Lesli Fredrickson was required to carry a workload greater than any other pre-loader and her requests for a transfer to a work station more suitable to her needs were refused, although routinely granted to other workers. (See subparts E. and F. of the Statement of Facts) The chief factual question is whether this discrimination was **intentionally** carried out by UPS in retaliation for her opposition to Russell. There is a subsidiary legal question of whether Fredrickson's opposition to Russell (not employed by UPS) is legally protected under the Fair Employment and Housing Act.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973) and *Burdine*, *supra*, the Court defined a three-stage procedural approach. First, the plaintiff must prove a prima facie case of discrimination. Second, if the plaintiff succeeds in his or her proof, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reasons for the defendant's action. Third, should the defendant carry this burden, the plaintiff must prove the defendant's reasons were but a pretext for discrimination. *Burdine*, 450 U.S. at 252-253, 101 S.Ct. 1093. The purpose of this procedural approach is "progressively to sharpen the inquiry into the elusive factual question of

intentional discrimination." *Burdine* at 450 U.S. 253, n.8, 101 S.Ct. 1094.

See also *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742,

2746 (1993). In its decisions, the Supreme Court emphasized that the problem

of ascertaining the "employer's mental processes" is a "sensitive and difficult"

question and even quoted from an 1885 British opinion to underscore the issue.

Aikens at 460 U.S. 716, 103 S.Ct. 1482; *Hicks* at 509 U.S. 524, 113 S.Ct. 2756;

both citing *Burdine*.

In *Burdine*, the Court held: "The burden of establishing a prima facie case of disparate treatment is not onerous." 450 U.S. at 253, 101 S.Ct. at 1094. It is sufficient if the circumstances give rise to an inference that defendant's acts, "**if otherwise unexplained**, are more likely than not based on impermissible factors." 450 U.S. at 253-254, 101 S.Ct. at 1094. (emphasis added, inner quotation marks and citation omitted)

Here, the summary judgment proceeding involved only plaintiff's prima facie case. Defendant UPS did not seek to explain its discriminatory acts against Fredrickson, nor, under the *Burdine* rules, was it required to do so. Under the same rules, however, plaintiff's burden was extremely light. She was not required even to **prove** a discriminatory intention on the part of UPS, only to raise enough of an inference to require UPS to explain.

These principles were summarized and applied in *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994). Quoting from prior authority, the court held that the amount of evidence needed for a prima facie case is "very little." The requisite degree of proof "is minimal and **does not even need to rise to the level of a preponderance of the evidence.**" *Id.* (emphasis added)

"Proof of a *prima facie* case of retaliatory discharge requires a showing that:

- (1) [plaintiff] was engaged in a protected activity;
- (2) [she] was thereafter subjected by [her] employer to an adverse employment action; and
- (3) a causal link exists between the protected activity and the adverse employment action."

Wallis, supra, 26 F.3d at 891. California courts follow the same procedural outline. *Flait v. North American Watch Corp.*, 3 Cal.App.4th 467, 476 (1992).

We address each of the elements in turn.

B. Fredrickson's Opposition to Russell was Protected by the Fair Employment and Housing Act.

Title 42 U.S.C., §2000e-3(a) provides that "It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this title..."

Cal. Government Code §12940(f), part of the FEHA, makes it an unlawful

employment practice "For any employer ... to ... discriminate against any person because the person has opposed any practices forbidden under this part..."

Federal regulations provide that:

"An employer may also be responsible for the acts of non-employees with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and corrective action." 29 C.F.R. 1604.11(e)

"CFEHA goes even further than the federal statute by *requiring* that supervisors 'take immediate and appropriate corrective action' when harassment is brought to their attention. (Gov. Code § 12940,, subd. (h).)" *Flait v. North American Watch Corp.*, 3 Cal.App.4th 467, 476 (1992).

Fredrickson opposed Russell by asking help from UPS Human Resources Manager Don Pell. She complained about Russell's prior sexual harassment of her and about his intimidating visitations to her work station after she refused to tell Susan Knoblauch that she was "friends" with Matthew Russell. She asked Pell to see that Russell did not harass her at work. (Facts, subpart D). She also opposed Russell by becoming involved in the public opposition of Froschl and Donlin. (Facts, subpart J)

Plaintiff submits, first, that Russell's actions, including his intimidating workplace visitations, constituted ***actual sexual harassment*** by a non-employee

that UPS was required to correct once it was brought to its attention. Hence, Fredrickson's opposition was to practices **actually** unlawful under the FEHA.

