I. INTRODUCTION.

Unable to legitimately substantiate the summary judgment it was improperly granted by the Superior Court below, Defendant and Appellee Superior Court for the State of California, County of Orange ("Defendant") spends the majority of its brief in opposition to the instant appeal engaged in an irresponsible and misleading contortion of facts and law. Statements of "fact" are made that are either devoid of a corresponding reference to the record or are blatantly misrepresented. Similarly, many of the authorities cited by Defendant in support of its various points of law are incorrect or are stretched beyond logic and reason.

Further, Defendant misstates the importance of the rule of law urged by Appellant Linda Wills ("Wills"). "[C]onduct resulting from a disability is considered to be part of the disability, rather than a separate basis for the termination." (*Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1139–1140.) This is due to the fact that, "if the law fails to protect the manifestations of [a] disability, there is no real protection in the law because it would protect the disabled in name only." (*Gambini v. Total Renal Care, Inc.* (9th Cir. 2007) 486 F.3d 1087, 1095.)

Defendant claims that what Wills's asks for is a "free pass" to threaten violence against co-workers and that the rule of law urged by Wills—and as expressly recognized by the Ninth, Second, and Tenth Federal Circuit Courts of Appeal and endorsed by the California Department of Fair Employment and Housing (DFEH)—is an illogical and poorly reasoned farce that would lead to anarchy and the decline of Western Civilization. Defendant is wrong. As set forth herein, the appropriate standard is the only logical common sense approach that preserves the rights of the disabled while at the same time balances the burden on employers.

Further, the trial court below also erred by ruling that Ms. Wills failed to exhaust her administrative remedies. Defendant's hyper-technical "gotcha" approach to exhaustion doctrine is at odds with the law of the State of California. The appropriate question is whether or not the defendant was on notice and had an opportunity to participate in the administrative process. (*Cole v. Antelope Valley High School District* (1996) 47 Cal.App.4th 1505, 1511.) Defendant does not dispute this standard – it ignores it and makes no meaningful effort to address the keystone authority at issue, *Nazir v. United Airlines* (2009) 178 Cal.App.4th 243. Rather, Defendant ducks the law and again misrepresents the facts. As set forth herein, the rule urged by Defendant and adopted by the Superior Court below is wrong.

Finally, aside from the substantial issues of law presented by this proceeding, this is ultimately an appeal from a summary judgment where the existence of disputed issues of material fact should have precluded the action taken by the court below.

II. DEFENDANT'S FACTUAL STATEMENT IS RIDDLED WITH ERRORS, IMPROBABLE STRETCHES OF THE EVIDENCE, AND INACCURACIES.

The Defendant's Brief asks the Court for nothing less than license to discriminate against anyone whose disability may manifest with behavioral symptoms. Defendant repeatedly argues that only its ***perception*** of Wills's conduct matters, divorced from any consideration as to whether her conduct implicates a disability. (Resp. Brief, pp. 38, 39, 50 ["The Only Material Fact is the OCSC's Perception of Events"].) No matter how irrational and unsupportable its accusations, Defendant believes that it can end its employee's career over anything it proclaims a "threat."

A. Defendant's Claims of Threatening Conduct are Not Supported by the Record.

In order to support its irrational and discriminatory conclusions, Defendant's Brief continuously strains or outright misrepresents the record on appeal. In the first paragraph of its introduction alone, Defendant falsely alleges that it is undisputed that Wills created a "'kill' list" of police officers that she sent emails directed at making coworkers "pay," and that she left a threatening "voicemail" for coworkers. (Resp. Brief, p. 1.) Not only does Wills strongly dispute these facts (VI AA 1279–1280 [no facts pertaining to "kill list;" disputed that any police officer thought it was a threat], 1282 [no mention of "voicemail;" disputed as to any perception of threat], 1282–1283 [nothing stated about making coworkers "pay;" disputed as to whether recipient was threatened]), there is no evidence to support Defendant's characterizations.

In truth, the evidence shows only that, in the throes of a manic episode caused by her disability, Wills spoke to one police officer about the Quentin Tarantino movie "Kill Bill" (VI AA 1448:13–1450:7; VII AA 1526 [the officer did not even understand the reference, II AA 476:15–17]); that she sent grandiose, rambling emails about her conversations with God to several acquaintances, including some of Defendant's employees (III AA 542–563); and that she forwarded a ringtone—not a voicemail—but a pre-recorded ringtone[1] featuring an image of a character from "Our Gang" and a wild, cursing voice demanding that the recipient "better check your messages!" (III AA 520, 655 [note objection at VII AA 1570—the audio portion of the ringtone provided is only half of the exhibit].) These are the

[1] According to Merriam-Webster Online, a "ringtone" is "the sound made by a cell phone to signal an incoming call;" while a "voice mail" is "an electronic communication system in which spoken messages are recorded or digitized for later playback to the intended recipient; *also*: such a message." (http://www.merriam-webster.com/dictionary/, last accessed August 16, 2010).

only instances of threatening misconduct cited in Defendant's Notice of Intent to Discharge Wills (III AA 518–582). There is nothing reasonable about claiming that any of these events could constitute a "threat."

1. Defendant Misrepresents the Evidence Pertaining to Anaheim Police Department's Perception of the "Kill Bill" Incident.

Defendant goes so far as to falsely state that Anaheim Police Department Commander Michael Richardson undisputedly believed that Wills's "Kill Bill" comment was a "threat." (Resp. Brief, p. 41.) Appellant urges the Court to carefully review Defendant's every citation to the record concerning Commander Richardson's beliefs. The only citations to the record showing evidence of Commander Richardson's beliefs concerning the incident are a declaration and his deposition testimony.

Five times, Defendant cites to Commander Richardson's declaration in support of summary judgment (Resp. Brief, pp. 4, 31, 39 fn. 11, 41, 63 [I AA 149–152]), which—although certainly drafted by Defendant's counsel—scrupulously avoids characterizing any of Wills's conduct as a "threat." Defendant also cites to his deposition testimony (Resp. Brief, p. 41); however, Commander Richardson's testimony expressly states that Wills was not charged with threatening a peace officer for the "Kill Bill" comment because, ***"At the time it was—it was speculation. This was a quote, one quote statement made by someone. Whether it was a threat or not, you know, had yet to be determined."*** (VIII AA 1809:24–1810:2, emphasis added.) That is the sum total of Defendant's evidence that the "Kill Bill" incident was an actual threat.

Despite the testimony of the commanding police officer in charge of the matter that Wills's comments were not a crime, Defendant persists—in complete disregard of Commander Richardson's testimony—that talking about the movie "Kill Bill" was a criminal threat to a police officer under

Penal Code section 69. (Resp. Brief, p. 31.) Other than the evidence from Commander Richardson, which this Court should review carefully as discussed above, everything on that page of the Defendant's Brief is rank speculation and gossip among police department employees. (*Id*.) Defendant discusses what Officers Gardetto and Labonte thought was "possible," and the alleged fear of employee Nelleson who was not even present at the time the comment was made, but only learned of it through the hearsay of Officer Gardetto (VI AA 1387:11–17, 1389:7–1390:3). As the record overwhelmingly shows, the truth is that Commander Richardson was correct to determine that any allegations of threats by Wills were only based on "speculation." (VI AA 1409:22–1410:16.) Defendant offers no evidence to contradict Commander Richardson's conclusions.

2. The Only Mention of Coworkers in the Emails sent by Wills are Words of Gratitude.

Defendant justifies its illegal termination of Wills by relying on the alleged ***perception*** of one of its employees, Marie Suchy, that emails sent by Wills were a threat, without regard as to whether that perception was reasonable or whether it was related to the knowledge that Wills suffered from a mental disability. In fact, as Defendant admits, Ms. Suchy was only frightened by the email because she knew Wills was mentally ill enough to require hospitalization—she had called 911 to have Wills hospitalized the week before, when Wills expressed suicidal ideation during a phone call with Ms. Suchy during her medical leave. (Resp. Brief, p. 6, citing I AA 143–144.)

Not only is Ms. Suchy's perception biased due to her knowledge of Wills's disability, the alleged perception of the email is not reasonable. When a reasonable person reviews the emails, the only mention of Wills's coworkers with Defendant is an offer of gratitude, not a threat. The emails are in the record (III AA 542–563) and it can easily be determined that the

only time reference is made to court employees is an acknowledgement that certain persons, including "OC COURT HUMAN RESOURCES" had been caring and supportive to Ms. Wills during her medical leave.

Had Ms. Suchy actually bothered to read the emails instead of jumping to prejudiced conclusions about Wills, she would have seen where Wills ***thanked her by name*** for supporting her during her hospitalization. (III AA 544 [second complete paragraph].) Ms. Suchy would also have read, "SO THANKS AGAIN TO GOD … AND ALL THE FAMILY, FRIENDS AND COWORKERS THAT VISITED ME AND / OR CALLED ME IN THE CRAZY HOSPITAL. ***I WILL LOVE YOU GUYS FOREVER*** … ." (III AA 545 [first complete paragraph], emphasis added.) Wills's offers of thanks and love, no matter how unconventionally or inappropriately stated, cannot reasonably be seen as a threat of any kind.

