IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MADDIE WADE, Plaintiff and Appellant, v. STARBUCKS CORPORATION and DUSTIN GUTHRIE, Defendants and Respondents.	Appellate Case No. F079838 Fresno County Superior Court Case No. 18CECG02779

Appeal from the Superior Court for the County of Fresno
Honorable Kimberly A. Gaab

APPELLANT'S OPENING BRIEF

Arnold P. Peter (SBN 120091)
Eyal Farahan (SBN 314849)
PETER LAW GROUP
1230 Rosecrans Avenue, Suite 150
Manhattan Beach, CA 90266
Tel: (310) 277-0010
Fax: (310) 432-0599
Email: apeter@peterlawgroup.com
efarahan@peterlawgroup.com

Lindsay Nako (SBN 239090)
David S. Nahmias (SBN 324097)
IMPACT FUND
2080 Addison Street, Suite 5
Berkeley, CA 94704
Tel: (510) 845-3473
Email: lnako@impactfund.org
dnahmias@impactfund.org

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, rule 8.208)

There are no interested entities or persons to list in this certificate.
(Cal. Rules of Court, rule 8.208(e)(3).)

Dated: April 23, 2020 PETER LAW GROUP

By /s/
Arnold P. Peter
Eyal Farahan

Dated: April 23, 2020 IMPACT FUND

By /s/
Lindsay Nako
David S. Nahmias

Attorneys for Plaintiff and Appellant
Maddie Wade

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

State Cases

Federal Cases

Statutes

Code Civ. Proc.

Gov. Code

Regulations

Cal. Code Regs.

Other Authorities

INTRODUCTION

Maddie Wade appeals the judgment of the Superior Court for Fresno County following its order granting summary judgment to her former employer Starbucks Corporation and her former store manager Dustin Guthrie. Ms. Wade alleges workplace discrimination, harassment, wrongful constructive termination, and intentional infliction of emotional distress based on the hostile treatment she received after informing her manager that she is transgender.

Ms. Wade had been building a career with Starbucks for eight years when she met with her store manager, Mr. Guthrie, in October 2017 to tell him that she was transgender and starting a gender-affirming transition from male to female. She was an excellent employee and had built a productive relationship with Mr. Guthrie. After learning Ms. Wade is transgender, however, Mr. Guthrie's friendly and supportive manner turned hostile. He began to avoid her, spoke to her in a curt manner, changed her previously reliable work schedule, reduced her hours, and dropped previous offers to help her advance her career. He also refused to use her requested name and pronouns, and only referred to her by her former name and male nicknames—knowingly violating company policy protecting transgender employees. While Ms. Wade's coworkers generally showed her kindness and respect during her transition, they confirmed that Mr. Guthrie did not.

Ms. Wade attempted to discuss Mr. Guthrie's hostile behavior with him multiple times, but he rebuffed her. She ultimately transferred locations and reached out to other Starbucks managers to complain about Mr. Guthrie's treatment, but received no meaningful response. By June 2018, she believed she had no choice but to end her employment.

Online, Mr. Guthrie was candid about his hostility toward transgender people. In the years leading up to his October 2017 meeting with Ms. Wade, he published numerous derogatory anti-transgender social media posts. Just weeks before their meeting, Mr. Guthrie posted an image with text describing transgender women not as women, but as "a guy that cut off his own damn pecker." (3 Clerk's Transcript ("CT") 659.) His bias became clear in the workplace when, after learning that Ms. Wade was transgender, he began treating her in a hostile manner and refused to address her as a woman.

In granting Starbucks's and Mr. Guthrie's motions for summary judgment, the superior court committed multiple errors. *First,* the court failed to draw inferences in Ms. Wade's favor, in particular disregarding direct and contemporaneous evidence of Mr. Guthrie's discriminatory motives. Such evidence is rare in workplace discrimination cases and should have weighed heavily against summary judgment. The court also failed to consider the totality of the evidence in evaluating Ms. Wade's hostile work

environment, as required by California law, as well as evidence that Starbucks minimized and ignored her complaints, ultimately forcing her to quit to preserve her mental wellbeing.

Second, the superior court did not properly apply the burdens as required at summary judgment. It required Ms. Wade, the non-moving party, to affirmatively prove her claims, rather than requiring Starbucks and Mr. Guthrie to prove as a matter of law that she had not and could not establish the elements of her claims. There were, at a minimum, disputed issues of material fact that should not have been resolved at summary judgment.

Third, the superior court relied on inaccurate and inappropriate legal standards. Specifically, the court ignored Ms. Wade's direct evidence of discriminatory animus and instead applied the burden-shifting standard for proving discrimination based on circumstantial evidence. It then failed to use the correct legal elements for that burden-shifting standard. It also applied a heightened hostile work environment standard that is inappropriate on these facts.

For these reasons, this Court should reverse the superior court's order granting summary judgment to Starbucks and Mr. Guthrie.

STATEMENT OF THE CASE

I. Background On Transgender Individuals And Gender-Affirming Transitions

The Fair Employment and Housing Act's implementing regulations define gender identity as "each person's internal understanding of their gender." (Cal. Code Regs., tit. 2, § 11030, subd. (b).) Most people have a gender identity that matches the sex they were assumed to be at birth (often referred to as a person's "sex assigned at birth." Transgender people, however, have a gender identity that differs from the sex assigned to them at birth. (*Id*. § 11030, subds. (b), (e).) Many transgender people undergo a gender-affirming transition to begin living as the gender with which they identify. (See Cal. Code Regs., tit. 2, § 11030, subd. (f) [defining "transitioning"].)

Transitioning is the only safe and effective treatment for "gender dysphoria," a serious medical condition characterized by a "'marked incongruence'" between a transgender person's "'experienced/expressed gender'" and sex assigned at birth, and the "'clinically significant distress'" associated with it. (*Edmo v. Corizon, Inc.* (9th Cir. 2019) 935 F.3d 757, 768-769, quoting American Psychiatric Assn., *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) pp. 452-453, 458, en banc rehg. den. (9th Cir. 2020) 949 F.3d 489.) "Left untreated, [gender dysphoria] can lead to

debilitating distress, depression, impairment of function . . . and even suicide." (*Id.* at p. 769.)

