COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION THREE

JANET CONNEY, M.D., Plaintiff/Respondent, vs. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant/Appellant.	Case Nos. B179099 & B180451 (Los Angeles Superior Court No. BC297766)

APPLICATION OF AMICI CURIAE FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT REGENTS OF THE UNIVERSITY OF CALIFORNIA

Consolidated Appeals From A Judgment
And Attorney's Fees Order

The Honorable Mel Red Recana

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APPLICATION OF AMICI CURIAE FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

TO: THE PRESIDING JUDGE

This Application is submitted jointly by the League of California Cities (the "League"), the California State Association of Counties ("CSAC"), and the City and County of San Francisco ("CCSF") (collectively "Amici"). Pursuant to Rule 29.1(f) of the California Rule of Court, Amici respectfully request leave to file the attached brief in support of Appellant The Regents of the University of California.

The League is an association of 478 California cities united in promoting the general welfare of cities and their citizens. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys representing all 16 divisions of the League from all parts of the state. The committee monitors appellate litigation affecting municipalities and identifies those that are of statewide significance. The committee has identified this case as posing an issue of statewide significance.

CSAC is a non-profit corporation whose membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

CCSF is a chartered city comprised of many departments. As of this date, CCSF employs in excess of 20,000 employees. The Fair Employment and Housing Act ("FEHA"), Cal. Govt. Code §12940, *et seq.*, protects CCSF employees and applicants for employment from discrimination, harassment, and retaliation based on race, age, sex, disability, national origin, and other

protected status. Like other large local governmental entities in California, CCSF faces a steady stream of employment discrimination litigation based in whole or part on FEHA.

Taken together, the League and CSAC represent over 500 local entities, employing well in excess of 100,000 employees. The League, CSAC, and CCSF have a common and important interest – that dovetails with the public interest – in guarding against excessive attorney fee awards in FEHA litigation. Financial resources of local governments are not inexhaustible. Hence, payment of excessive attorney fee awards under FEHA inevitably diverts financial resources from programs designed to meet a variety of public needs. At the same time, in certain respects many public employees have greater employment protections than private sector employees, and thus any prophylactic value that may be thought to inhere in large attorney fee awards may be less important to safeguarding the FEHA rights of public employees.

Counsel for Amici have reviewed the briefs on file in this case to date. Amici do not seek to duplicate arguments set forth in the briefs. Rather, Amici seek to assist the Court in understanding the public interest in avoiding excessive attorney fee awards in FEHA cases involving public entities.

Amici respectfully submit that there is a need for additional briefing on these matters and that, based on their experience, they may assist this Court in making a sound decision. Accordingly, we respectfully request leave to file the attached brief of Amici Curiae.

DATED: April 19, 2006

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INTRODUCTION

The Legislature and California courts have long afforded public entities greater protections from liability and damages in civil actions than those available to private litigants. This case concerns an unsettled question of law regarding one of those protections, namely the extent to which public entities should be protected from an award of an attorney fee multiplier in claims brought under the California Fair Employment and Housing Act (FEHA). As the appellant persuasively demonstrates in their opening brief, an award of a fee multiplier against public entity employers in FEHA cases should be limited to those extraordinary cases in which the plaintiff secures a result that confers a significant public benefit for a large class that outweighs the plaintiff's own personal and financial stake in the lawsuit. See Appellant's Opening Brief at 63-76. Amici curiae agree and do not repeat appellant's arguments in this brief.

Instead, this brief focuses on the important public policy considerations implicated here. As explained below, a strong public policy in favor of protecting public funds exists and supports limiting awards of fee multipliers against public entities in FEHA cases to exceptional cases. By contrast, awarding fee multipliers as a matter of "routine" in garden-variety FEHA litigation would promote more meritless FEHA litigation, make such cases increasingly contentious, expensive and difficult to resolve, and cause a significant drain on already strained public coffers, diverting limited resources from other vital public services, including the enforcement of FEHA.

ARGUMENT

I. THE STRONG PUBLIC POLICY IN FAVOR OF PROTECTING PUBLIC FUNDS FROM CIVIL CLAIMS SUPPORTS LIMITING ATTORNEY FEE MULTIPLIERS AGAINST PUBLIC ENTITIES TO EXCEPTIONAL CASES.

Both the Legislature and California courts have long recognized a strong public policy in favor of protecting public funds from civil litigation. This public policy strongly supports limiting awards of attorney fee multipliers against public entities in FEHA cases to exceptional cases. A contrary rule subjecting public entities to fee multipliers on a routine basis in FEHA cases would promote meritless litigation, make FEHA cases more difficult and more expensive to settle, and ultimately harm to the very people FEHA is suppose to protect.