The unreasonableness of Ms. Suchy's alleged perception is only compounded when considering that, although the emails were sent to not less than 10 of Defendant's employees at their work addresses, Ms. Suchy was the only one that brought it to a supervisor. As for the judgment of Defendant's supervisors and human resources department, their excuse for making discriminatory assumptions about Wills is even more flimsy. There is no reasonable explanation for seeing these emails as "threatening" to Defendant or its employees without considering Wills's disability. Even then, there is no rational basis for that conclusion. Perceiving these emails as threatening is an act of pure discrimination based on prejudice and unfounded fear about Wills's disability.

3. Defendant Contradicts the Record to Suggest that the Ringtone Sent by Wills was a "Voicemail" or that the Ringtone Was Connected with Defendant's Workplace.

Defendant knows well that the cell phone message that formed part of the basis for Wills's termination was a forwarded ringtone and not a "voicemail" message. Yet, from the first page of the Defendant's Brief, Defendant insists on referring to the pre-recorded ringtone as a "voicemail" to improperly try to invoke the hysteria that affected all of its decisions regarding Wills's termination. (E.g., Resp. Brief, p. 5 [imploring the Court to listen to the incomplete and inaccurate audio-only recording in the record—see objections at VII AA 1570].)

The truth is found in the support for Defendant's own Notice of Intent to Discharge. A redacted portion of the recipient Cynthia Gonzalez's personal cell phone bill is attached to the Notice as "Attachment D." (III AA 538–540.) As the bill itself shows, the only communications with Wills on the relevant date, July 21, 2007, were two "Multimedia Messa[ges]" at 3:31 p.m. and 3:34 p.m.[2] (III AA 540.) There are no phone calls from Wills on the bill at all, let alone on July 21, 2007. Nor does the bill reflect any voicemails retrieved on that date. Defendant's dishonest references to the ringtone as a "voicemail" are shocking and unnecessary. These inaccurate characterizations also speak to the unreasonable nature of the original determination that the ringtone could possibly have been seen as a threat.

Finally, the bill and the Defendant's Brief identify the date that the ringtone was sent as July 21, 2007—a Saturday. There is no dispute that the ringtone was sent from Wills's personal cell phone to Gonzalez's

[2] Defendant's own response to the DFEH charge on April 1, 2008, also expressly identifies this as an "MMS" message, including a definition and comparison to text messaging and not a voicemail. (VI AA 1377, fn. 1.)

personal cell phone outside of work hours. Defendant has never offered a justification for its decision to include this decidedly not-work-related personal interaction between two individuals outside of the workplace as a basis for termination.

B. Defendant Ignores the Only Medical Evidence Before the Court

Attempting to provide an alternative justification for the summary judgment below, Defendant implies that the undisputed medical opinion of Wills's treating psychiatrist, Dr. David Chandler (Chief of Psychiatry at Kaiser Orange County), does not apply to all of Wills's conduct resulting in termination. Defendant suggests that Wills's "lack of judgment" in thinking that the ringtone or "Kill Bill" comments were meant as a joke is not attributable to her disability, or that Dr. Chandler did not opine on her alleged lack of judgment. (Resp. Brief, pp. 2, 6–7, 41–42.) Defendant also suggests that Dr. Chandler did not offer any medical opinion about the "Kill Bill" incident itself. (Resp. Brief, p. 19–20.)

Both implications are contrary to the record. Each and every allegation of misconduct in the Defendant's Brief was set forth in the Notice of Intent to Terminate. (III AA 518–582 ["Kill Bill" incident, III AA 519–520; ringtone, III AA 520–521; emails, III AA 521–522; so-called "misuse of court resources," III AA 522; and poor judgment, III AA 522–523].) Dr. Chandler reviewed the Notice and testified at his deposition that ***every*** act of misconduct alleged there, ***including the "Kill Bill" incident and the allegation of poor judgment***, were the ***direct result*** of bipolar disorder. (VII AA 1514:6–1515:1.)

Specifically regarding the allegation of poor judgment, Dr. Chandler expressly stated that bipolar patients have poor recall of what they do while they are manic. (VII AA 1508:21–24.) Dr. Chandler also provided his uncontroverted expert medical opinion that Wills did not have a clear

recollection of her communications with Defendant's employees while she was manic, due to memory impairment caused by bipolar disorder. (VII AA 1508:13–1509:3.) Dr. Chandler's medical determination proves that every instance of misconduct cited by Defendant as a basis for termination was caused by bipolar disorder—including the allegations of poor judgment after the manic episode had passed.

Dr. Chandler's analysis is completely uncontroverted. Defendant offers no evidence, argument, or comment on this medical evidence.[3] There is no opposing affidavit or testimony from a physician. There is nothing in the record that even suggests a different medical opinion on the cause of Wills's alleged misconduct. Thus, the undisputed facts before this Court are that the alleged misconduct resulting in termination was, without exception, the manifestation of Wills's bipolar disorder.[4]

C. Defendant's Brief Misleadingly Re-Orders Facts in an Attempt to Show that Wills did not Exhaust Administrative Remedies

Defendant states that Wills was "[i]gnoring the admonition" of the DFEH that she should file a non-investigated complaint when it filed her DFEH operative charge in February 2008. (Resp. Brief, p. 8.) This argument, and the ordering of the paragraphs on the page, falsely suggests that Wills received the non-investigated complaint notice before the DFEH charge was filed. Since Defendant tellingly fails to cite the dates of the DFEH filings, Wills provides this summary:

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[3] In a footnote, Defendant argues that its request for judicial notice of some pleadings before the trial court on another matter were sufficient to overcome the medical evidence in opposition to the summary judgment motion. (Resp. Brief, p. 46, fn. 14.) Neither pleading—each of which simply re-argue Defendant's main points—include, or may be considered "evidence."

[4] Even if there was any medical evidence to support it, Defendant's argument that it can terminate an employee because it does not like her sense of humor strains credulity. (See Resp. Brief, p. 42.)

January 17, 2008	Defendant's termination of Wills effective (VI AA 1279).
January 24, 2008	Wills meets with DFEH Consultant "D. REID … for the purpose of filing a charge of discrimination … [¶] [on the basis of] DISABILITY" (VII AA 1521).
January 29, 2008	DFEH types and mails its "COMPLAINT OF DISCRIMINATION" to Wills for signature (III AA 722).
February 2, 2008	Wills receives and signs the "COMPLAINT OF DISCRIMINATION" (*id*.), she also contacts the DFEH to find out "why the complaint did not did not include a specific mention of my being terminated solely because of disability. I called the DFEH official to inquire as to why that was not immediately clear from the complaint as I thought the complaint should be more specific." (VII AA 1518:1–8.) She was told by the DFEH that they would not pursue a wrongful termination claim because Defendant "told them I had been terminated for misconduct." (*Id*.)
February 13, 2008	After initially sending it to the wrong address, the DFEH sends Wills the notice of non-investigated complaint, confirming that Wills complained to the DFEH about disability discrimination. (VII AA 1520–21.
July 23, 2008	After Wills retains counsel, she requests and receives a right-to-sue letter from the DFEH. (III AA 724.)

The actual facts show that Wills received the notice of non-investigated complaint weeks after she signed the DFEH's "COMPLAINT OF DISCRIMINATION," not before, as claimed by Defendant. The

DFEH sent Wills several confusing, boilerplate forms while she was unrepresented and told her that there was nothing more to be done about her discrimination complaint. On the other hand, Defendant offers no facts or argument that it did not have notice of Wills's disability discrimination claims during the administrative process, that it did not have the opportunity to engage in the process, or that there was anything else that Wills could have done to enhance or expand the administrative process or seek further administrative remedies.

The facts are clear. Wills did everything she could to get the DFEH to issue the charge she wanted to allege. She communicated extensively with the DFEH about the fact that she believed she was terminated because of her disability. Even the DFEH acknowledged that she had communicated with it "for the purpose of filing a charge of discrimination … [¶] [on the basis of] DISABILITY." For whatever reason, the DFEH erroneously decided to issue a different charge based on something that Wills never claimed, denial of medical leave. Wills was never denied medical leave by Defendant and never claimed she was. (See II AA 363:10–18.)

By the time of the DFEH charge, Defendant was already well-familiar with Wills's disability discrimination claims. The parties had been through extensive union grievance procedures and Defendant had already received Dr. Chandler's letter discussing the disability (III AA 719) as well as thorough written documentation from Wills discussing her claims (e.g., VII AA 1528 ["The allegations and reasons for the decision to fail my promotional probation as a Court Clerk I and to discharge me from Court employment are based on apparent acts of discrimination. This discrimination is due to my medical disability … ."].)

Defendant's response to the DFEH charge addressed practically nothing relating to the nonsensical denial of medical leave allegations. (VI

AA 1375–1383.) Defendant's response is not "merely preemptive discussion" about disability discrimination, as the court below held. Virtually the only issues addressed by the response were Wills's complaints of disability discrimination (e.g., VI AA 1378 [the first sentence of the section headed "Legal Discussion" states, "Ms. Wills has failed to establish a prima facie case of disability discrimination."].)

As in the response to the DFEH charge, Defendant has maintained the same arguments throughout the administrative and court proceedings. Even now, Defendant still argues it was entitled terminate Wills based on her conduct without regard for her disability (Resp. Brief, pp. 16, *et seq.*, 45–46), which was the exact same argument it made to the DFEH: "The totality of Ms. Wills conduct is completely incompatible with Court employment and such conduct, not Ms. Wills' disability or her taking of a protected leave, formed the basis for discharge from Court employment." (VI AA 1379.) The fact that Defendant makes the exact same argument in its Defendant's Brief before this Court as it made before the DFEH is evidence enough that Defendant had complete notice and opportunity to address these same charges in the administrative proceeding.