Transitioning to live consistently with one's gender identity may include, but is not limited to, changing one's name and pronouns.[1] (See Cal. Code Regs. tit. 2, § 11030, subd. (f).) A transgender person is "misgendered" when another person identifies their gender incorrectly, "as by using an incorrect label or pronoun."[2] Using a transgender person's correct name and pronouns is a critical aspect of their gender transition process, and "misgendering someone with gender dysphoria is 'traumatic.'" (*Monroe v. Baldwin* (S.D.Ill., Dec. 19, 2019, No. 18-cv-00156) __F.Supp.3d__ [2019 WL 6918474, at *15].)

Ms. Wade had been diagnosed with gender dysphoria and was beginning a medically supervised gender transition when she told Mr. Guthrie that she is transgender. (2 CT 317; 3 CT 635; 4 CT 759.)

[1] Transitioning may also include undergoing hormone therapy, surgeries, or other medical procedures. (Cal. Code Regs., tit. 2, § 11030, subd. (f).)

[2] See Merriam-Webster Dict. <https://www.merriam-webster.com/dictionary/misgender> (as of Apr. 16, 2020).

II. Factual Background

A. Maddie Wade Builds A Career At Starbucks.

Maddie Wade began working for Starbucks in October 2009 as a Barista. (4 CT 758.) She was quickly recognized for her strong work ethic, loyalty, and leadership skills and promoted to Supervisor in 2014. (*Ibid.*; 2 CT 240; 3 CT 634.)

As a Supervisor, Ms. Wade was responsible for the daily operations of the store during her shift, while also serving customers and overseeing Baristas. (3 CT 634.) She hoped to advance to Assistant Manager and perhaps someday Manager, overseeing operations of an entire café.[3] (See 3 CT 634-635.)

In November 2016, Ms. Wade transferred to the Milburn location in Fresno, California. (4 CT 758.) Dustin Guthrie arrived as Manager of the Milburn location in July 2017. (*Ibid.*) Ms. Wade recalls that, shortly after Mr. Guthrie's arrival, he told her that she was the most experienced Supervisor in the store. (3 CT 634.) He asked her to take on advanced responsibilities, including ordering inventory and ensuring store compliance with food safety standards. (3 CT 634-635.) Mr. Guthrie also assigned Ms.

[3] Advancement also had financial benefits. Supervisor is an hourly position, while Assistant Manager and Manager are higher paying salaried positions. (3 CT 634.)

Wade to opening shifts, telling her that was where he needed his most capable Supervisor. (3 CT 635.)

Not long after Mr. Guthrie arrived, Ms. Wade told him that she wanted to advance her career at Starbucks and become an Assistant Manager. (1 CT 177.) He told her that he "would do anything that [he] could to support her in her development," and that he would "provide her the tools that [he] could do to help her develop." (1 CT 177-178.) Ms. Wade recalled that he offered to "tak[e her] under his wing" and promised to secure her an assessment for an Assistant Manager promotion. (3 CT 634-635.)

Mr. Guthrie and Ms. Wade quickly built a positive working relationship, and Ms. Wade considered Mr. Guthrie a "work friend." (4 CT 758.) Ms. Wade described their relationship as "very good." (2 CT 331.) The two "had similar interests." (*Ibid.*) Ms. Wade was also well liked and respected by her other coworkers. (3 CT 648 ["Maddie is one of the hardest workers I have ever seen"].)

During this time, the performance of the Milburn location skyrocketed, quickly rising from one of the lowest performing stores in its district to one of the highest. (3 CT 635.) It exceeded all performance metrics and received excellent customer comments praising the store's fast and friendly customer focus. (*Ibid.*)

B. Ms. Wade Begins Her Gender Transition.

Following the Milburn location's dramatic improvement, Ms. Wade felt confident enough in her position at Starbucks to tell Mr. Guthrie and her colleagues that she is transgender. (3 CT 635.)

On approximately October 1, 2017, the two met and Ms. Wade told Mr. Guthrie about her gender dysphoria diagnosis and plan to transition. (3 CT 759.) She testified that she provided him with information about the transition process and asked that she be referred to as Maddie and with female pronouns. (2 CT 317, 323.) Out of consideration for any potential discomfort, she also offered the option of using neutral or no pronouns when referring to her. (2 CT 324.) Ms. Wade testified that she specifically asked that Mr. Guthrie and others "refrain from calling [her] Matt and [using] male pronouns." (2 CT 324, 363 ["I actually just preferred that nobody called me Matt. That was my main request"].)

In the same meeting, Mr. Guthrie asked if Ms. Wade would like to change her shifts or lessen her responsibilities in order to focus on her gender transition. (3 CT 635.) Ms. Wade told him that she did not want to change her schedule in part because she could easily have someone cover part of her morning shift if she needed to leave for medical appointments or due to the physical effects of medication. (*Ibid.*) She also told him that she did not want to work fewer hours or lessen her responsibilities because she needed the

hours and wanted to continue on her career path with the company. (*Ibid*.) He did not object and was supportive during the conversation. (3 CT 588.)

C. Mr. Guthrie's Behavior Changes Dramatically After Learning Ms. Wade Is Transgender.

The next day, Mr. Guthrie told Ms. Wade that he was struggling to "wrap[] his head" around the idea of her gender transition because of his personal religious views. (2 CT 337; 3 CT 636.) But he told her that her positive impact on the store helped him feel differently about her transition. (3 CT 636.) That soon changed.

1. Mr. Guthrie Ignored Company Policy Designed To Support Transgender Employees.

After learning of Ms. Wade's transition, Mr. Guthrie contacted his District Manager, who sent him a copy of Starbucks's "Workplace Guidelines for Supporting Transgender Partners." (4 CT 771-772 [hereafter Workplace Guidelines].)