In *Accardi v. Superior Court*, 17 Cal.App.4th 341, 345 (1993), the court declared: "Sexual harassment does not necessarily involve sexual conduct." Plaintiff there was a female police officer who alleged numerous and continuing episodes of discrimination and harassment because of her sex, including singling her out for unfavorable work assignments, overburdening her with double work assignments and ignoring her medical limitations. 17 Cal.App.4th at 346-347. The court also stated that "the creation of a hostile work environment need not have anything to do with sexual advances," citing *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3rd Cir. 1990) *Id.* at 348. The court further held that "This type of harassment can occur in a variety of ways," again citing *Andrews and Hall v. Gus Construction Co., Inc.*, 842 F.2d 1010 (8th Cir. 1988).

Andrews and Hall were cited in *Ellison v. Brady*, 924 F.2d 872, 875-876, n. 5 (9th Cir. 1991) as authorities supporting an argument that harassing conduct need not be sexual. The court stated: "We need not and do not decide whether a party can state a cause of action for a sexually discriminatory working environment under Title VII when the conduct in question is not sexual."

Accardi affirmatively extends the protection of the FEHA into the area that

the *Ellison* court left open under Title VII. Fredrickson is thus entitled to the protections declared in *Folkerson v. Circus Circus Enterprises, Inc.*, 107 F.3d 754, 756 (1997), where the court reviewed prior authorities and declared:

"We now hold that an employer may be liable for sexual harassment on the part of a private individual, such as the casino patron, where the employer ratifies or acquiesces in that harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct."

Even if Russell's actions were not **actually** violative of the FEHA, Fredrickson's opposition to them were protected under the FEHA because plaintiff "must only show that she had a **reasonable belief** that the employment practice she protested was prohibited under Title VII." *Trent v. Valley Electric Association, Inc.*, 41 F.3d 524, 526 (9th Cir. 1994) (emphasis added, inner quotations and citation omitted) In *Trent*, the plaintiff was terminated after protesting foul language and sexually offensive references made by an outside consultant at a safety meeting. The court therefore did not address the issue of whether the consultant's conduct was actually prohibited by Title VII.

Likewise, in *Moya v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994), the court held that a prison guard terminated for refusing to discriminate against black inmates made out a retaliation claim regardless of whether the inmates were "employees" protected by Title VII if the terminated guard "could show that his

belief that an unlawful employment practice occurred was 'reasonable.'"

See also *Sias v. City Demonstration Agency*, 588 F.2d 692, 695-96 (9th Cir. 1978), where there was an implicit, but no explicit finding that plaintiff's opposition was based on a reasonable belief that the City's practices violated Title VII and where the court quoted a principle from a Minnesota District Court opinion "that appropriate informal opposition to perceived discrimination must not be chilled by the fear of retaliatory action in the event the alleged wrongdoing does not exist."

The line of authorities beginning with *Sias* and relied on in *Trent* can be harmonized in the factual context of this case with *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th Cir. 1978) where plaintiff was fired after protesting a single racist remark by a co-worker and where the court held that: "The opposition must be directed at an unlawful practice of an employer, not an act of discrimination by a private individual." The *Silver* court indicated that racial harassment could be imputed to the employer if the "employer knows of it and fails to take remedial action." 586 F.2d at 142. See *Folkerson*, supra, at 107 F.3d 755-756.

Here, UPS participated in the workplace harassment by Russell when its supervisors, Eric Kemp and Randy Reynolds, accompanied Russell on his intimidating visitations. (Facts, subparts D. and J.) Although Fredrickson asked

Don Pell for help, and UPS was thus put on notice, the visitations continued.

(*Id.*) UPS ratified and acquiesced in Russell's intimidating harassment.

Accordingly, Fredrickson's protests about Russell's intimidating workplace visitations and prior sexual harassment (some of which occurred in the workplace) were protected by the FEHA.

C. The Increase in Fredrickson's Workload and the Refusal to Transfer Her Despite Instructions From Her Physician and Her Ultimate Termination Constituted "Adverse Employment Actions."

For purposes of summary judgment, the increase in Fredrickson's workload, the refusals to transfer her despite instructions from her physician (when such transfers were routinely granted to other employees upon request) and her final termination qualify as adverse employment actions. See *Strother v. S. Cal. Permanente Medical Group*, 79 F.3d 859, 869 (9th Cir. 1996) (applying California law); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir. 1994), *cert. den.* ___ U.S. ___, 115 S.Ct. 733 (1995) (transfer characterizable as adverse employment action even though plaintiff not "given additional responsibilities); *U.S. v. City of Phoenix*, 75 F.E.P. Cases 1633, 1636 (D. Ariz. 1997) (citing *Steiner*, plaintiff's shoulder condition aggravated by transfer of helper and being required to take on more job responsibilities); *Accardi v.*

Superior Court, 17 Cal.App.4th 341, 346-347 (1993), discussed *supra*.