III. DISCUSSION.

A. Appellant has not Waived Argument on the Causes of Action Summarily Adjudicated on Exhaustion Doctrine Grounds.

Defendant argues that Wills has "abandoned" her claims for retaliation, failure to prevent harassment, failure to engage in the interactive process, harassment, or discrimination claims from 2002–2003 and 2004–2006. Defendant is wrong. The trial court's order is based on two rulings: (1) that an employer need not consider whether the misconduct is the manifestation of a disability for purposes of termination (VIII AA 1914–1917); and (2) that all other claims were subject to exhaustion doctrine

(VIII AA 1913–1914). The trial court did not issue any other specific rulings on any of the other claims.

Appellant's Opening Brief includes extensive argument on each of these substantive rulings. To the extent that any other ruling is implied by the trial court's order, those implications are addressed by the argument regarding inferences improperly made by the trial court, as addressed in the AOB, pages 43–46. Defendant does not identify any portion of the trial court's order on appeal not addressed by the AOB.

The foregoing notwithstanding, Defendant's citation to *Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, etc., is irrelevant because the law merely acknowledges the basic proposition that new arguments cannot be raised for the first time in a reply brief on appeal. (*Id*. at 370, fn. 8.) In the present case, Wills appeals granting of summary judgment. On appeal, the appellate court undertakes the same analysis as the trial court on the papers below. (*Deveny v. Entropin* (2006) 139 Cal.App.4th 408, 419 ["In [performing a *de novo* review after grant of summary judgment], we use the same three-step process employed by the trial court.'"].)

Before the trial court, Wills's opposition to Defendant's motion for summary judgment clearly addressed all of the arguments raised by Defendants, including those Defendant now claims are waived. (VI AA 1251–1277 [specifically: retaliation, VI AA 1276–1277; harassment and failure to prevent harassment, VI AA 1276; failure to engage in the interactive process, VI AA 1277; earlier continuing discrimination claims, VI AA 1274–1275].) In light of the comprehensive briefing of every issue raised, Defendant's claims of waiver are not correct.

B. Termination for Conduct Caused by a Disability is the Same as Termination for the Disability Itself.

All authority cited by both sides leads to the inescapable conclusion that, "conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for the termination." (*Humphrey*, 239 F.3d at 1139–1140.) Accordingly, "where an employee demonstrates a causal link between the disability-produced conduct and the termination, a jury must be instructed that the employee was terminated on the impermissible basis of her disability." (*Gambini*, 486 F.3d at 1093.) This is due to the fact that, "if the law fails to protect the manifestations of [a] disability, there is no real protection in the law because it would protect the disabled in name only." (*Id*. at 1095.) Nothing offered by Defendant in its brief compels any conclusion to the contrary.

1. Defendant Mischaracterizes California Law Regarding Protections Afforded to Disabled Employees.

Defendant contends that two California appellate decisions stand for the proposition that an employer is entitled to disregard the fact that an employee's conduct is caused by a disability, citing *Brundage v. Hahn* (1997) 57 Cal.App.4th 228, and *Gonzalez v. State Personnel Board* (1995) 33 Cal.App.4th 422. Defendant is wrong and its reliance on these cases is misplaced as neither support its position here. Although no *published* opinion of a California Court explicitly adopting *Humphrey* and *Gambini* yet exists, it is clear that the rule they provide is and should be the law of this state.

i. Brundage*: An Employer Cannot Be Liable For Disability Discrimination If It Was Unaware Of The Disability When Employee Terminated.*

Brundage does not stand for the proposition that an employer is entitled to distinguish between the conduct and its cause. In *Brundage*, the

defendant did not have notice of the plaintiff's disability in advance of its decision to terminate her employment and it was on that basis that it was able to obtain summary judgment. Catherine Brundage was fired because she went missing from her job for months. She then sued, claiming that she disappeared because of a manic episode caused by her bipolar disorder. "County asserts that it is undisputed that Brundage was terminated because of her job abandonment. Brundage, on the other hand, claims her termination was a discriminatory act based on her mental disability, in that she was terminated because her manic-depressive disorder caused her to be absent from work for a six-week period." (*Brundage*, *supra* at 236.)

The *Brundage* defendant was ultimately able to obtain summary judgment in its favor because the evidence was undisputed that it was ***unaware*** of the fact that Brundage was disabled at the time she was fired. "An adverse employment decision cannot be made 'because of' a disability, when the disability is not known to the employer. Thus, in order to prove an ADA claim, a plaintiff must prove the employer had knowledge of the employee's disability when the adverse employment decision was made." (*Id*. at 237.) "Because [Defendant] ***did not know about Brundage's manic-depressive disorder,*** it could not have terminated her because of that disorder." (*Id*., emphasis added.)

Accordingly, *Brundage* does nothing to help Defendant's case here. Rather, *Brundage* stands for the rather unremarkable proposition that a defendant cannot be liable for discrimination based on a disability that it did not know existed at the time of the adverse employment action. (See also *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 57 [recognizing that dispositive issue in *Brundage* was notice].) Such is not the case here, where Defendant admits that it was on notice of Plaintiff's bipolar disorder well before its decision to terminate her employment. *Brundage* does not say anything other than that an employer cannot be

liable for disability discrimination if it was unaware of the disability when it made the decision to terminate. Defendant does not dispute that it knew of Wills's disability at the time of her termination and its selective quotations from *Brundage*, none of which come from the actual part of the case discussing why Ms. Brundage was terminated, are not relevant. Defendant argues that *Brundage* supports its position "in essence," but ignores the plain language of the decision to the contrary. Ms. Brundage's disability was not a factor in her termination because her employer was unaware of that disability when she was fired.

ii. Gonzalez: *Alcoholism and Drug Addiction are Not the Same As Bipolar Disorder.*

Similarly unavailing is Defendant's reliance on *Gonzalez v. State Personnel Board* (1995) 33 Cal.App.4th 422. *Gonzalez* involved a state employee fired for, *inter alia*, driving a state vehicle with a suspended driver's license and reported to work drunk on several occasions. Gonzalez protested his termination, claiming that his conduct was caused by his alcoholism. As recognized by *Gonzalez* itself, the rules for adverse employment actions based on alcoholism and drug abuse are different than for other those based on other disabilities. (*Gonzalez*, *supra* at 432.) *Gonzalez* even provides a litany of Federal authorities dealing with drug addicts and alcoholics in an effort to show the distinction between these disabilities and others. (*Id*. at 432–434.) As recognized by *Humphrey*, "we have applied a distinction between disability-caused conduct and disability itself as a cause for termination only in cases involving illegal drug use or alcoholism." (*Humphrey,* 239 F.3d at 1140 fn. 18.)

Even the ADA itself draws a distinction with conduct caused by alcoholism: "'[I]ndividuals with a disability' *does not include* any individual who is an alcoholic whose *current use* of alcohol prevents such individual from performing the duties of the job in question or whose

employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others." (*Maddox v. University of Tennessee* (6th Cir. 1995) 62 F.3d 843, 847.)

Another key distinction between *Gonzalez* and the instant action is the fact that the defendant there actually made efforts to warn and accommodate the plaintiff (including a prior suspension, warnings and counseling) – not just terminating him. (*Gonzalez*, 33 Cal.App.4th at 425.)

iii. Defendant Completely Ignores the DFEH Case Analysis Manual and Mischaracterizes EEOC Guidance.

***The California Department of Fair Employment and Housing expressly endorses* Gambini** for the proposition that, "[c]onduct resulting from a disability 'is part of the disability and not a separate basis for termination,'" and uses *Gambini* as an example of how similar incidents should be handled.[5] Defendant attempts to dismiss the significance of this fact by arguing that the DFEH guidelines are not binding. Defendant's contention that no weight be given to DFEH's directive to interpret the FEHA statutory scheme in accord with *Gambini*, is plainly erroneous. "While the ultimate interpretation of a statute is an exercise of the judicial power [citation], when an administrative agency is charged with enforcing a particular statute, its interpretation of the statute will be accorded great respect by the courts 'and will be followed if not clearly erroneous.'" (*Judson Steel Corp. v. Workers' Comp. Appeals Bd*. (1978) 22 Cal.3d 658, 668–669; accord *Dyna-Med, Inc. v. Fair Employment & Housing Com*. (1987) 43 Cal.3d 1379, 1417 ["Although the ultimate interpretation of a statute rests with the courts, consistent administrative construction of a

[5]DFEH 2008 Case Analysis Manual Update, Chapter 5, ¶ I.3., pp. 95–97 (2008), *available at* http://www.dfeh.ca.gov/DFEH/Publications/CaseAnalysisManual2008Updt/Chapter%205%20Disability.pdf.

statute over many years, particularly when it originated with those charged with putting the statutory machinery into effect and enforcing it, is entitled to great weight and will be followed unless clearly erroneous."].)