The Workplace Guidelines are intended to "help[] ensure that transgender partners feel welcome at work and are treated with dignity and respect." (2 CT 410.) The guidelines provide, *inter alia*:

- "Partners should be addressed by their preferred name" and "the pronoun that corresponds to [their] gender identity";

- "Managers should assist partners when new names are needed on documentation . . . such as helping the partner secure a new . . . name badge";

- "A refusal to respect a partner's request to be identified by the pronoun of choice is considered disrespectful . . . and not in alignment with Our Mission and Values";

- "Intentional or persistent refusal to identify the partner by the pronoun of choice may violate Starbucks's *Anti-Harassment Standard*";

- Managers should, "[w]ith the partner's input, develop a plan with the partner to support the transition, that may include: [d]ate of the transition, e.g., the first day of the change in gender presentation, name and pronoun usage; [p]referred pronouns; . . . [and] [w]hat changes will be needed for records, systems and signage"; and

- After transition, managers should "[l]ead by example; use the partner's new name and pronouns . . . [and] [e]nsure respectful and inclusive treatment and that work proceeds as normal[.]" (2 CT 414-416.)

Had Mr. Guthrie complied with the Workplace Guidelines, he and Ms. Wade would have developed a workplace transition plan, including establishing a "date of transition" on which her name would be changed on her name badge and other documents and from which all employees would use that name and appropriate pronouns. (See *ibid.*)

Instead, after reviewing the guidelines, Mr. Guthrie chose to ignore them. He did not prepare any kind of transition plan with Ms. Wade. (2 CT 392.) He merely informed Ms. Wade that she was responsible for telling him "whatever she needed as far as time off." (*Ibid.*; *see also* 2 CT 402-404 ["If I

remember correctly, the only plan that we had ever discussed was having prior notification of when these appointments are going to happen, that way we can schedule around them"].)

2. Mr. Guthrie Intentionally And Persistently Misgendered Ms. Wade.

Mr. Guthrie also insisted on continuing to use Ms. Wade's former name. (2 CT 324.) From the time Ms. Wade told Mr. Guthrie about her transition through her last day at the Milburn location—nearly six months—Mr. Guthrie only used Ms. Wade's former name and never once called her Maddie or referred to her with female pronouns. (3 CT 637.) He did not change her nametag and then testified that he "took the action of referring to Maddie in the way she presented herself to me, which was Matthew," *even after* Ms. Wade asked that he stop using that name. (2 CT 393; 3 CT 675-676; see also 3 CT 637 [Mr. Guthrie also referred to Ms. Wade as "brother" or "man"].)

Their coworkers noticed Mr. Guthrie's obstinate refusal to treat Ms. Wade as a woman. Rachel Schwehr testified that Mr. Guthrie was the only person in the store who did not use female pronouns to refer to Ms. Wade. (3 CT 645.) Another coworker, Dean Zaire, said that Mr. Guthrie would not say "Maddie;" "he'll say, you know, 'Matt' or 'brother.'" (3 CT 657.) Mr. Guthrie's behavior stood in stark contrast to that of their coworkers, whom Ms. Wade

described as "very good about pronouns," "supportive," and "respectful." (2 CT 365-366.)

3. Mr. Guthrie Began To Treat Ms. Wade With Hostility.

Although Mr. Guthrie initially said he supported Ms. Wade's transition, their relationship "deteriorated" rapidly over the following weeks. (2 CT 317; 4 CT 773-774.) Ms. Wade testified, "We were almost close enough to say, like, a friendship at work beforehand, and then that was almost immediately gone." (2 CT 320.) Mr. Guthrie began to schedule his shifts to avoid contact with her. (*Ibid.*) When they had to interact, he used short, curt dialogue. (3 CT 637.) He overreacted to minor issues, like the misplacement of a mop or cup sleeves and lids out of order, threatening to write up Ms. Wade and her whole shift. (2 CT 326-329, 374-375.) He also began to look at Ms. Wade as if she disgusted him, similar to how he looked at homeless people before he kicked them out of the store. (2 CT 329.)

Their coworkers noticed the change in their relationship. Ms. Schwehr testified:

> When I first got there, Maddie was Dustin's favorite, and they were two peas in a pod. . . . [A]fter she came out to us all [as transgender], it was no longer like that at all.
>
> * * *
>
> [J]ust the way that they would talk to each other in passing was very hostile, very short and to the point, very directed. And

whereas before . . . they were having, you know, like, full-blown conversations about families and stuff. (3 CT 648-649.)

On occasion, Ms. Wade had to leave her morning shifts early to attend doctor's visits or because she felt unwell. (3 CT 636-637.) In each instance, she ensured her shift was covered, and the location ran without incident. (*Ibid*.) After a time, Mr. Guthrie informed Ms. Wade that she was required to use vacation hours, rather than accrued sick pay, for the time she was away from the store for medical appointments or other reasons associated with her gender transition. (3 CT 637.) Later, he told her that she should not leave her shifts with a lower-level employee at all, despite the fact that he and others frequently did the same. (*Ibid*; 2 CT 400-401.) Nonetheless, Ms. Wade complied with his request. (3 CT 637.)

4. Mr. Guthrie Changed Ms. Wade's Work Schedule And Reduced Her Hours.

About six weeks after Ms. Wade started her transition, she noticed that her hours were declining. (2 CT 320; 3 CT 637.) She went from working 38 hours each week to as little as 23 hours. (2 CT 321.) Mr. Guthrie also changed her previously reliable morning schedule to include midday and closing shifts. (3 CT 396-399.) Other employees noted the change in Ms. Wade's schedule. (3 CT 646-647; 3 CT 654-656 ("I remember when Maddie . . . all of a sudden started working nights. Maddie never worked nights . . . and it was, like, okay, then hours started getting cut . . . ."].)

Mr. Guthrie testified that he consulted with Ms. Wade before changing her schedule (2 CT 396, 400, 404), which Ms. Wade disputed. She testified that she was surprised by the changes, and that Mr. Guthrie had no explanation when she asked him why her schedule and hours were changing. (3 CT 637-638.) When she asked Mr. Guthrie if the changes were related to her performance, he told her that she was "doing fine." (3 CT 637-638.)