D. Sufficient Evidence Supports the Inference of a Causal Link Between Fredrickson's Opposition to Russell and the Increased Workload Imposed on Her, the Refusal to Follow Doctor's Instructions and the Final Termination.

In cases involving discrimination in hiring or promotion, the "ultimate question" of intent may be established in a *prima facie* case "through indirect evidence under the familiar *McDonnell Douglas* four-part test." *Lam v. University of Hawai'i*, 40 F.3d 1551, 1559 (9th Cir. 1994). When the *McDonnell Douglas* test is adapted to the retaliation case, the third element is the "causal link" between opposition and adverse employment action. The "elusive factual question of intent" presents itself anew, although in a less acute form.

In *Pacheco v. New Life Bakery, Inc.*, No. 97-17039 (opinion filed July 28, 1999) (9th Cir. 1999), the court re-stated the three-prong test for a *prima facie* case of retaliation and held:

"As to the third prong, this circuit has held that 'temporal proximity' between filing of a complaint and discharge may be sufficient to find a causal link where a complainant's layoff occurred only four months after he filed a discrimination complaint. *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 919 (9th Cir. 1996); see also *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987)('causation ... may be inferred from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision.')

California applies the same principles. *Flait v. North American Watch Corp.*, 3 Cal.App.4th 467, 478 (1992).

Here, there was an escalating course of events that began in September of 1996. "Probably in October," plaintiff went to Don Pell, told him the whole story and asked him to stop Russell from harassing her in the workplace.

Between September and December, she went to Don Pell asking for help at least five times. (See Facts, subpart D; ER 40 and 54) It was during this period that her workload increased beyond that of any other pre-loader in the facility and that UPS ignored her protests. (Facts, subpart E)

In December of 1996, while plaintiff was on medical leave for her injured shoulder, her knowledge of Russell's sexual harassment was documented by UPS Human Resources Manager Terri Champion. (Facts, subpart H) According to Champion's notes, Fredrickson told Froschl, "I know everything." Champion learned that Russell had invited Fredrickson to "rock & roll" that Fredrickson told Russell to stop "& that he's harassing her." It was after these disclosures that UPS ignored the instructions of Fredrickson's physician to transfer her to "a belt without overhang" that would not aggravate her back and shoulder injury. (Facts, subpart G)

In connection with her related claim for wrongful discharge in violation of

public policy, the District Court found that "plaintiff's claim for retaliation fails because she cannot show a causal link between the protected activity and the employer's action" and stated that plaintiff offered "inconsistent evidence on when her workload increased and when she met with Pell." (ER 177) In one place, Fredrickson stated she met with Pell in late October of 1996 and in another place that her conversation with Pell took place in December. (*Id.*) The District Court failed to note that Fredrickson met with Pell at least five times between September and December. (ER 40 and 54)

The District Court also found an inconsistency between Fredrickson's deposition testimony that her workload increased in October of 1996 and her declaration that the workload increased about November 1, 1996.

Even if there were inconsistencies, they do not rise to the level of a judicial estoppel or constitute an attempt to create a "sham issue of fact." *Fredenburg v. Contra Costa County Department of Health Services*, 172 F.3d 1176, 1179 (9th Cir. 1999); *Burrell v. Star Nursery, Inc.*, 170 F.3d 951 (9th Cir. 1999).

The District Court also found that plaintiff "fails to provide any evidence that Pell had any influence over her work assignments. ... Nowhere does she claim that Pell communicated his knowledge of her complaint to [Fredrickson's supervisors] Paul or Kemp." (ER 178)

Plaintiff submits that she need not prove communications among managers at UPS, first, because knowledge and notice among managers is imputed as a matter of law, and second, because, in connection with the preliminary showing needed for a *prima facie* case, the circumstances support an inference that such communications actually took place.

Cal. Civil Code §2332 provides:

"NOTICE TO AGENT, WHEN NOTICE TO PRINCIPAL. As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other."

See generally, 2 Witkin, *Summary of California Law* (9th ed. 1990), "Agency and Employment," §99.

The UPS Policy Book, distributed to managers, provides, "We Maintain a Working Environment Free of Sexual Harassment" and states:

"Employees who believe they are being harassed should request that the conduct cease. They should take any complaint to their supervisor and/or Human Resources manager.