This rule of statutory construction is not limited to "a published regulation" (Resp. Brief, p. 29), but rather "[c]ourts must, in short, independently judge the text of the statute, taking into account and respecting the agency's interpretation of its meaning, of course, whether embodied in a formal rule or less formal representation." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.) In *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376 (hereinafter "*Laurel Heights*"), the California Supreme Court applied the rule in interpreting "Guidelines" issued pursuant to the California Environmental Quality Act (CEQA) without regard to whether they did or did not constitute a binding regulation: "Whether the Guidelines are binding regulations is not an issue in this case, and we therefore need not and do not decide that question. At a minimum, however, courts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous … ." (*Laurel Heights*, *supra* at 391 fn.2. See also *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 220 ["The board's interpretation of an ordinance's implementation guidelines is given considerable deference and must be upheld absent evidence the interpretation lacks a reasonable foundation."].)[6]

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[6] Defendant also contends that the DFEH guidelines are not properly before this Court. Defendant, however, did not object to the trial court's consideration of the DFEH directive construing the FEHA to apply *Gambini* in the proceedings below, and should not be heard to do so for the first time now. (See Civ. Proc. Code, § 437c, subd. (b)(5) ["Evidentiary objections not made at the hearing shall be deemed waived."].) Further, the DFEH directive is not merely evidence, but rather legal precedent of a

Defendant then attempts to mislead this Court by selectively quoting from guidelines from the federal Equal Employment Opportunity Commission (EEOC) regarding the ADA. Foremost, this is not an ADA case, it is a FEHA case. Moreover, Defendant's brief fails to quote the final two sentences of the paragraph from the quoted EEOC guidelines, which conclude, "Other conduct standards, however, may not be job-related for the position in question and consistent with business necessity. If they are not, imposing discipline under them could violate the ADA." (IV AA 802.)

2. Defendant Mischaracterizes "Weight" of Federal Authority.

Defendant's statement that "federal law almost unanimously supports the trial court's holding" is irresponsible and demonstrably false.

Just as it has done with *Brundage* and *Gonzalez*, Defendant is mischaracterizing these cases. *Humphrey* is the only *published* FEHA case that directly addresses this issue and its holding is unambiguous: "conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination." (*Humphrey*, 239 F.3d at 1139.) None of the other Federal authorities cited by Defendant are analogous to the instant action, and most certainly none are as directly on point as *Humphrey* and/or *Gambini*.

First Circuit

The plaintiff in *Calef v. Gillette Company*, was "not actually disabled." (*Calef v. Gillette Company* (1st Cir. 2003) 322 F.3d 75, 86.)

California administrative agency, and "[a] reviewing court may take optional judicial notice according to the specifications of Evidence Code sections 452 and 459, subdivision (a)." (*Messenger Courier Ass'n of Americas v. California Unemployment Ins. Appeals Bd*. (2009) 175 Cal.App.4th 1074, 1088.) Accordingly, the DFEH directive that *Gambini* properly states the applicable law under FEHA should be given due consideration.

Further, the actions that led to his termination were not caused by his alleged disability, Attention Deficit Hyperactivity Disorder. Moreover, Calef had a history of violent incidents, including one when he had to be physically separated from another employee. After several of these incidents, Calef was disciplined and given a written warning. When the conduct persisted, he was terminated. Here, Wills is actually disabled and the undisputed evidence is that the conduct at issue was caused by her disability. Moreover, Wills was never violent, there is ample deposition testimony that she never presented a credible threat of harm to anyone, and the Notice of Intent to Terminate from Defendant does not cite to any violence or threat of violence as a reason for her discharge. (I AA 140:15–25; III AA 518–582; VIII AA 1809:24–1810:2.) Further, Wills was never warned prior to her termination, she was just fired.

Second Circuit

The Second Circuit's approach allows an employee to establish that he or she was fired because of a disability if they can show that they were fired for conduct that is "causally related" to that disability. (*Teahan v. Metro-North Commuter R.R. Co.* (2nd Cir. 1991) 951 F.2d 511, 516–517.)

> An example may help to illustrate this point. An employee has one leg shorter than the other, causing him to limp, which we assume is a "handicap" under § 504. The limp causes the worker to make a loud "thump" when he takes a step. He is fired, his employer says, because of the thumping. Under the district court's analysis the employee may not maintain a suit under § 504 because the handicap is the limp, not the thump; hence the worker was not fired "solely by reason of" his handicap, but rather because of an attribute caused by the handicap.

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> Returning again to the limping employee, the district court's analysis would mean that when the employer disclaims reliance—in the absence of establishing the employer's asserted reason as pretextual—the worker is not given an opportunity to show that he is "otherwise qualified." Yet, the proper analysis is that the causal connection between the limp (handicap) and the thump (symptomatic manifestation of the handicap) is such that the employer did "rely" on the handicap.

(*Id.*)

Defendant mischaracterizes key facts in *Sista v. CDC Ixis North America, Inc.* (2d Cir. 2006) 445 F.3d 161, in its effort to provide a misleading portrait of the state of the law across the nation. There was no allegation in *Sista* that the plaintiff's conduct was caused by any mental disability. Michael Sista was demoted from his position as a manager in the structured credit group of an investment bank because was mean to a subordinate. Sista was also informed that if his behavior continued that he ran the risk of being terminated. In response, Sista acknowledged that his behavior was "inappropriate." "After his demotion, Sista became depressed." (*Id*. at 165.) That led to a series of events that ended with Sista attempting suicide by slashing his left wrist.

Accordingly, *Sista* does not involve a case where the conduct was caused by the disability. If anything, Sista's depression was caused by the consequences of his conduct—his demotion. *Sista*, therefore, does not contradict *Humphrey* and *Gambini*, it is irrelevant to that analysis.

In reality, the Second Circuit is in agreement with the Ninth on this issue. In *Sedor v. Frank* (2d Cir. 1994) 42 F.3d 741, the Second Circuit

recognized that an adverse employment action taken due to conduct caused by a disability cannot be distinguished from termination because of the disability itself. "The causal relationship between disability and decision need not be direct, in that causation may be established if the disability caused conduct that, in turn, motivated the employer to discharge the employee." (*Id*. at 746.)[7]

Third Circuit

Sever v. Henderson (3rd Cir. 2007) 220 Fed.Appx. 159, 161–62, an unpublished opinion, was decided on the basis that the plaintiff could not prove that he suffered from a disability when opposing a motion for summary judgment because he only submitted a declaration from a doctor who first saw the plaintiff more than seven years after he had already been terminated. "Although the time frame of [the doctor's] conclusions is uncertain, it is clear that Sever was not under [the doctor's] care until after the gesturing incident took place." (*Id*. at 160.)

Fourth Circuit

Defendant's reliance on *Jones v. American Postal Workers Union*, (4th Cir. 1999) 192 F.3d 417, is equally misplaced. "The principal issue in [*Jones*] is whether a labor union that represents federal employees may constitute a labor organization as that term is defined in the [ADA] and therefore be subject to suit in federal district court for violations of [the ADA]." (*Jones*, 192 F.3d at 417.) Accordingly, *Jones* is a case about jurisdiction, not whether or not conduct caused by disability is part of the disability, and not a separate basis for termination. In one paragraph of dicta at the end, *Jones* summarily concludes that a termination based on employee misconduct is not a violation of the ADA even when the

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[7] Defendant makes the distinction between *Sedor* and *Sista* clear, "*Sedor* focused on an employee whose disability caused him to be absent from work." (Resp. Brief, p. 22, fn. 7.)

misconduct is related to a disability. All but one of the authorities cited by *Jones* in support of this sweeping statement, however, deal with drug and alcohol related disability and support the non-controversial statement that being drunk or high on the job is grounds for termination, even if the employee is an alcoholic or drug addict. *Jones* is also factually distinguishable from the instant action. Jones made an explicit threat to kill a specific person the day he was fired, his doctor expressed concern that Jones could lose control if he returned to work and the Notice of Intent to Discharge stated that Jones was being fired because he was a threat to himself and to others.[8]

Fifth Circuit

The same applies to Defendant's reliance on *Hamilton v. Southwestern Bell Telephone Company* (5th Cir. 1998) 136 F.3d 1047. Hamilton did not prove that he was actually disabled under the ADA or that his disability caused his conduct. "In sum, we find that the record is without support for Hamilton's claim that the mental impairments imposed by his PTSD are severe enough or of sufficient duration to constitute a disability under the ADA." (*Id*. at 1052.)

Sixth Circuit

In *Macy v. Hopkins County School Bd. Of Educ.* (6th Cir. 2007) 484 F.3d 357, Sharon Macy was fired for conduct that led to her conviction for

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[8] Further, even if *Jones* does support Defendant's position, the FEHA unequivocally provides greater protections to California employees than the ADA as interpreted by a court in West Virginia. "We know that the Legislature mandated that every provision of FEHA be construed liberally for the accomplishment of FEHA's purposes. (Gov. Code, § 12993, subd. (a).) We know that the elimination of age and other invidious bases for discrimination in employment is the public policy of this state. (*Id.*, § 12920.) We know that it is the purpose of FEHA 'to provide effective remedies that will eliminate ...' discriminatory practices." (*Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 365, alteration in original.)

nine counts of terroristic threatening under Kentucky law. (*Macy*, 484 F.3d at 362.) Moreover, Macy alleged that the disability in question was physical (head trauma) not mental. Further, Macy failed to present any evidence that her conduct was the result of her disability or that she was fired because of her disability. "Macy argued below that she had presented direct evidence of discrimination, but mentions this argument in her brief on appeal in only one sentence, and only in passing. […]. Accordingly, this argument is forfeited, and we do not address it here." (*Id*. at 364 fn. 3.)