5. Mr. Guthrie Stopped Assisting Ms. Wade's Career Advancement.

In late December 2017 or early January 2018, Mr. Guthrie asked Ms. Wade if she wanted to work fewer hours and take a step back from her path to Assistant Manager because of her transition. (3 CT 638.) She told him that she could do both and that, rather than step back from work, she would like more hours. (*Ibid.*) Despite her request and Mr. Guthrie's lack of explanation for the reduction in her hours, he did not return her to her previous schedule. (*Ibid.*) After that conversation, Mr. Guthrie never mentioned the Assistant Manager assessment or promotion to her again, effectively eliminating any hope Ms. Wade had of advancing in the Milburn store while he remained Store Manager. (*Ibid.*)

Mr. Guthrie's change in behavior toward Ms. Wade made her feel "insecure, anxious, depressed, alienated, embarrassed, and afraid" in her continued employment. (3 CT 637.) She was "shaken" by Mr. Guthrie's

reaction to her transition and deeply disturbed by the rapid change in their relationship. (3 CT 640.) Over the course of weeks, she went from working closely with Mr. Guthrie to having him ignore and isolate her. (*Ibid.*) After she told him she was transgender, he treated her like "she did not matter." (*Ibid*; 2 CT 317.)

D. Ms. Wade Attempts To Address Mr. Guthrie's Treatment And Leaves His Store.

By late 2017, Ms. Wade began to believe that Mr. Guthrie's treatment of her was not going to change. (3 CT 638.) In approximately December 2017, she asked him to approve her transfer to a new location. (3 CT 369.) Around that time, she also confronted him about his behavior and asked if it was related to her performance, but he told her he had no complaints about it. (3 CT 638.)

In January or February 2018, Ms. Wade wrote Mr. Guthrie a personal letter expressing her dismay and confusion. (3 CT 638.) Because Mr. Guthrie's hostility toward her had created an intolerable working environment, her letter suggested she work fewer hours, even though she actually wanted to keep her normal work schedule. (*Ibid.*) Mr. Guthrie did not respond to her letter and the situation did not improve over the following weeks. (*Ibid.*)

In January or February 2018, Ms. Wade contacted Manager Joy Garner to ask to transfer to her Barstow location, also in Fresno. (2 CT 370.) During that conversation, Ms. Wade told Ms. Garner that she felt she was treated badly as soon as she came out as transgender and told Ms. Garner that she wanted to "talk to the district manager of that area to express [her] concerns." (2 CT 318-319, 343.)

Publicly, Ms. Wade tried to support Mr. Guthrie and her team at the Milburn location. On January 25, 2018, while her transfer was pending, Ms. Wade wrote in response to a storewide group message chain, "Thanks Dustin you are awesome. I'm happy to be a part of this team as well. I have never seen a store on par with what we have here." (3 CT 378.) She also continued to join group events to support her coworkers, such as a company dinner shortly after her transfer, even though she did not feel comfortable around Mr. Guthrie. (2 CT 354.)

Ms. Wade's final day at the Milburn location was March 11, 2018. (4 CT 760-761.) She took a two-month leave of absence for a transition-related medical procedure before returning to work at Ms. Garner's location in early May 2018. (4 CT 761.)

E. Ms. Wade Leaves Starbucks.

About a week after arriving at the Barstow location, Ms. Wade reminded Ms. Garner that she wanted to speak with District Manager Tatiana Stockton to discuss her treatment at the Milburn location. (3 CT 638.) Ms. Garner agreed but also tried to persuade Ms. Wade to speak with Mr. Guthrie, who had contacted Ms. Garner. (2 CT 343.) Ms. Wade declined, explaining that she "wasn't comfortable" speaking with Mr. Guthrie, and that she had "already met and discussed [her] concerns with Guthrie three times without any resolution." (*Ibid.*; 3 CT 638-639.) Starbucks offered no other response or remedy.

The harmful conditions Ms. Wade experienced because of her gender identity continued after she transferred. Customers routinely referred to her as "sir" and "man." (3 CT 639.) When Ms. Wade told Ms. Garner about customers misgendering her, Ms. Garner "dismissively laughed about it and brushed aside [her] concerns." (*Ibid.*) Ms. Wade perceived a "general and blatant disregard for Starbucks' policies" at the Barstow location. (*Ibid.*) Any concerns that she expressed were "kind of brushed off immediately," and Ms. Garner and Ms. Stockton "never tried to solve the issues." (2 CT 343-344.)

On May 23, 2018, after Ms. Wade reminded Ms. Garner that she wanted to speak with District Manager Stockton, Ms. Stockton texted Ms.

Wade to schedule a time to talk. (2 CT 343; 3 CT 639.) Ms. Wade immediately texted back with available times. (*Ibid*.) Ms. Stockton never responded. (2 CT 343, 346.) Believing that she would never have her concerns addressed, frustrated with the consistent disregard for corporate policy, and suffering from anxiety and depression, Ms. Wade resigned from Starbucks on June 5, 2018. (2 CT 342-345; 3 CT 639.)