"Managers and supervisors are responsible for maintaining an environment free of sexual harassment." (ER 93 authenticated at ER 130-132 and 140-141)

Here, Pell, acting on behalf of UPS, "ought, in good faith and the exercise of ordinary care and diligence," to have communicated with Kemp and Paul about the workplace harassment Russell was inflicting on Fredrickson.

In *Smith v. Workers' Compensation Appeals Board*, 152 Cal.App.3d 1104, 1110 (1984), the court applied the principle stated in Cal. Civil Code §2332 and overruled the finding of the Board that "Smith failed to establish a causal relationship between her disability and her termination." The Board had failed to consider "whether that causal connection was supplied by the actions of management people other than the one who fired Smith... The Board's decision in this case has the effect of creating a defense of management incompetence or bureaucratic error..."

The same reasoning applies here.

Moreover, the District Court failed to take into account additional evidence that supports an inference that UPS managers communicated among themselves and that UPS intentionally discriminated against Fredrickson because of her opposition to Russell.

When Russell made his intimidating visitations to Fredrickson's work station, he was accompanied by Fredrickson's supervisor Eric Kemp and by Randy Reynolds, who ran the station. (ER 54, 109-110) "It was more intense there towards January and February of '97" after UPS ignored the instructions of Fredrickson's physician that she was "not to work under an overhang." (ER 55, 59, 109-110, 160-162)

After Fredrickson gave her two-weeks notice, she renewed her requests to Kemp that she be transferred. Kemp told her that she had her chance to work out her problems with Matt Russell with Human Resources. (ER 56)

The discriminatory treatment meted out to Fredrickson was extreme. She was required to bear a workload beyond that of any other person in the facility. Her doctor's instructions were ignored. (ER 54-55) In *Sischo-Nownejad v. Merced Community College District*, 934 F.2d 1104, 1112 (9th Cir. 1990), the court quoted from *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335, n. 15, 97 S.Ct. 1843, 1854 n. 15: "Proof of discriminatory motive ... can in some situations be inferred from the mere fact of differences in treatment."

Additional evidence is provided by the sham UPS investigation of complaints about Russell where one investigator was Russell's longtime personal friend and another took Russell out to lunch at a Chinese restaurant and accepted Russell's explanation without talking to any of the women employees who were complaining about him. (Facts, subpart B) In *Fuller v. City of Oakland, California*, 47 F.3d 1522, 1529 (9th Cir. 1995), the district court observed that there were "serious deficiencies in the [company's] investigation which give the appearance of bias ...". Also significant is the failure of Champion to make any

effort to interview Fredrickson after Fredrickson stated she wanted Donlin present. (ER 56) *Mockler v. Multnomah*, 140 F.3d 808, 813 (9th Cir. 1998) ("The failure to interview witnesses is evidence of inadequate remedial action.")

There is substantial evidence that the Russell affair was notorious at the UPS Petaluma facility through late 1996 and early 1997. See Champion's notes that are filled with names, reports and just plain gossip. (ER 115-121) As the Business Agent for the Teamsters, Russell was a powerful and important person at the UPS facility. On September 7, 1996, Elaine Donlin wrote a letter to the Ethics Committee of the International Brotherhood of Teamsters complaining about Russell's harassment and retaliation and the "sham" investigation carried out by the Local; and she sent copies of the letter to national and local officials of both UPS and the Teamsters.

According to notes taken by UPS Human Resources investigator Terri Champion, "Int'l Teamsters come out & T/W [talk with] ee's (employees) and went back to T/W their atty's → election time." The involvement of political matters in the Russell affair was noted both by UPS Human Resources manager Robert Martin who accepted Russell's statement that the Froschl matter "was all a political ploy within the union because of the friction between the -- I guess the two parties within the union." (ER 137-138) Champion noted in September that

"Veronika and Elaine were members of the Teamsters for a Democratic Union."
(ER 109)

Such a brew of sex, sexual harassment, power and politics gives off aromatic fumes so intense that no conscious person in its vicinity could fail to take notice.

Plaintiff has made the minimal showing required for a *prima facie* case of retaliation. The evidence supports an inference that UPS intentionally overworked Fredrickson and ignored her doctor's instructions as punishment for her opposition to Russell and to intimidate her, Donlin and Froschl and other women who were potential witnesses against him. All concerned were on notice both as a matter of law and, inferentially, as a matter of fact. UPS sided with Russell because of its cozy relationship with him, to make him beholden to the company and perhaps because it favored his side in union elections. The company wanted to corrupt the union representative responsible for protecting workers against it and found a perfect vehicle for its purposes in revelations about Russell's embarrassing sexual harassment of women employees. Fredrickson was set up as a horrible example to demonstrate that Russell and UPS could together violate antidiscrimination laws with impunity and display their power with arrogance.