Further, the language that Defendant cites from *Macy* is merely a citation to Sixth Circuit cases dealing with drug and alcohol related disabilities. One of those cases, *Maddox v. University of Tennessee*, *supra*, explains in considerable detail that conduct resulting from drug addiction and/or alcoholism is different than conduct resulting from other disabilities. "Likewise, the ADA specifically provides that an employer may hold an alcoholic employee to the same performance and behavior standards to which the employer holds other employees 'even if any unsatisfactory performance is related to the alcoholism of such employee.' 42 U.S.C. § 12114(c)(4). These provisions clearly contemplate distinguishing the issue of misconduct from one's status as an alcoholic." (*Maddox*, 62 F.3d at 847–848.)

Seventh Circuit

Similarly, the plaintiff in *Palmer v. Circuit Court of Cook County, Illinois* (7th Cir. 1997) 117 F.3d 351, was also not actually disabled—she just did not like her boss. "The judge was certainly correct that a personality conflict with a supervisor or coworker does not establish a disability within the meaning of the disability law." (*Palmer*, 62 F.3d at 352.) Further, Palmer was also violent and made multiple direct threats to kill her supervisor. Additionally, even after the first of these threats, Palmer was not fired, she was warned and suspended. It was only after two

separate suspensions (totaling 17 days) and subsequent statements where Palmer said, "I'm ready to kill her. I don't know what I'll do. Her ass is mine. She needs her ass kicked and I'm going to do it … I want Clara bad and I want her dead" and a phone call to the putative victim where she said, "Your ass is mine, bitch," that Palmer was actually fired.

Eighth Circuit

Defendant admits that, "there is no published Eight Circuit opinion regarding this issue." It then proceeds to misrepresent three cases cited. In *Crawford v. Runyon*, (8th Cir. 1994) 37 F.3d 1338, the Eighth Circuit reversed summary judgment that had been granted in favor of an employer against an employee who claimed employment discrimination. The court found that a triable issue of material fact existed as to whether or not the employer's proffered reason for terminating the plaintiff was pretextual. (*Crawford*, 37 F.3d at 1342.) Accordingly, not only does *Crawford* not say what Defendant claims that it does, the case actually supports Wills's position.

Defendant's citation to the unpublished *Rosenthal v. Webster University* (8th Cir. 2000) 230 F.3d 1363, suffers from the same issue its reliance on *Brundage* above—it is a notice case. "[W]e conclude defendants were entitled to judgment as a matter of law because Rosenthal did not produce any valid evidence that defendants knew of his bipolar disorder before they suspended him and set the conditions for his readmission."[9]

[9] Defendant's reliance on the unpublished *Lang v. Washington University School of Medicine* (8th Cir. 1998) 141 F.3d 1169, is particularly desperate. The "opinion" is nothing more than a short one paragraph affirmation of a lower court ruling that provides no facts or analysis. It is impossible to understand from this ruling how it bears any relation to the case at bar.

Tenth Circuit

Defendant fails to address the multiple authorities provided in Appellant's opening brief from the Tenth Circuit that support *Humphrey*, *Gambini* and their progeny. Throughout the federal jurisprudence, courts uniformly hold that antidiscrimination law "does not contemplate a stark dichotomy between 'disability' and 'disability-caused misconduct,' but rather ***protects both***." (*McKenzie v. Dovala* (10th Cir. 2001) 242 F.3d 967, 974, quoting *Nielsen v. Moroni Feed Co*. (10th Cir. 1998) 162 F.3d 604, 608 and *Den Hartog v. Wasatch Acad*. (10th Cir. 1997) 129 F.3d 1076, 1088, emphasis added.)

Eleventh Circuit

Earl v. Mervyns, Inc. (11th Cir. 2000) 207 F.3d 1361, actually demonstrates Defendant's failings to accommodate Ms. Wills and her disability. Debra Earl was terminated for excessive tardiness allegedly caused by obsessive compulsive disorder. Her employer had a corporate policy allowing for 15 "punctuality infractions" in a 365 day period and establishing a three-step corrective action to employees in violation of the policy. After being late 33 times within the relevant time period, Earl was given multiple warnings and offered accommodations that were not offered to any other employee, Earl was still unable to get to work on time. Earl's doctor "admitted that no other accommodations for her OCD would have allowed her to arrive to work on time." (*Earl*, 207 F.3d at 1364.) Her employer finally concluded, and the court agreed, that her inability to arrive at work on time despite every reasonable accommodation rendered her unable to perform essential job functions.

Here, Wills was not offered any warnings or accommodations—she was just terminated. Further, there is no allegation that Wills was unqualified for her position or that she was unable to perform essential job functions. *Earl* does not support the proposition that an employer is

entitled to disregard the cause of an employee's conduct—it shows what an employer should do to attempt to accommodate a disability.

Defendant's citation to *Williams v. Motorola, Inc.* (11th Cir. 2002) 303 F.3d 1284, is even more bizarre because the case is irrelevant to the issue before this Court. Melanie Williams was fired because of her "inability to work with others, not to mention engaging in threats of violence and insubordination." Williams did not ever argue that these issues were caused by a disability but rather argued that she was fired because she refused to submit to a medical exam (and because she was sexually harassed and discriminated against).

Accordingly, it is readily apparent that Defendant's contention that the "weight" of authority from other Federal Circuits supports its position is false.

3. Defendant Makes Desperate Effort to Avoid Ninth Circuit Precedent.

Instead of accepting unequivocal authority from cases that are directly on point and from the federal circuit covering California, Defendant looks to Courts from Kentucky and West Virginia to make its case—and even then is forced to resort to blatant mischaracterizations of those authorities.

i. Humphrey *is As Close to a Controlling Authority As Exists.*

First and foremost, *Humphrey* is a FEHA case and it held that under California's Fair Employment and Housing Act, the statutory basis for Wills's claims in the instant action, that, "conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination." (*Humphrey*, 239 F.3d at 1139.) Although not technically binding authority, *Humphrey* is more than merely persuasive here because it is well settled that, "because the FEHA provisions relating to disability discrimination are, in fact, based on the ADA, and other

federal law decisions interpreting federal antidiscrimination laws are relevant in interpreting the FEHA's similar provisions." (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 948.) Further, *Humphrey* is the only published FEHA opinion specifically addressing this issue. As set forth above, *Brundage* and *Gonzalez* are irrelevant to this analysis.

Defendant's effort to distinguish *Humphrey* because it did not involve alleged threats is of no moment. Foremost, in *Gambini*, *Humphrey* was extended to include a case involving threats. Further, the distinction is immaterial as the rule from *Humphrey* is clear: "conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination."

The same can be said for Defendant's attempt to distinguish *Humphrey* by calling it an "accommodation" case. Defendant is conflating the issues of accommodation and discrimination, which are separate and distinct. The Superior Court below was confused by this attempted distinction and this argument was addressed in Wills's opening brief. (AOB, § V.A.6.i.)

ii. Gambini *Is On All Fours With the Instant Dispute.*

Defendant attacks *Gambini* for every reason it can think of—all of which lack merit.

a. *Gambini* is Factually Analogous to Instant Action.

Defendant also claims that *Gambini* is factually distinguishable because there, Stephanie Gambini was supposedly "terminated because her supervisors believed that her bipolar condition created a threat to safety, not because she made specific threats." This, despite the fact Gambini warned her supervisors that they "will regret this." (*Gambini*, 486 F.3d at 1092.) Defendant claims this is different than what it accuses Ms. Wills with

respect to the "Kill Bill" incident with Officer Gardetto, but fails to explain how. Similarly, Gambini was terminated, in part, for sending inappropriate emails. (*Id*. at 1094.) Again, this is yet another example of what Ms. Wills was terminated for but according to Defendant, it is somehow a distinction between the two cases.

The facts demonstrate that *Gambini* is on all fours with the instant action. If anything, Stephanie Gambini's conduct was far more egregious than what Ms. Wills is accused of.

b. *Relevant Portion of* Gambini *is Not Dicta.*

Next, Defendant attempts to dismiss the relevant portion of *Gambini* as mere dicta. The argument that follows is confused and confusing. For example, Defendant attacks *Gambini* as a "poorly reasoned exposition of *Washington law*." This statement, however, ignores that the Washington State Supreme Court, "has stated explicitly: Conduct resulting from the disability … is part of the disability and not a separate basis for termination." (*Id*. at 1093, citing *Riehl v. Foodmaker, Inc.* (Wash. 2004) 94 P.3d 930, 938.) Accordingly, *Gambini* does not interpret Washington law, it quotes it.[10] It also notes that Washington law on this point is based in large part on *Humphrey*, "which in the context of the Americans With Disabilities Act ('ADA') similarly articulated that 'conduct resulting from a

[10] It is also worth noting that Washington State law, therefore, also recognizes that conduct resulting from a disability is considered part of the disability, rather than a separate basis for termination and that the Washington State Supreme Court has adopted *Humphrey*. This is particularly significant because the analogous Washington State statute is "similar to the ADA and the FEHA." (*Humphrey*, 239 F.3d at 1136 fn. 12, *see also Bowen v. Ziasun Technologies, Inc.* (2004) 116 Cal.App.4th 777, 790 [recognizing that the Ninth Circuit's application of a federal law, or its interpretation of a similar law from another state, is persuasive when interpreting a California law].)

disability is considered part of the disability, rather than a separate basis for termination.' As a practical result of that rule, where an employee demonstrates a causal link between the disability-produced conduct and the termination, a jury must be instructed that it may find that the employee was terminated on the impermissible basis of her disability." (*Id*. at 1093.)