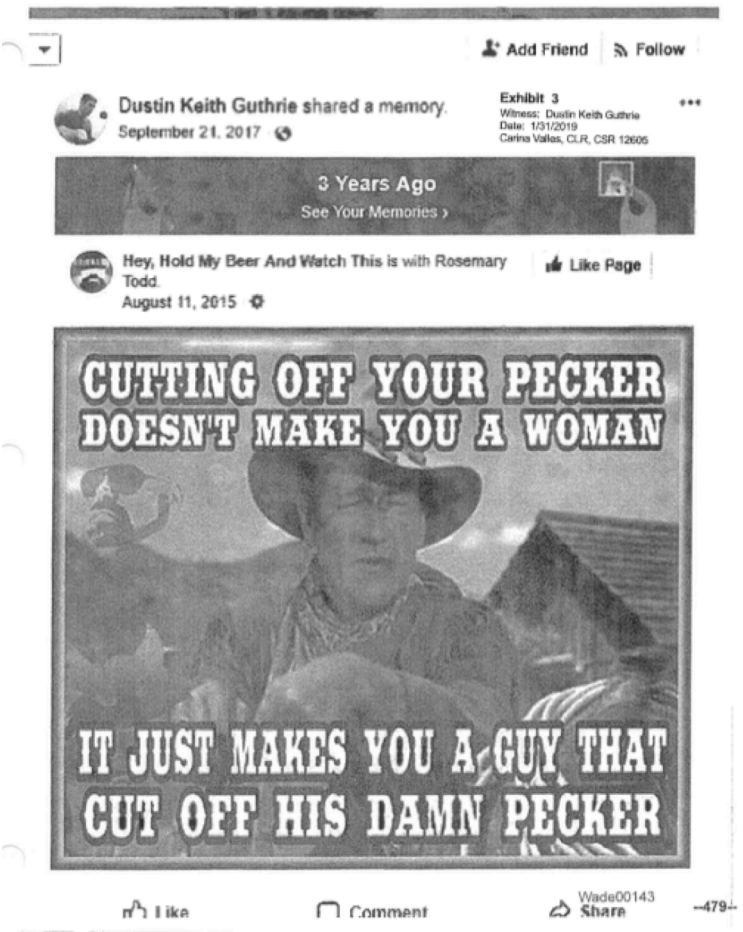
Resigning was a very difficult decision for Ms. Wade. (3 CT 639.) She began her gender transition secure and happy in her position at Starbucks, believing that she would have a rewarding career, steady income, and health insurance for many years. (*Ibid*.) Instead, the "accumulated stress" from her job caused her therapist to conclude that the workplace environment was "adversely affecting [her] mental and physical health" and referred her to a stress therapist. (2 CT 344, 348; 3 CT 639.) After nearly nine years of employment, Ms. Wade felt forced to quit, a decision that also had significant repercussions for her mental and physical health. (2 CT 350-351.)

Although Ms. Wade was experiencing significant anxiety and depression, leaving Starbucks was extremely risky for her. Losing her income and health insurance "effectively stopped [her] gender transition in its tracks, including hormone replacement progression and already scheduled follow-up medical appointments." (3 CT 639.) It "caused [her] to slide back into gender dysphoria." (*Ibid.*) She had no insurance coverage for visits to

the stress therapist to process her experience. (2 CT 351.) Ms. Wade would not have voluntarily decided to leave her long-term position, but felt she had to leave to preserve her mental health. (3 CT 639.)

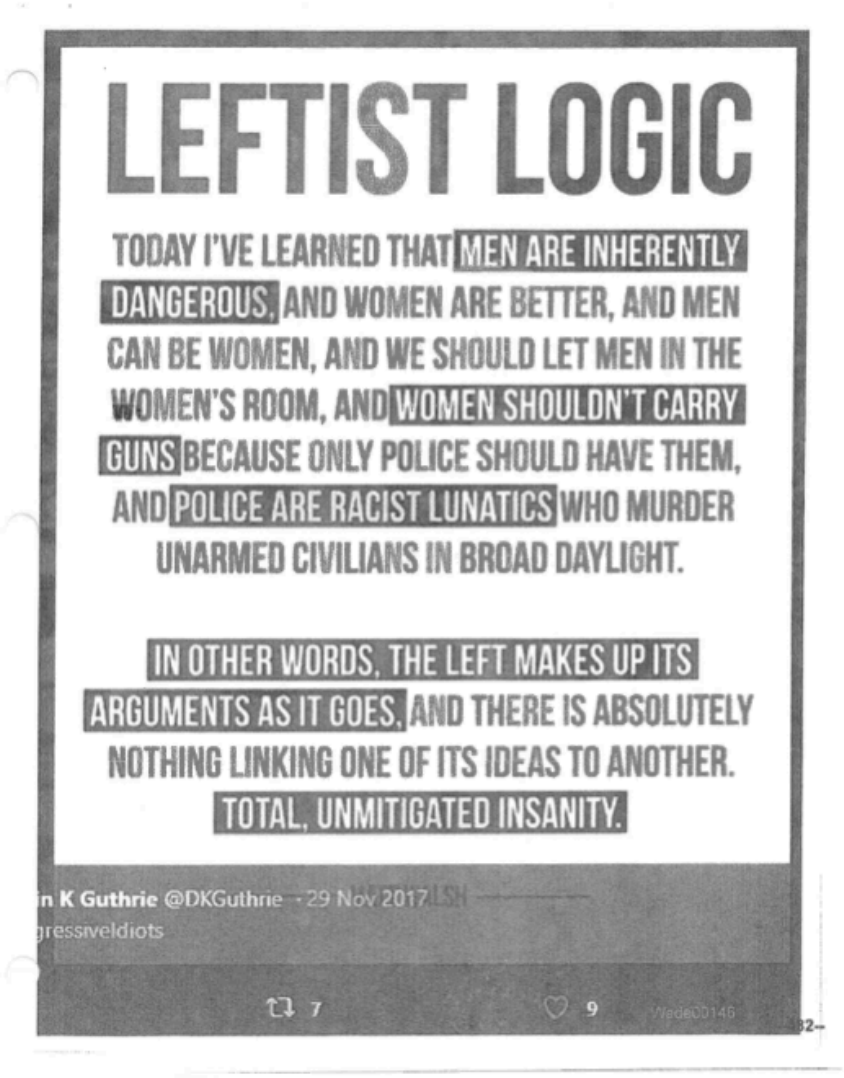
F. Mr. Guthrie Publishes Derogatory Anti-Transgender Statements Online.

At the time Ms. Wade told Mr. Guthrie about her transition, he had been publicly posting disparaging comments about transgender people online. About two weeks before their October 2017 meeting, he posted the following anti-transgender message on Facebook:



(3 CT 659 [shared on September 21, 2017].)

Two months later, he posted another anti-transgender message on Twitter:



(3 CT 662 [shared on November 29, 2017].) At deposition, Mr. Guthrie testified that these posts embodied how he actually felt about transgender people at that time. (3 CT 502.)

These posts joined earlier ones that:

- Questioned "if we are going to identify people simply because of their 'feelings'—doesn't anything go?" (3 CT 661 [shared on Facebook on February 17, 2017]);
- Derided Caitlyn Jenner, a retired Olympic gold medalist and transgender rights activist, as a man who "never identified as a woman, he just wanted to cross dress without being judged" (3 CT 664 [shared on Twitter on February 14, 2016 and referring to Ms. Jenner by her former male name]; see also 3 CT 665-666 [posts on Twitter also deriding Ms. Jenner shared on February 14, 2016 and December [date illegible], 2015]); and
- Stated that "Gender is not now, nor has it ever been a preference" (3 CT 667 [shared on Twitter on October 9, 2014].) (See generally 3 CT 659-669 [all social media posts].)