Fredrickson submits that she carried her burden of proof and made a *prima facie* showing of retaliation in violation of the FEHA.

II. Plaintiff Satisfied the Requirement that She Make an Administrative Charge When She Delivered Her Written, Verified Statement to the EEOC Fully Stating Her Claims, Notwithstanding the Failure and Refusal of the EEOC to Include All Claims in the Notice Sent to UPS.

In May of 1997, Fredrickson went to the EEOC to complain about the harassment and discrimination she had suffered from Mr. Russell and UPS. She told Mr. Bowman, the EEOC counselor, all about Matt Russell and his harassment, as well as telling Mr. Bowman everything about the overwork and working conditions that aggravated her shoulder injury. (ER 57) Copies of papers Fredrickson personally filled out at the EEOC are attached to her declaration. (ER 65-70; see also 143 re copying of these documents) Her written statement is made under penalty of perjury (ER 66) and she checked boxes to state her belief that she was discriminated against by both employer and Union Local 624. (ER 65) Some of the statements Fredrickson made in writing to the EEOC in May of 1997 are as follows:

"1/96 [should have been 11/96] my work load increased tremendously.

Unlike all other scanners in the building, I was the only one loading into trucks. Even after Dr's advice and me asking management to please

lighten my work load." "The Co. UPS wanted me out and it was evident through my work load and with all the Union drama they didn't want to confront. It was the easier softer way for UPS to just let me go." "I complained about the work load to Eric Kemp in Jan 97 about my workload and how it was aggravating my on the job injury. In Oct. 96 I complained about the sexual harassment I was receiving from Union representative Matt Russell." "Eric Kemp ... said I had my chance to work things out with Human Resources and I didn't. He also said that with my bad back and all it was probably best that I leave." "I complained to UPS Human Resources in Petaluma about sexual harassment. About my spr [supervisor] not accommodating my back injury but increasing my physical workload in violation of my medical limitations." "When I put in 2 wks notice I couldn't stand it because of the work load hurting me and increased work load. Matt Russell staring at me on my work site."¹

When Fredrickson received the typewritten document from the EEOC, she was surprised that there was nothing in it about Russell and that it did not mention sexual harassment. Fredrickson asked Bowman about the omissions and

¹ Bowman's notes state Russell's name, capacity and telephone number and accurately summarize Fredrickson's claims. (ER 72)

Bowman said that this was all that was needed for a right-to-sue letter. (ER 58)

The "Charge of Discrimination" the EEOC sent to UPS does not mention sexual harassment or Matt Russell. (ER 46) The only box checked as the Cause of Discrimination is "Disability." The dates of Discrimination are "Earliest" 1/07/97 and "Latest" 03/04/97. The "Notice of Charge of Discrimination" indicates that "a charge of employment discrimination has been filed against your organization under ... The Americans with Disabilities Act." (ER 47)

In September of 1998, a contract attorney employed by plaintiff's attorney contacted the EEOC and attempted to determine why claims and factual allegations of sexual harassment and constructive discharge had not been included in the EEOC charge and to rectify the errors. (ER 142-144) The contract attorney had great difficulty in communicating with EEOC officials and in convincing Bowman to make any amendment to the EEOC charge. An amended EEOC "Charge of Discrimination" was issued after October 30, 1998 (the date the document was signed by Fredrickson). (ER 48) The only substantive change was the checking of an additional box marked "sex" for "Cause of Discrimination" and the following statements:

"Between October 1995 and March 1997, I and other female employees were subjected to sexual harassment from union business agent Matt Russell. My complaints to management resulted in no effective corrective action being taken.

....
"I believe that I have discriminated against because of a perceived disability which together with to sexual harassment and intimidation created a hostile environment and constructive my discharge." (sic)

The law provides that the written, verified statement Fredrickson gave to the EEOC satisfies the requirement that she file a charge with a proper administrative agency. Legal questions relating to statutory requirements for filing a charge with the EEOC are reviewed de novo. *Bouman v. Block*, 940 F.2d 1211, 1218 (9th Cir. 1991) *cert. den.* 502 U.S. 1005, 112 S.Ct. 640 (1991).