The California Legislature has long recognized the importance of protecting public funds from civil litigation by carefully limiting the exposure of public entities to civil claims for damages. For example, under the Government Tort Claims Act, public entities are immune from liability except as provided by statute. Cal. Govt Code § 815(a); *Caldwell v. Montoya*, 10 Cal.3d 972, 980 (1995). The Act further provides a variety of absolute and qualified immunities to public entities and their employees. See *e.g.*, Cal. Govt Code § 820.2 (discretionary acts and omissions), § 820.8 (public employee immunity for acts or omissions of another), § 820.9 (local officials' immunity for misconduct of governing body), § 818.8 (misrepresentation), § 821.5 (prosecutorial immunity). Another distinctive requirement of litigation against public entities and employees is the claims presentation requirement of the Act, which includes statutes of limitations much shorter than might otherwise apply to a plaintiff's claims against a private entity. Govt Code §§ 910, *et seq.* , Public entities also are not liable for punitive damages or required to indemnify a public employee for such damages. Cal. Govt Code §§ 818, 825(a). These

statutory provisions evidence a strong desire on the part of the Legislature to protect public coffers from the risks of civil litigation.

Consistent with this desire, California courts have typically disfavored attorney fee multipliers against public entity defendants. See *State of Cal. v. Meyer*, 174 Cal. App. 3d 1061, 1073-74 (1985)(denying multiplier to landowner plaintiff in eminent domain proceedings); *San Diego Police Officers Ass'n v. San Diego Police Dept.*, 76 Cal. App. 4th 19, 24 (1999)(upholding a 0.2 downward adjustment of fees in mandamus proceedings regarding the application of California Penal Code Section 148.6). In rejecting multipliers, these courts have recognized that any "award of fees would ultimately be borne by the taxpayers" and would therefore run afoul of the strong public policy in favor of protecting public funds. *San Diego Police Officers Ass'n*, 76 Cal. App. 4th at 24; see also *Meyer*, 174 Cal. App. 3d at 1073-1074 (holding that there "is a difference between an award paid by a client and one paid by a public entity").

Limiting the exposure of public entities to attorney fee awards is especially appropriate in the FEHA context because of the unique nature of public employment. Public employees enjoy numerous rights that afford them far greater job security than their counterparts in the private sector including, among other things, substantive and procedural due process rights, the protections of civil service merit systems and administrative proceedings, and the benefits of collective bargaining agreements and representation by labor organizations. See *e.g.*, *Skelly v. State Personnel Bd.*, 15 Cal.3d 194 (1975)(establishing due process rights); Cal. Cons. Art. VII; Cal. Govt Code § 18500, *et seq.*; The Charter of the City and County of San Francisco, Art. X (establishing the City's Civil Service Commission, Department of Human Resources, and authorizes the Commission to make rules regarding City

employment including procedures to review and resolve allegations of discrimination); Charter of the City of Alameda, Art. XIII (establishing civil service board); Charter of the City of Long Beach, Art. XI; Charter of the City of Stockton, Art. XXV. As a result, public employees, unlike their private counterparts, have a variety of avenues to secure and enforce their right to discrimination free workplaces. Given these existing protections, fee multiplier awards would provide little or no additional benefit to public employees.

Moreover, attorney fee multipliers are not necessary to encourage attorneys to bring FEHA cases against public entities. Given the size of public entity budgets and the fact that payment of any award of fees and damages is guaranteed by taxpayer dollars, litigants view public entities as the ultimate "deep pocket." Indeed, there is no evidence of a shortage of attorneys willing to bring FEHA cases against public entities.

Permitting attorney fee multipliers in routine FEHA cases would, however, have a devastating impact on the public fisc and ultimately harm the very people FEHA is suppose to protect. Public entities employ hundreds of thousands of individuals throughout the state and face a heavy stream of FEHA litigation brought by current and former employees. For example, the City and County of San Francisco employs in excess of 20,000 employees and has approximately 20-25 active FEHA cases in a given year. Most of these cases are garden-variety claims that have no impact beyond the resolution of the plaintiff's personal rights and economic interests. Awarding fee multipliers on a regular basis in such cases would only encourage meritless litigation and make it more difficult and expensive for public entities to settle. FEHA litigation would become more contentious, more expansive, and more expensive. The result would be a devastating drain on the increasingly strained coffers of public entities and the diversion of public funds from vital public services like FEHA

enforcement into the pockets of plaintiffs' attorneys. Thus, awarding fee multipliers in routine FEHA cases will likely harm the very people that FEHA is suppose to protect. And ultimately the public will suffer.

II. THE RECENT DECISION IN *HORSFORD* ERRONEOUSLY SUGGESTS THAT ATTORNEY FEE MULTIPLIERS AGAINST PUBLIC ENTITIES ARE THE RULE RATHER THAN THE EXCEPTION.