Mr. Guthrie admitted to sharing the offensive images on his social media accounts, testifying that he thought they were "funny." (*See* 3 CT 497-501, 504, 506.) Ms. Wade learned about the posts after leaving Starbucks. (4 CT 796.) She then understood "how we could go from a positive professional relationship where Guthrie relied on me and considered me a work friend to a place where he ignored and isolated me and treated me like I did not matter." (3 CT 640.)

III. Superior Court Proceedings And Order On Defendants' Motions For Summary Judgment

A. Ms. Wade Files A State Court Action.

On July 26, 2018, Ms. Wade filed her complaint in Fresno County Superior Court. (1 CT 4-40.) The complaint alleged (1) wrongful constructive termination in violation of public policy against Starbucks; (2) discrimination on the basis of sex, gender, gender identity, and/or gender expression in violation of Government Code section 12940, subd. (a) et seq. against Starbucks; (3) harassment on the basis of sex, gender, gender identity, and/or gender expression in violation of Government Code section 12940, subd. (a) et seq. against Starbucks and Mr. Guthrie; and (4) intentional infliction of emotional distress against Starbucks and Mr. Guthrie. (1 CT 17-21.) The complaint sought multiple forms of relief, including compensatory and punitive damages. (1 CT 22.)

B. Starbucks And Mr. Guthrie Move For Summary Judgment And The Superior Court Resolves The Case In Their Favor.

On March 7, 2019, Defendant Guthrie moved for summary judgment on the two causes of action brought against him and the claim for punitive damages. (1 CT 212-237.) On March 28, 2019, Defendant Starbucks separately moved for summary judgment on all causes of action and the claim

for punitive damages. (2 CT 419-447.) Ms. Wade filed her oppositions on May 6 and 9, 2019. (3 CT 555-585; 4 CT 724-756.) Defendants filed their replies on June 6, 2019. (4 CT 847-858, 865-876.) On June 11, 2019, the court held a hearing on the motions, and on July 3, 2019, the court issued its final order granting Defendants' motions for summary judgment on all four causes of action. (4 CT 938-950.) The court issued its final judgment on July 19, 2019. (4 CT 938-939.) Ms. Wade timely filed her notice of appeal on August 23, 2019.

C. The Superior Court's Order Granting Defendants' Motions For Summary Judgment

1. Wrongful Constructive Termination

The superior court granted summary judgment to Starbucks on Ms. Wade's wrongful constructive termination claim on the basis that her working conditions were not sufficiently intolerable or aggravated at the time of her resignation as to be unlawful. (4 CT 945.) The court cited three reasons for its conclusion. First, Ms. Wade was not working with Mr. Guthrie at the time she resigned. (4 CT 943-944.) Second, to the extent that working conditions with Mr. Guthrie may have been intolerable, Starbucks remedied the issue by granting Ms. Wade's request to transfer. (4 CT 944.) Third, the court concluded that "the conditions at Guthrie's store were not so

intolerable," as evidenced by Mr. Guthrie's alleged poor behavior toward other employees and Ms. Wade's January 25, 2018 group text praising Mr. Guthrie and her coworkers. (4 CT 944-995.)

2. Discrimination

The superior court granted summary judgment to Starbucks on Ms. Wade's discrimination claim on the basis that "there was no constructive discharge" and the evidence was not sufficiently clear regarding Mr. Guthrie's denial of access to Starbucks's Assistant Manager training program and reduction of Ms. Wade's working hours. (4 CT 945-946.) The court concluded that the evidence was too vague to conclude whether the denial of access to manager training constituted an adverse employment action. (4 CT 945.) The court then concluded that Ms. Wade had presented evidence that only her hours were cut, but that a causal connection between the reduction in hours and her gender identity was speculative. (4 CT 946.)

3. Harassment

The superior court granted summary judgment to Defendants on Ms. Wade's harassment claim on the basis that the undisputed material facts showed that Mr. Guthrie's conduct did not create a subjectively or objectively hostile work environment. (4 CT 947.) The court noted that Mr. Guthrie did not make anti-transgender comments or negative comments about Ms. Wade's transition or gender identity. (*Ibid.*) It also noted that his challenged

behavior (which the court limited to "leering and threats to write-up employees") was directed at non-transgender employees, as well as Ms. Wade. (*Ibid*.) Finally, the court concluded that Mr. Guthrie's failure to use Ms. Wade's proper pronouns and visible discomfort with and distance from Ms. Wade after she disclosed her transition were not sufficiently severe as to create an unlawful hostile work environment. (*Ibid*.)

4. Intentional Infliction Of Emotional Distress

The superior court granted summary judgment to Defendants on Ms. Wade's intentional infliction of emotional distress claim on the basis that the evidence did not demonstrate extreme or outrageous conduct or severe emotional distress. (4 CT 948.)

5. Punitive Damages

Although Defendants moved for summary judgment on Ms. Wade's punitive damages claim, the trial court declined to address it given its grant of summary judgment as to all causes of action. (4 CT 948.)

STATEMENT OF APPEALABILITY

The superior court's grant of summary judgment to Defendants on all causes of action is appealable under Code of Civil Procedure section 904.1, subdivision (a)(1). An order granting summary judgment "is appealable if it effectively disposes of the entire matter." (*Jacobs-Zorne v. Super. Ct.* (1996) 46 Cal.App.4th 1064, 1071.)

STANDARD OF REVIEW

On appeal, a summary judgment ruling receives de novo review, considering all evidence admitted before the trial court. (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 206, internal quotation omitted.) The reviewing court "independently evaluate[s] the record, liberally construing the evidence supporting the party opposing the motion, and resolving any doubts in his or her favor." (*Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 499–500, citation omitted.) "[T]he court must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843, quoting Code Civ. Proc. § 437c, subd. (c).) Summary judgment is a "drastic remedy" and any doubts must be resolved in favor of the non-moving party. (*See's Candy Shop v. Super. Ct.* (2012) 210 Cal.App.4th 889, 900.)