Further, the portion of *Gambini* explaining that conduct resulting from the disability is part of the disability and not a separate basis for the termination is not mere dicta, it is central to the resolution of the holding. (*Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 432 ["the definition of [ ] was central to the resolution of the holding in [ ]. Hence, we cannot agree with the dissent that the definition of [ ] in [ ] was 'sheer dictum."].)[11]

c. *Gambini* Has Been Endorsed by the DFEH.

As set forth above, *Gambini* has been expressly endorsed by the California Department of Fair Employment and Housing, the California agency tasked with enforcing the FEHA.

d. *Gambini* is Good Policy.

Defendant also calls *Gambini* an "ill-conceived, improper extension of disability rights." The defendants in *Gambini*, just as Defendant does here, claimed that the rule enunciated in that case would be a nightmare of epic proportions. The Ninth Circuit dismissed those concerns and recognized that "our holding is thus far less controversial and sweeping that [defendant] and the amici proclaim." (*Gambini*, 486 F.3d at 1090.)

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[11] Defendant's Footnote 10 is a tautological contortion. Merely because Defendant continues to demand that *Brundage* and *Gonzalez* say that which they plainly do not or that myriad federal authorities supposedly exist disagreeing with *Humphrey*, *Gambini*, *Dark* and the Second Circuit, does not make it so. *Gambini* is persuasive, *inter alia*, because it is factually on all fours and because it is based on *Humphrey*, a FEHA case, and Washington State law that is modeled after FEHA.

The rule urged by Defendant would eviscerate the rights of the disabled. This is because, "***if the law fails to protect the manifestations of her disability, there is no real protection in the law because it would protect the disabled in name only***." (*Id*. at 1095, emphasis added.) Conversely, the rule as explained by *Humphrey*, *Gambini*, *Dark* and their progeny is commonsense and perfectly logical. It is also good policy that is the only true way to protect the rights of those suffering from mental disabilities.

Defendant's arguments are a mirror of those espoused by every opponent of progress and recognition of the rights of the oppressed throughout history. The supposed slippery slope—the notion that the most absurd possible outcome will be realized if these rights are recognized is—not a legitimate justification for the discrimination of the disabled and Defendant has failed to articulate a sensible alternative.

iii. Dark *is Relevant.*

Defendant then attacks *Dark v. Curry County* (9th Cir. 2006) 451 F.3d 1078, because it does not specifically deal with the exact facts at issue in the instant action and/or contemplate every single scenario that could possibly arise in the future. If Defendant wants a case that is practically factually indistinguishable from the case at bar—it need look no further than *Gambini*. *Dark*, however, is factually relevant because the employer there, just as Defendant here, contended that it was entitled to terminate the employee because of his conduct – irrespective of the cause.

a. Standard Employed by Ninth Circuit is Logical and Sensical.

In its discussion of *Dark*, Defendant misses the point. Defendant contends that "Wills's proposed rule oversteps the intent of the FEHA, creates an absurd rule, and leads to problematic results." To the contrary, *Humphrey* recognizes that "with few exceptions, conduct resulting from a

disability is considered to be part of the disability, rather than a separate basis for termination." (*Humphrey*, 239 F.3d at 1139–1140.) *Dark* discusses those exceptions: (1) where the disability is alcoholism or drug addiction or (2) where the conduct is criminal or egregious. Accordingly, *Dark* further refines *Humphrey* and *Gambini* and recognizes that an employer cannot separate out conduct caused by a disability from its cause unless one of the two exceptions are met. There is nothing ill-conceived or flawed about this reasoning, it is perfectly logical and consistent with the intent of the ADA and the FEHA. Allowing employers to terminate employees because of conduct caused by a disability and disregarding the disability is the illogical result that runs counter to the letter and spirit of the FEHA. Rather, the rule enunciated by the Ninth Circuit protects both the employee and the employer.

b. Wills's Conduct Was Neither Criminal Nor Egregious.

Defendant then posits that even if the "criminal and egregious" standard is employed, it was still entitled to summary judgment. Foremost, whether or not Wills's alleged conduct rose to the level of "criminal and egregious" is, at best, a disputed issue of material fact and is not appropriate for resolution by summary judgment. Defendant continues to take great liberties with the record and the fact is that it is inflammatory accusations are not supported by the facts. (See, *infra*, § II.A.)

Further, even accepting *arguendo* Defendant's inflated version of the facts, Wills's conduct would still not be criminal or egregious. As explained in *Dark*, the "criminal or egregious" exception is reserved for definitive acts of egregious conduct. The court noted that, "***Attempting to fire a weapon*** at individuals is the kind of egregious and criminal conduct which employees are responsible for regardless of any disability." (*Id*.,

quoting *Newland v. Dalton* (9th Cir. 1996) 81 F.3d 904, 906, emphasis added.)

4. Defendant's Proposed Interpretation of the Law Would Provide No Protections to the Disabled—It is the Absurd Proposal.

Defendant concludes this section of its brief by reiterating the calamity that would befall California if the rights of the disabled were actually protected. Calling *Humphrey*, *Gambini*, *Dark* and their progeny "poorly reasoned," Defendant urges this Court to allow employers to discriminate by, as the Second Circuit reasoned in *Teahan*, disregarding the fact that the thump is caused by the limp. The fact, however, is that unless California follows the law as enunciated by *Humphrey*, there will be no protections for the disabled.

Foremost, it is important to note that merely because Defendant continues to foist its flawed interpretation of *Brundage* and *Gonzalez* on the Court does not make it correct. No published opinion of the Courts of this State have addressed this issue and there is no "weight" of federal authority on Defendant's side. Conversely, the Ninth Circuit—along with the Second and Tenth—have unequivocally held that the only way to effectively protect the rights of the disabled to is prohibit employers from separating disability related conduct from its cause.

Defendant then suggests that the FEHA and legislative intent behind the statute support its proposed rule. In the argument under this heading, however, Defendant provides nothing in support of this outlandish contention. Rather, Defendant merely posits that because there is no explicit reference to the adoption of a rule to expressly protect the rights of the disabled in this fashion—it does not exist. This point, however, ignores the plain language of the authorities cited in Appellants Opening Brief that provide, "[T]he protections provided employees by FEHA are broader than

those provided by the ADA. [citations omitted]. To further the societal goal of eliminating discrimination, ***the statute must be liberally construed to accomplish its purposes and provide individuals with disabilities the greatest protection***." (*Gelfo*, 140 Cal.App.4th at 60, emphasis added. See also Gov. Code, § 12993, subd. (a) ["The provisions of this part shall be construed liberally for the accomplishment of the purposes of this part."]; *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1026 [discussing the legislative intent of amendments to FEHA in detail and concluding that the purpose was to "'to strengthen California law where it is weaker' than the ADA," and "'retain California law when it provides more protection for individuals with disabilities than' the ADA"], quoting Stats. 1992, ch. 913, § 1, p. 4282.)

Accordingly, despite the fact that Defendant criticizes the suggestion that California law requires the most encompassing and broadest protection possible for employees—that is exactly what the law requires. This is further reinforced by the fact that the DFEH, the agency charged with enforcement of the FEHA, has itself adopted *Gambini* as the appropriate rule of law in California.

The "workable and common-sense framework" urged by Defendant is neither. It is rather a sacrifice of the rights of the disabled to their employers who would be able to terminate any employee regardless of whether or not the conduct leading to their termination was caused by a disability. Defendant would no longer dare make an argument of this nature if the disability in question involved use of a wheelchair or some other physical disability. Similar rationales were once used to prohibit interracial marriage and employment for homosexuals in certain jobs.

The hysterical calamity foretold by Defendant is a scare tactic—an excuse to avoid equal protection under the law to those amongst us who

suffer from mental disabilities.[12] It is not an absurd or illogical rule: conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination. (*Humphrey*, 239 F.3d at 1139.) This is because, if the law fails to protect the manifestations of her disability, there is no real protection in the law because it would protect the disabled in name only. (*Gambini*, 486 F.3d at 1093.) The exceptions to this rule are (1) where the disability is alcoholism or addiction to illicit drugs (*id*. at 1084, fn. 3, citing *Humphrey* and 42 U.S.C. § 12114(c)(4)); and (2) where the conduct is criminal or egregious (*id.*). Employees must still prove that they are qualified for the position and employers are still able to raise a "business necessity" or "direct threat" defense against the discrimination claim and/or that the proposed reasonable accommodation poses an undue burden. (*Id*. at 1090.) Each case must be judged on its own merits and these questions answered on an individual basis. Accordingly, this rule should not be controversial. It should be seen for what it is, the only legitimate means by which the rights of the disabled can be protected.

Conversely, Defendant is not seeking to strike any sort of balance and would sacrifice the rights of the disabled to its own sense of convenience and expediency. This is not what the law requires and it is not good policy.