Despite the compelling case law and public policy considerations supporting limits on attorney fee multipliers against public entities in FEHA cases, the Fifth District Court of Appeal in *Horsford v. The Board of Trustees of California State University*, 132 Cal. App. 4th 359 (2005) recently concluded otherwise. The reasoning in *Horsford*, however, is flawed because it failed to consider the relevant case law and public policy considerations.

In *Horsford*, three members of the campus police department of California State University, Fresno sued for race discrimination in violation of FEHA. The court reversed the award of attorney's fees, finding that the trial court abused its discretion by awarding fees based on its estimate of a reasonable fee rather than on a calculation of a lodestar and by failing to consider the relevant factors for awarding a multiplier. *Id.* at 395-96, In remanding the case, the Court instructed the trial court to consider several factors including the public entity status of the defendant. On that point, the Court stated that the trial court abused its discretion by relying on the public entity status of the defendant to "completely deny" a fee multiplier. The Court also noted that even though the fee award would fall on taxpayers, the public entity status of the defendant in a FEHA case is "far less important . . . where the public entity intentionally engages in discrimination and chooses to defend its conduct through lengthy and complex litigation." *Id.* 400-01.

Horsford incorrectly applied the law regarding attorney fee multipliers. Nothing prohibits a court from denying fee multipliers solely based on the

public entity status of the defendant, and *Horsford* cites no case law to support its assertion to the contrary. By contrast, relevant case law establishes that fee multipliers against public entities are the exception. See *San Diego Police Officers Ass'n*, 76 Cal. App. 4th at 24; *Meyer*, 174 Cal. App. 3d at 1073-1074. Indeed, fee multipliers against public entities are only available if the other relevant factors overwhelmingly support a multiplier notwithstanding the public status of the defendant. Thus, California courts have upheld multipliers *only* in the narrow class of cases where the prevailing party achieved an extraordinary result that provided a public benefit to a large class of persons. See, e.g., *Serrano v. Unruh*, 32 Cal. 3d 621, 624 (1982) (plaintiff sought order mandating changes to public school financing; no prospect of damages); *Edgerton v. State Personnel Bd.*, 83 Cal. App. 4th 1350, 1363 (2000)(plaintiff and union secure injunction against drug testing of Caltrans employees during off-duty hours; no prospect for damages in case); *Kern River Public Access Committee v. City of Bakersfield*, 170 Cal. App. 3d 1205, 12—(1985)(plaintiffs sought access to public land; no prospect for damages); *San Bernardino Audubon Society v. County of San Bernardino*, 155 Cal. App. 3d 738, 755 (1984) (society sued to enforce environmental laws; no prospect of damages).

Serrano, Edgerton, Kern River, and *San Bernardino Audubon Society* are classic examples of extraordinary circumstances warranting a fee enhancement. These cases all involved issues of public interest as well as great risk. None of the cases resulted in judgments from which attorney fees might be paid. The plaintiffs in those cases owed no financial obligations to their attorneys for their efforts, and an award of fees was uncertain both because of the complexities of the legal issues and because there was no clear legal authority for shifting fees to the defendant. In contrast, these circumstances typically do not exist in FEHA cases.

Finally, *Horsford* erroneously dismissed the strong public policy in favor of protecting public funds. As demonstrated by the numerous statutory protections from civil damages given to public entities and the case law emphasizing the important of preserving the public fisc, the public entity status of a defendant is an important consideration in determining whether to award a fee multiplier. *Horsford*'s suggestion to the contrary therefore cannot stand.

CONCLUSION

When a public entity pays an award of attorney's fees, the public pays. Recognizing this practical reality, both the Legislature and the courts have typically limited the exposure of public entities to civil claims for damages. Routinely awarding attorney fee multipliers against public entities in garden-variety FEHA cases contravenes both the legislative desire to protect the public fisc and the governing case law. Such a rule would benefit no one except for the attorneys who bring such cases. And, ultimately, the public would suffer because public entities would lack the funds necessary to provide essential public services. Accordingly, the Court should limit awards of fee multipliers against public entities in FEHA cases to exceptional cases.

DATE: April 19, 2006

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 2,928 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on April 19, 2006.

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CERTIFICATE OF SERVICE

I, LISA HARRIS, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Fifth Floor, San Francisco, CA 94102.

On April 19, 2006, I served the following document(s):

- **APPLICATION OF AMICI CURIAE FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT REGENTS OF THE UNIVERSITY OF CALIFORNIA**
- **BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT REGENTS OF THE UNIVERSITY OF CALIFORNIA**

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in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed April 19, 2006, at San Francisco, California.

LISA HARRIS