The pivotal fact is that the charge is filed **with the agency** and not **with the employer**. What is delivered to the employer or other organization is "a notice of charge." 42 U.S.C. § 2000e-5.

The regulations defining procedures for filing charges of discrimination with the EEOC are set forth in 29 C.F.R. §§ 1601.6 *et. seq.* The administrative remedy is initiated when information received by the Commission "discloses that a person is entitled to **file a charge with the Commission...**" § 1601.6 (emphasis added) "A charge may be made in person or by mail at the offices of the Commission in Washington, D.C., or any of its field offices..." § 1601.8.

Section 1601.9 provides that: "A charge shall be in writing and signed and shall be verified."

Section 1601.12(a) provides for specific information to be included in a

charge. Section 1601.12(b) provides:

"Notwithstanding the provisions of paragraph (a) of this section, **a charge is sufficient when the Commission receives from the person making the charge a written statement** sufficiently precise to identify the parties, and to describe generally the action or practices complained of."

In *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462 (5th Cir. 1970), the court held that "the crucial element of a charge of discrimination is the *factual* statement contained therein. Everything else entered on the form is, in essence a mere amplification of the factual allegations." (emphasis in original) *Sanchez* has been frequently cited in this Circuit and was called "the leading case" in *Okoli v. Lockheed Technical Operations Co.*, 36 Cal.App.4th 1607, 1615 (1995).

In *Casavantes v. California State University, Sacramento*, 732 F.2d 1441, 1443, (9th Cir. 1984) the court quoted from Section 1601.12(b), *supra*, and held:

"We note initially that federal regulations governing EEOC procedures make clear that the Intake Questionnaire, as completed by *Casavantes*, was sufficient to constitute a charge."

In *Albano v. Schering-Plough Corp.* 912 F.2d 384, 387-388 (9th Cir. 1990) *cert. den.* 498 U.S. 1085, the court rejected the employer's argument "that it was not adequately notified that *Albano* would file a constructive discharge claim in federal court" and reasoned:

"We view the EEOC charge primarily as an impetus to EEOC investigation and conciliation, not as a pleading giving notice to the employer. [citations] Further, even recognizing the role of the EEOC charge in placing an employer on notice of the claims against it, the claimant is not responsible for the absence of notice in these circumstances. It is the EEOC, not the claimant, who is responsible for notifying the employer of the claims alleged in the EEOC charge. 29 U.S.C. § 626(d) (1988). Thus the claimant should not be penalized because of the EEOC's own errors."

These principles are consistent with the established rules that employment discrimination charges are to be construed "with the utmost liberality" and that the district court has jurisdiction over a claim of discrimination "if that claim falls within the scope of ... an EEOC investigation which *could reasonably be expected* to grow out of a charge of discrimination." *Paige v. State of California*, 102 F.3d 1035, 1041 (9th Cir. 1996) (emphasis in original, inner quotation marks omitted).

As to Russell personally, he was fully identified in the charge Fredrickson filed and any investigation would have uncovered his role in the events because Fredrickson complained to Pell about him and because he was the focus of Champion's investigation. See also *Kaplan v. International Alliance of Theatrical and Stage Employees, etc.*, 525 F.2d 1354, 1359 (9th Cir. 1975) (International union properly sued although not named in administrative charge, citing *Sanchez, supra*).

California courts construing the FEHA follow the federal model and are in accord. *Denney v. Universal City Studios, Inc.*, 10 Cal.App.4th 1226, 1232-1234 (1992); *Sandhu v. Lockheed Missiles & Space Co.*, 26 Cal.App.4th 846, 858-860 (1994) (immaterial that incorrect box was checked).

In sum, Fredrickson fully satisfied the requirement that file a charge with an appropriate administrative agency. Her handwritten, verified statement fully identified the persons who harassed and discriminated against her and what they did. Her claims cannot be defeated because the EEOC did not and would not carry through.

III. Defendant Russell Can Be Held Personally Liable Under the Fair Employment and Housing Act for His Harassment and His Participation in the Retaliation Against Fredrickson.

Title VII does not allow for personal liability. *Greenlaw v. Garrett*, 59 F.3d 994, 1001 (9th Cir. 1995). California's Fair Employment and Housing Act does provide for personal liability for certain unlawful acts. The case law is scanty, but the statutory basis and developing trend of decisions demonstrate that an individual can be held personally liable when, as here, the person engages in "conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for

other personal motives." *Reno v. Baird*, 18 Cal.4th 640, 646 (1998) (inner quotations omitted).