ARGUMENT

I. The Superior Court Erred In Granting Summary Judgment To Starbucks On Ms. Wade's Discrimination Claim.

A. There Are Triable Issues As To Whether Starbucks Discriminated Against Ms. Wade.

The superior court erred in granting summary judgment to Starbucks because there are triable issues of fact as to whether Starbucks violated Government Code section 12940, subdivision (a), which prohibits discrimination in compensation or in terms, conditions, or privileges of employment because of sex, gender, gender identity, and gender expression.

To establish a claim of intentional discrimination, the plaintiff must prove:

> (1) the employee's membership in a classification protected by the statute; (2) discriminatory animus on the part of the employer toward members of that classification; (3) an action by the employer adverse to the employee's interests; (4) a causal link between the discriminatory animus and the adverse action; (5) damage to the employee; and (6) a causal link between the adverse action and the damage. (*McCaskey v. Cal. State Automobile Assn.* (2010) 189 Cal.App.4th 947, 979.)

The plaintiff may satisfy her burden of proving unlawful intentional discrimination with direct or circumstantial evidence. (*Dejung v. Super. Ct.* (2008) 169 Cal.App.4th 533, 549.) When the plaintiff relies on circumstantial evidence, courts evaluate the case using the *McDonnell Douglas* burden-shifting framework, discussed below. (*McCaskey*, at p. 979.)

There is no dispute that Ms. Wade belongs to a protected class because she is a transgender female. (See 4 CT 770.) Starbucks contested only whether Ms. Wade endured any adverse employment actions and whether those actions occurred because of her gender identity. (4 CT 945.)

1. Ms. Wade Experienced Multiple Adverse Employment Actions.

An adverse employment action is one that "materially affect[s] the terms and conditions of employment." (*Yanowitz v. L'Oreal USA Inc.* (2005) 36 Cal.4th 1028, 1036 (*Yanowitz*).)[4] "[A]dverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls within the reach of the antidiscrimination provisions of sections 12940(a)[.]" (*Id.* at p. 1054-1055.) Courts "broadly interpret" the definition of adverse employment action based upon the "sweeping provisions" of the Fair Employment and Housing Act. (*Thomas v. Dept. of Corrections* (2000) 77 Cal.App.4th 507, 511.)

The superior court properly concluded that Mr. Guthrie reduced Ms. Wade's working hours after he learned that she was transgender. (4 CT 946 ["Plaintiff has presented evidence that only her hours were cut"].) That, in

[4] While *Yanowitz* involved retaliation, the Supreme Court held that the legislature intended to provide "a comparable degree of protection" to employees "subject to the types of basic forms of discrimination at which the FEHA is directed," as well as those who experience unlawful retaliation. (*Yanowitz*, *supra*, 36 Cal.4th at p. 1050.)

and of itself, is an adverse employment action that supports Ms. Wade's legal claim. However, the record also contained evidence of additional adverse employment actions.

Ms. Wade testified that Mr. Guthrie denied her access to advancement opportunities, namely training and the skills assessment necessary to advance to Assistant Manager. (3 CT 638.) Denial of opportunity for advancement may also constitute an adverse employment action. (*Light v. Dept. of Parks & Recreation* (2017) 14 Cal.App.5th 75, 93 (*Light*) [rescinding offer to train contributed to adverse employment action].) Should Ms. Wade have successfully advanced and been promoted to Assistant Manager, she would have been eligible to earn a significantly higher salary. (*See* 3 CT 634.) Evidence that Ms. Wade lost this critical "prospect[] for advancement or promotion" creates a triable issue of fact as to whether she suffered an adverse employment action under section 12940, subdivision (a). (See *Yanowitz*, *supra*, 36 Cal.4th at p. 1055.)

Ms. Wade's wrongful constructive termination, discussed further in Section III below, also constitutes an adverse employment action. (See *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1253 ["Constructive discharge, like actual discharge, is a materially adverse employment action," quoting *EEOC v. Univ. of Chicago Hospitals* (7th Cir. 2002) 276 F.3d 326, 331-332].)

The record raised, at a minimum, triable issues of fact as to whether Ms. Wade experienced multiple adverse employment actions after disclosing her transgender status to Mr. Guthrie.

2. The Adverse Employment Actions Occurred Because Of Ms. Wade's Gender Identity.

Ms. Wade presented sufficient evidence to raise a reasonable inference that the adverse employment actions occurred because of her transgender status.

First, the record of Mr. Guthrie's open and repeated derision of transgender people over a period of years creates a triable issue as to whether he possessed discriminatory animus toward Ms. Wade after learning she was transgender. "[D]erogatory comments can create an inference of discriminatory motive." (*Cordova v. State Farm Insurance. Cos.* (9th Cir. 1997) 124 F.3d 1145, 1149 (*Cordova*) [interpreting Title VII]; see also *Godwin v. Hunt Wesson, Inc.* (9th Cir. 1998) 150 F.3d 1217, 1221 (*Godwin*) [sexist comment "directly suggests the existence of bias and no inference is necessary to find discriminatory animus"].)[5] Mr. Guthrie shared numerous

[5] "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*).)

anti-transgender posts on his public social media accounts, including at least two messages in close proximity to his October 2017 meeting with Ms. Wade.[6]

In *Cordova*, *supra*, 124 F.3d at pages 1147 and 1149, the Latina plaintiff was denied a position in a trainee program and submitted "strong evidence of discriminatory animus" in the form of an affidavit from the employee who was ultimately selected for the program. The affiant testified that she heard the hiring manager refer to a different Latino employee as a "dumb Mexican." (*Id.* at p. 1149.) The Ninth Circuit considered the "egregious and bigoted" remark to be relevant evidence of discriminatory animus. (*Ibid.*) That the plaintiff herself did not hear the remark and that it was not made about her did not matter at summary judgment; "if such remarks were indeed made, they could be proof of discrimination against Cordova despite their reference to another agent and their utterance after the hiring decision." (*Ibid.*)