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[12] Defendant relies on *Brown v. City of Salem* (D. Or. 2007) 2007 WL 6711336, to further is frenzied prophecy of doom should the rights of the disabled be protected. All that *Brown* actually does is conclude that a triable issue of material fact exists as to whether or not Mr. Brown was fired because of his sleep apnea or not and so finds that summary judgment was not appropriate. It does not say that Brown must be kept in his position, that he cannot be terminated or that there are no accommodations that can resolve the issue. Does Brown use a C-PAP machine which are commonly used to treat sleep apnea? Are there other accommodations that can be made to resolve the issue? Does the City of Salem have a legitimate business necessity defense? None of these questions are answered, or even addressed, by *Brown*, which merely says that they are for a jury to resolve.

C. Wills Filed a Verified DFEH Charge, for which She Received a Right-to-Sue; the Only Question Pertaining to the DFEH Charge before this Court is the Scope of that Charge as it Relates to This Action.

Defendant's argument in favor of the exhaustion doctrine is purely one of paperwork—not of substance, procedure, nor law.

1. Defendant Cites No Authority Supporting Its Constrained, Tortured Reading of the DFEH Charge—the Charge Must Be Read Liberally.

Defendant argues again, as it did before the trial court, that the Court should apply the hyperformal, hypertechnical, anti-employee "wrong box" argument for construing DFEH-prepared form complaints. (Resp. Brief, pp. 11–12.) Although Defendant tacitly accepts that the additional hoops it wants Wills to jump through would not have lead to any other administrative remedies, it insists that a pointless procedural exercise was necessary in this case. Defendant cites no authority for this proposition.

To the contrary, the law is clear that "wrong box" arguments are impermissible. (See, e.g., *Sanchez v. Standard Brands, Inc.* (5th Cir. 1970) 431 F.2d 455, 462.) In *Sanchez*, the Fifth Circuit held: "We turn first to Standard Brands' contention that Celia Sanchez is irrevocably bound by the fact that she checked only the box labeled 'sex' when she executed her original charge of discrimination. We reject this contention because we conclude that her failure to check the box labeled 'national origin' was a mere 'technical defect or omission' … ." (*Id*.) *Sanchez* is the test adopted by California courts for determining the sufficiency of DFEH charges with regard to the exhaustion doctrine. (*Baker v. Children's Hospital Medical Center* (1989) 209 Cal.App.3d 1057, 1063.) *Sanchez* definitively rejects the "wrong box" argument advanced by Defendant.

Defendant's generic authority only points out that a verified charge must be filed, which Wills did. Defendant dismisses out of hand that informal communications with the DFEH are evidence of the proper scope

of a DFEH charge (Resp. Brief, p. 15–16); but the authority cited merely states that a verified charge must be filed to exhaust administrative remedies. (*Rodriguez v. Airborne Express* (9th Cir. 2001) 265 F.3d 890, 897; *Cole v. Antelope Valley High School District* (1996) 47 Cal.App.4th 1505, 1515.)

In fact, the federal authority cited by Defendant squarely supports Wills in this case.[13] In *Rodriguez*, the complaining employee told the DFEH consultant that he wanted to file a disability discrimination claim. (*Rodriguez*, *supra* at 894.) The DFEH consultant told the employee that he could only file a race discrimination claim and proceeded to do so, marking the wrong box for "RACE" on the charge form, but not the box for "DISABILITY." (*Id*. at 894, 895) After the employee's disability discrimination claim was summarily adjudicated by the trial court for failure to exhaust administrative remedies, the Ninth Circuit reviewed a declaration by the employee stating he had asked for a disability discrimination charge, as well as the DFEH consultant's notes of the pre-complaint interview, which did not specifically discuss facts pertinent to disability. (*Id*. at 894–895, 900–901.) The Ninth Circuit rejected the employer's "wrong box" argument and concluded that, based on the evidence in the employee's declaration regarding what he alleged to the DFEH informally, there was a triable issue of material fact as to whether he had failed to exhaust administrative remedies. (*Id*. at 902.) Thus, under *Rodriguez*, informal discussion with DFEH consultants ***does*** impact the scope of the formal DFEH charge for purposes of the later court action.

Rodriguez agrees with California courts on the liberal interpretation of DFEH charges. Constrained readings of a DFEH charge do not further the purpose of the agency or FEHA; they hinder it. Accordingly, the courts

[13] To the extent it is applicable, *Cole* also supports Wills. (See AOB, pp. 3, 36, 40, 42.)

do not place unnecessary obstacles in front of unrepresented claimants trying to avail themselves of administrative remedies simply on the basis of an obscure procedural misstep made with the errant advice of a lay DFEH bureaucrat. (See *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 267–268.)

Most significantly, Wills offers much more evidence of her communications with the DFEH than the plaintiff in *Rodriguez*. While Rodriguez was only supported by his own affidavit regarding informal communications with the DFEH, Wills has her own affidavit (VII AA 1516–1518[14]), plus the corroborating DFEH documentation that she actually did complain about disability discrimination to the agency (VII AA 1521).

2. *Nazir* is Directly On Point.

Defendant brushes aside the most significant case on the issue, *Nazir v. United Airlines, Inc.*, *supra*, by trying to distinguish it factually in a footnote. (Resp. Brief, p. 13, fn. 4.) Defendant claims that *Nazir* shows two facts not present here: (1) an error on the part of the DFEH in completing the charge; and (2) evidence on the DFEH record to support additional claims. These attempts to distinguish are meritless. First, *Nazir's* holding as to the sufficiency of the DFEH charge makes no mention of some error by the DFEH—the key issue is whether or not the claimant made some request for the agency to act. (*Nazir*, 178 Cal.App. 4th at 269 [holding that informal communications with the DFEH were a "request for

[14] Wills's declaration in opposition to motion for summary judgment includes the following: "I told the DFEH official that I wanted to file a disability discrimination complaint. I told the DFEH official that I had been terminated because of my disability. I also told the DFEH official that I knew I had been terminated because of my disability because the OCSC's reasons for termination were all caused by my disability, and most had taken place while I was out of the office on medical leave." (VII AA 1517:16–23.)

the DFEH 'to act'" and therefore exhausted administrative remedies].) Second, the DFEH dismissed the relevant charge in *Nazir* because, "the investigation did not reveal sufficient evidence or information to establish that a violation of the FEHA occurred." (*Id*. at 265.) This is exactly what Defendant argues happened here. Accordingly, Defendant offers nothing substantive to distinguish *Nazir* from this case, or to indicate why it should not apply.[15]

3. The Facts in Wills's DFEH Charge are In a "Chain of Related Actions" with the Claims in the Judicial Complaint.

Defendant alternatively argues that the allegations in the DFEH charge are not "like or related" to the judicial claims under the *Sanchez* test. (Cf., *Baker*, 209 Cal.App.3d at 1065 [holding that administrative remedies are exhausted for the purposes of a FEHA claim so long as any additional judicial claims "could be characterized as describing 'a chain of related actions.'"].) Defendant cites no analogous authority for the proposition that Wills's DFEH charge was not "like or related" to her court complaint. (Resp. Brief, pp. 14–15.) Rather, Defendant offers an *ad hoc* argument that, because the wrong box was checked, no investigator would be able to figure out that Wills had a disability or that the disability was the basis for the "discrimination" that Defendant admits is alleged in the DFEH charge.

Defendant's position is unreasonable. The DFEH charge states that Wills took a "***medical*** leave" and that she was prevented from returning to work after she took that leave "pending an investigation." (III AA 722,

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[15] *Nazir* is a recent case, but it has already been cited several times, including approval from the California Supreme Court on a different issue. (*Reid v. Google, Inc.* (Aug. 5, 2010 S158965) ___ Cal.4th ___, p. 24; see also *Thompson v. City of Monrovia* (June 14, 2010 B216252) ___ Cal.App.4th ___, p. 18–19; *Bozzi v. Nordstrom, Inc.* (July 13, 2010 B217782) ___ Cal.App.4th ___, pp. 6, 11; *Rome v. GlaxoSmithKline Beecham Corp.* (9th Cir. Feb. 16, 2010) 08-56688, p. 3 [unpublished].)

emphasis added.) These are the essential facts of the case at bar. Any reasonable investigation would reveal that the reason Wills took a medical leave was due to her disability (she was hospitalized in a psychiatric ward for most of that time during a severe manic episode [see VII AA 1524–1526]). Likewise, any reasonable investigation would reveal that the reason for the investigation discussed in the charge was to determine if Wills was to be terminated because of conduct caused by her disability. (See, e.g., III AA 519, under "Current Issues.")

Defendant's argument asks this Court to conclude that a reasonable investigation under the *Sanchez* test would not reveal the reasons for the two main facts in the DFEH charge. There is no basis for Defendant's forced conclusions that, for example, a reasonable investigation of facts surrounding a medical leave would not include determining the medical condition necessitating the medical leave. Such conclusions are contrary to the law and common sense.

4. Boilerplate Instructions on a DFEH Form Letter are Not Relevant.

Defendant also argues that the DFEH told Wills to file the non-investigated complaint "precisely" because the operative complaint did not support disability-related claims. (Resp. Brief, p. 15.) Defendant offers nothing in support of that naked claim. The DFEH sent Wills a form letter advising that she would need a right-to-sue in order to pursue her claims for disability discrimination. The form letter clearly assumes that the non-investigated complaint is the only pending DFEH charge and that the complainant will not be able to obtain a right-to-sue otherwise.[16] Since Wills did receive a right-to-sue after informing the DFEH that she was

[16] The actual "admonition" in the DFEH letter states: "To protect your right to file a private lawsuit and include in that lawsuit the allegations you made to the Department of Fair Employment and Housing, you may file a non-investigated complaint to obtain a right to sue letter." (VII AA 1520.)

discriminated against on the basis of disability, the boilerplate language in the letter is meaningless here.