The FEHA includes some provisions, such as the prohibition against straightforward discrimination, that are applicable only to employers or organizations. See, e.g., Cal. Government Code §§ 12940(a), (b) and (e). Other provisions, pertinent here, also apply to "persons." Under the FEHA, it is unlawful:

"For any ... person ... to ... discriminate against any person because the person has opposed any practices forbidden under this part,,,"
(§ 12940(f))

"For any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."
(§ 12940(g))

"For ... any person ... to harass an employee..." (§ 12940(h))

As demonstrated above, under California law, Russell harassed Fredrickson when he made frightening appearances at her work station. See discussion of *Accardi v. Superior Court*, 17 Cal.App.4th 341 (1993), *supra*. While in the company of UPS managers, including Randy Reynolds who ran the facility, Russell was claiming credit for the excessive workload imposed on Fredrickson and for the aggravation of injured back and shoulder. This harassment occurred after Fredrickson had opposed Russell and had been

identified by Donlin in a letter to the union as a victim of Russell's harassment. (Facts, subpart J).

The facts sufficiently implicate Russell in harassment, retaliation, aiding and abetting and incitement of retaliation to require him to explain his actions under the *Burdine* test discussed above. There is enough evidence to support an inference of his personal involvement in the unlawful acts perpetrated against Fredrickson.

California case law supports this conclusion. In *Matthews v. Superior Court*, 34 Cal.App.4th 598 (1995), plaintiff, a heterosexual male, was subjected to sexual harassment by homosexual coworkers. The court held that "supervisory personnel who were aware of, and at times participated in, the unlawful conduct, are 'persons' subject to personal liability for sexual harassment under the FEHA." 34 Cal.App.4th at 599-600.

Here, Russell was not Fredrickson's supervisor, but he held a position of comparable status and, most important, had a comparable abusive power, which he fully exercised.

In *Doe v. Capital Cities*, 50 Cal.App.4th 1038 (1996), plaintiff, an aspiring actor, was drugged and raped by a casting director and other men on a Sunday at the director's home. The employer demurred. The court concluded

that the employer could be held liable for the unlawful conduct of its casting director and that "while the harassing conduct need not occur in the workplace, it must occur in a work-related context." 50 Cal.App.4th 1048. The concept of "context" suggests that, under California law, liability is not narrowly circumscribed, but can be extended to cover a novel situation such as that presented here.²

IV. The Facts Support Plaintiff's Common Law Causes of Action for Wrongful Discharge/Constructive Termination and Intentional Infliction of Emotional Distress.

Under California law, common law causes of action are independent of and supplementary to statutory remedies based on the FEHA. In the leading case of *Rojo v. Kliger*, 52 Cal.3d 65, 74-75 (1990), the court held that plaintiffs' failure to exhaust administrative remedies precluded FEHA claims, but not those based on the common law, including wrongful discharge and constructive termination. See 53 Cal.3d at 89.

"Employment discrimination claims ... by their very nature, involve several causes of action arising from the same set of facts. ***A responsible***

² We note that the issue of liability of a coworker for sexual harassment is currently before the California Supreme Court. See the superseded opinion of *Carrisales v. Dept. of Corrections* at 65 Cal.App.4th 1492 (review granted 11/4/98, S073601).

attorney handling an employment discrimination case must plead a variety of statutory, tort and contract causes of action in order to fully protect the interests of his or her client.” (emphasis in original, inner quotation marks and citation omitted)

A. Intentional Infliction of Emotional Distress.

In the employment context, the elements of a cause of action for intentional infliction of emotional distress are:

- "(1) outrageous conduct by the defendant;
- (2) intention to cause or reckless disregard of the probability of causing emotional distress;
- (3) severe emotional suffering; and
- (4) actual and proximate causation of emotional distress."

Agarwal v. Johnson, 25 Cal.3d 932, 946 (1979); see also *Heller v.*

Pillsbury Madison & Sutro, 50 Cal.App.4th 1367, 1388 (1996).

These elements are satisfied here. "It is settled that employment discrimination, particularly that involving sexual harassment, can cause emotional distress and that such distress is compensable under traditional theories of tort law." *Murillo v. Rite Stuff Foods, Inc.*, 65 Cal.App.4th 833, 848 (1998).

In *Alcorn v. Anbro Engineers, Inc.*, 2 Cal.3d 493, 498 n.2 (1970), and employment discrimination case, the court held that a cause of action for intentional infliction of emotional distress was supported and stated: "The cases

and commentators have emphasized the significance of the relationship between the parties in determining whether liability should be imposed. {Citations} Thus, plaintiff's status as an employee should entitle him to a greater degree of protection from insult and outrage than if he were a stranger to defendants."