5. Defendant Offers No Argument that Requiring Wills to Complete the Non-Investigated Complaint Form or that Barring Her Action Here Would Further the Public Policy behind FEHA.

The public policy considerations behind the FEHA administrative framework are twofold: (1) to provide fair notice of the facts to the putative defendant (*Hobson v. Raychem Corp.* (1999) 73 Cal.App.4th 614, 630); and (2) to promote governmental and societal ends including efficiency and conciliation (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 86).

Defendant does not present any evidence or argument that it was deprived of any opportunity to be involved in the administrative proceedings. Given Defendant's lengthy argument and documentation before the DFEH (e.g., VI AA 1375–1383), only the contrary conclusion is possible. In addition, Defendant presents no evidence or argument that the societal benefits of FEHA would be served by applying its suggested draconian rule. Instead, every argument advanced solely relates to the sufficiency of the paperwork for its own sake. (Resp. Brief, pp. 10–16.)[17]

D. Defendant is Estopped From Claiming that the Evidence It Provided of Similarly Situated Employees Cannot be Considered by the Court; Other Incidents Where Employees Reported "Fear" as a Result of Another Employee's Conduct are Similar *Per Se*.

[17] Defendant offers the one-sentence conclusion that it was not made aware of "any specific allegations" during the administrative proceedings (Resp. Brief, p. 16), but does not offer any accounting of the allegations for which notice was supposedly lacking or why the chief arguments presented on its behalf in the administrative proceeding (VI AA 1375–1383) are identical to the ones presented today in Defendant's Brief. If there were some claim or allegation in the judicial complaint for which Defendant did not have notice at the time of the administrative procedures, one would reasonably expect that Defendant's arguments would change and expand upon notice of the additional allegations in the judicial complaint—not so here.

In addition to the fact that Defendant terminated Wills only for conduct inseparable from her disability, the termination was discriminatory under the theory of disparate treatment. Before the trial court, and in the record on appeal, Wills demonstrated that on no less than six occasions Defendant was faced with the same conduct by its own standards, but only one occasion (Wills), did it terminate the employee.

Contradicting its argument before the trial court, Defendant now argues that there is no evidence of any similarly situated individuals who were subject to discipline. Puzzlingly, Defendant itself argued and provided evidence of three similar incidents in support of its summary judgment motion. Moreover, Wills herself was a victim of a further incident and yet a further incident was uncovered during the deposition of one of Wills's supervisors. Defendant's attempt to disclaim this evidence for the first time on appeal is improper procedurally, and damaging to the credibility of Defendant's arguments.

First, Defendant is estopped from claiming that the incidents in the Rohde Declaration are not similar. Defendant offered the Rohde Declaration before the trial court for the purpose of showing that similarly situated employees were similarly disciplined. (I AA 83–84 [citing to the Rohde Declaration to support, e.g., that "[i]n the past when the OCSC has concluded that an employee has engaged in conduct reasonably perceived as threatening, it has imposed discipline up to and including termination"].) Defendant cannot now recant that offer just because the evidence does not proof what they said it would prove. It is axiomatic that a party on appeal cannot contradict its prior arguments to the trial court.

Second, Wills presented uncontroverted evidence of her own experience being threatened by coworkers and being fearful. (III AA 699, fn. 5; VI AA 1458:14–1459:3, 1469:11–14.) Independent investigation of the incident found that Wills was reasonably fearful of this threat. (III AA

705 ["I find that a reasonable person would have taken offense … ."].) Wills then presented evidence of another incident with an employee named Angela Piccola, who supervisors testified made others "afraid." (VI AA 1484:13–16.) Finally, Defendant itself offered a declaration of one of its supervisors regarding three situations it claimed were similar, and it claimed resulted in discipline. (I AA 155 [Rohde Declaration].) Wills pointed out that of the individuals Defendant claimed were similarly situated, none were terminated, and only one was subject to any actual discipline in the form of a 10-day suspension. (AOB, pp. 28–29.)

Defendant responds now that the five other employees were not similarly situated. (Resp. Brief, pp. 43–45.) It claims that it investigated the "Elevator Incident" reported by Wills (coworkers threatened to "beat her up") and found that it actually did happen, and that Wills was reasonably concerned or "offended" about the event. This conclusion was reached after retaining independent counsel to conduct the investigation. These facts in Defendant's Brief alone provide sufficient basis for finding disparate treatment, because Defendant did not retain independent counsel to investigate the claims that Wills made threats.

In addition, the sole criterion used by Defendant to determine whether or not Wills made a threat was that the supposed target of the threat was fearful as a result. (See Resp. Brief, pp. 4, 5, 40–41.) If Wills was reasonably afraid of the Elevator Incident, and Piccola made others fearful, then—by Defendant's own argument—the incidents must be similar.

Defendant's attempts to argue around these admissions are not persuasive. The disparate treatment of all other similarly situated employees is apparent on its face when considering that Defendant thought termination was proper for Wills due to the "fear" allegedly caused by Wills's conduct. If "fear" is the basis for termination, it must be uniformly

applied. When multiple employees caused "fear" and only one is terminated, and that one is also the only one disabled, that evidence supports a finding of disability discrimination.

E. Disputed Issues of Material Fact Preclude Entry of Summary Judgment in Favor of Defendant.

In response to the argument that the Superior Court below improperly weighed evidence and made inferences in favor of it, Defendant argues that: (1) no inferences were made and (2) even if they were, the error was harmless. Defendant correctly does not dispute the law that requires the court below to make all reasonable inferences from the evidence presented in favor of Appellant and must resolve any doubts as to whether a triable issue of material fact exists in favor of Appellant. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

Defendant cannot credibly dispute that the Superior Court below both drew inferences and weighed evidence and that it did both in favor of the Defendant. For example, the trial court found that it was "beyond dispute that the Anaheim Police Department took [Wills's] statements [regarding "Kill Bill"] seriously as a potential threat." (VIII AA 1917.) However, this issue was hotly disputed, including Wills's testimony that Officer Gardetto (the only officer that actually heard the alleged comments) laughed at her comment (VI AA 1449:21–1450:7; VII AA 1526), and extensive testimony from the supervising officer that, for example, it was complete "speculation" in the department's view as to whether any threat had been made (VI AA 1409:22–1410:16 [e.g., "Whether it was a threat or not, you know, had yet to be determined." "… ***there was no reason to believe that she was going to follow through on something like that***."]), and that there was no need for additional department resources to be used to protect against any supposed threat posed by Wills (VI AA 1407:21–1408:2). The reasonable inference here is the opposite of the one the trial

court made—specifically, that the Anaheim Police Department did not take the comments as a threat. The trial court drew all inferences in favor of Defendant on this issue, and ignored the directly contradictory evidence that established a triable issue of material fact as to whether any of Wills's alleged conduct can be called threatening. Defendant disregards these facts as mere "conflicting evidence." Although Defendant claims that Appellant is mischaracterizing the significance of these facts, they are admissions made and are, by any objective measure, sufficient to create triable issues of material fact—particularly so because they are supposed to be viewed in a light most favorable to Ms. Wills. The Superior Court below failed to acknowledge the existence of these material issues of disputed fact and as such, erred in granting summary judgment.

Similarly flawed was the Superior Court's determination that the harassment endured by Wills "does not rise to the pervasive and severe level that is actionable." (VIII AA 1917.) Wills was cornered in an elevator and surrounded by a group of hostile co-workers who threatened that one would hold her so another could "kick her ass." (VI AA 1458:25–1459:2; III AA 699, fn. 5 [Independent Counsel Report].) These facts were admitted by Defendant—they were drawn from a report generated by Defendant's investigating counsel. Despite that fact, they were deemed by the Superior Court below to be inconsequential whereas an incoherent email sent from her personal account while she was on leave and a joke to a very large and armed police officer about putting him on a "Kill Bill" list were sufficient grounds for termination. That is an exercise in weighing the evidence and in drawing inferences in favor of the moving party on a motion for summary judgment. It is possible that a jury may make the same conclusion, albeit unlikely. That is not the point, however. The point is that the determination is for the jury to make a trial—not for the Court to make on a motion for summary judgment.

It is undisputed that Wills was not terminated because she posed any actual threat or potential threat, or because of job performance. (VII AA 1711–1712.) Nonetheless, she was terminated for conduct that is not even remotely as egregious as that engaged in by the mob of angry coworkers who trapped her in an elevator and threatened her with immediate physical harm. Why is the Defendant entitled to an inference that the conduct of these other employees (who were not disciplined for their admitted "poor judgment") but Wills is not? The standard on summary judgment was reversed by the Superior Court below and accordingly, the judgment entered in favor of Defendant must be reversed.

IV. CONCLUSION.

For the foregoing reasons, the Court should reverse the Summary Judgment granted in favor of Defendant and remand the action to the Superior Court for further proceedings.

Dated: August 24, 2010

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CERTIFICATE OF COMPLIANCE/WORD COUNT

Pursuant to California Rules of Court, rule 8.204, subdivision (c)(1), I certify that the attached document was prepared using Microsoft Word 2007 for Windows and that, based on this software's word count feature, the text of this brief, including footnotes but not including tables, contains 13,926 words.

Dated: August 24, 2010

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