Both Russell and UPS used their power to insult and injure Fredrickson. The physical, emotional and financial injuries she suffered at UPS and because of Matt Russell were so painful that she left California and returned to Arizona. (ER 58)

In *Fisher v. San Pedro Peninsula Hospital*, 214 Cal.App.3d 590, 600 (1989), plaintiff was a nurse complaining of sexual harassment perpetrated by Dr. Tischler, a member of the medical staff who gave plaintiff direct orders and made recommendations about her performance. The court held that "by its very nature, sexual harassment in the work place is outrageous conduct as it exceeds all bounds of decency usually tolerated by a decent society" and held that a cause of action for intentional infliction of emotional distress could be stated against Dr. Tischler. 214 Cal.App.3d at 618. His power is comparable to that of defendant Russell here.

In part II.D of this Argument, Fredrickson has summarized the course of events that constituted outrageous conduct and intentional infliction of emotional

distress. One California court has concluded that the cause of action is evaluated by the "I know it when I see it" test. *Yurick v. Superior Court*, 209 Cal.App.3d 1116, 1128 (1989) Fredrickson meets that test.

B. Wrongful Discharge/Constructive Termination

The facts might lead to alternative findings that (1) Fredrickson was terminated after she protested the refusal of UPS to follow her doctor's instructions and as the culminating retaliation for having opposed Russell and sought the assistance of UPS Human Resources; or (2) that she forced to resign her employment with UPS by the same course of events. The alternative possibilities arise because Fredrickson was terminated during the two week notice period stated in her resignation. (ER 45, 56-57) Fredrickson received unemployment compensation based on having been terminated. (ER 57, 63-65)

In Fredrickson was terminated, her cause of action is for wrongful discharge in violation of public policy. If she resigned, her cause of action is for constructive termination. Defendant Russell is not a proper defendant under either cause of action, which can be brought only against an employer. *Phillips v. Gemini Moving Specialists*, 63 Cal.App.3d 563 (1998)

If Fredrickson was terminated, she has provided substantial evidence in support of her cause of action under California law. In *Blom v. N.G.K. Spark*

Plugs, 3 Cal.App.4th 382, 388-389 (1992), the court held that a case of wrongful discharge in violation of public policy would be supported if "plaintiff's discharge was 'retaliation' for his efforts to require defendants to conform to employment discrimination laws and policies." See also *Holmes v. General Dynamics Corp.*, 17 Cal.App.4th 1418, 1426 (1993) (plaintiff's jury verdict affirmed where he "maintained the real reason for his termination was to silence and punish him for his repeated disclosures of GDE's breaches of its defense contracts [by] making false statements to a federal department or agency"); *Gould v. Maryland Sound Industries, Inc.*, 31 Cal.App.4th 1137 (1995) (retaliation for reporting to management the violation of overtime wage laws applicable to other employees).

Constructive discharge has occurred when "the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." *Turner v. Anheuser-Busch, Inc.*, 7 Cal.4th 1238, 1251 (1994). See also *Nolan v. Cleland*, 686 F.2d 806, 813-814 (9th Cir. 1982) (constructive discharge claim survives summary judgment when there is a history of unlawful discrimination and job assignment is made for

discriminatory-retaliatory purposes).

Fredrickson was required to carry a workload in excess of that of any other pre-loader until her back and shoulder injury was aggravated by the overwork, but UPS ignored her physician's instructions to transfer her, although such transfers were routinely granted to workers who had not run afoul of Matt Russell. Any reasonable person in the position of plaintiff would have been compelled to resign and UPS was repeatedly put on notice of the intolerable conditions under which Fredrickson was working.

CONCLUSION AND REQUESTED DISPOSTION

For the foregoing reasons, plaintiff respectfully submits that the order and judgment of the District Court should be reversed and the case should be remanded for trial on the following causes of action:

1. Sexual harassment and discrimination under the FEHA as to defendants UPS and Russell;
2. Constructive Termination in Violation of FEHA as to defendant UPS;
3. Constructive Termination in Violation of Public Policy as to defendant UPS;

4. Wrongful Termination in Violation of Public Policy as to defendant
UPS; and

5. Intentional Infliction of Emotional Distress as to defendants UPS and
Russell.

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LAW OFFICES OF SANDRA J. SPRINGS

Sandra J. Springs

Robert L. Kovsky

Attorneys for Plaintiff
Lesli Fredrickson