Similarly, Mr. Guthrie's "egregious and bigoted" anti-transgender statements demonstrate his discriminatory animus. (See *Cordova*, *supra*, 124 F.3d at p. 1149.) He publicly shared a statement belittling a transgender woman's gender transition as "cutting off [her] pecker" just before Ms. Wade,

[6] That Ms. Wade was not aware of the social media posts at the time of Mr. Guthrie's discriminatory acts is irrelevant at summary judgment; the posts raise a triable issue of motive appropriately left to a jury. (See *Cordova*, *supra*, 124 F.3d at p. 1149 & fn. 5.)

his employee, told him that she was starting her own transition. (See 3 CT 659.) This post was part of a series of offensive anti-transgender posts made by Mr. Guthrie on social media. (See 3 CT 659-669; see also *Chuang v. Univ. of Cal. Davis, Bd. of Trustees* (9th Cir. 2000) 225 F.3d 1115, 1128 (*Chuang*) [concluding at summary judgment that remarks by a decision-maker years prior to the adverse employment action, even if unrelated to the employee, could be direct evidence of discriminatory intent].) Mr. Guthrie's public statements evidence a longstanding discriminatory bias against transgender people that Ms. Wade alleges motivated his actions toward her.

Second, despite Ms. Wade's explicit request that Mr. Guthrie use her female name and pronouns, undisputed evidence demonstrates that Mr. Guthrie insisted on using her prior name and male nicknames. (2 CT 393; 3 CT 637, 657, 675-676.) It is also undisputed that Mr. Guthrie never used Ms. Wade's chosen name or referred to her using female pronouns as she requested, which violated Starbucks's Workplace Guidelines. (2 CT 324; 3 CT 637, 645, 657, 675-676; see, e.g., 2 CT 415 [declaring that intentional or persistent misgendering may violate Starbucks's anti-harassment policy].) His actions stood in stark contrast to those of Ms. Wade's other coworkers, who used Ms. Wade's requested name and pronouns. (See 2 CT 365-366; 3 CT 465.)

Intentionally and persistently misgendering an employee who is transgender can itself constitute unlawful discrimination under the Fair Employment and Housing Act, which supports an inference of discriminatory intent. The Act's implementing regulations confirm that "[i]f an employee requests to be identified with a preferred gender, name, and/or pronoun, including gender-neutral pronouns, an employer or other covered entity who fails to abide by the employee's stated preference may be liable under the [Fair Employment and Housing] Act[.]" (Cal. Code Regs., tit. 2, § 11034, subd. (h)(3).)

Courts have held that intentional misgendering can demonstrate that gender identity motivated the alleged discrimination. (See, e.g., *Prescott v. Rady Children's Hosp.-San Diego* (S.D.Cal. 2017) 265 F.Supp.3d 1090, 1099 [denying motion to dismiss sex discrimination claim alleging that the defendant "continuously" misgendered transgender boy].) A factfinder could reasonably conclude that Mr. Guthrie's consistent refusal to use Ms. Wade's female name and pronouns over a period of months is evidence of discriminatory intent based on her gender identity.

In sum, Mr. Guthrie's offensive anti-transgender statements and intentional and persistent misgendering of Ms. Wade create at least a triable issue of fact as to whether the adverse employment actions occurred because of Ms. Wade's gender identity.

B. The Court Erred In Granting Summary Judgment On Ms. Wade's Discrimination Claim.

Notwithstanding the existence of triable issues of fact, the superior court granted summary judgment to Starbucks. In doing so, it erred in two crucial ways. First, it failed to construe evidence in Ms. Wade's favor that she was subject to multiple adverse employment actions, and that the adverse actions were related to her gender identity. Second, the court applied the wrong legal standards to evaluate Ms. Wade's showing of discriminatory motive through direct and circumstantial evidence.

1. The Court Failed To Draw Reasonable Inferences In Ms. Wade's Favor.

The superior court erred when it concluded that it "[could] not find a triable issue" as to whether a denial of promotional opportunity constituted an adverse employment action.[7] The court stated that it required "more information" about training for the Assistant Manager position, but acknowledged that Ms. Wade testified that she had a goal of advancing, discussed it with Mr. Guthrie, and that after learning Ms. Wade is transgender, "Guthrie never contacted [her] again about the Assistant Manager training program." (4 CT 945.) Ms. Wade presented sufficient evidence to allow the court to draw reasonable inferences that Mr. Guthrie

[7] The court also erred in concluding that there was no constructive discharge (4 CT 942-945), addressed in Section III below.

had hindered her advancement, which should have weighed in her favor at summary judgment. (See *Light*, *supra*, 14 Cal.App.5th at p. 93.)

The court also failed to construe the evidence in her favor that adverse employment actions occurred because of her gender identity, instead holding that "it is entirely speculative that there was any causal connection between the reduction in hours and plaintiff's gender identity." (4 CT 946.) On summary judgment, the plaintiff "must adduce or point to evidence raising a triable issue, that would permit a trier of fact to find by a preponderance that intentional discrimination occurred." (*Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1098.) Ms. Wade pointed to several pieces of evidence—including Mr. Guthrie's offensive social media posts and persistent misgendering—from which the factfinder could reasonably infer discriminatory intent.

2. The Court Applied Incorrect Legal Standards To Evaluate Ms. Wade's Discrimination Claim.

The court also erred in evaluating Ms. Wade's evidence that she was subject to adverse employment actions because of her gender identity. First, it disregarded Ms. Wade's direct evidence of discriminatory intent and instead applied the *McDonnell Douglas Corp. v. Green* burden-shifting standard, which is used to evaluate claims of discrimination based on *circumstantial* evidence. (4 CT 945, citing *Guz v. Bechtel Nat. Inc.*, *supra*, 24

Cal.4th 317, 354-356.) Second, when applying the burden-shifting standard, it applied the wrong standard to Ms. Wade's prima facie case, obligating her to satisfy a higher burden than necessary to oppose summary judgment. (*Ibid.*) Both of these errors warrant reversal.

a. The Court Disregarded Direct Evidence Of Discriminatory Intent.

The superior court erred in applying only the *McDonnell Douglas* burden-shifting standard to analyze Ms. Wade's disparate treatment claim, despite direct evidence of Mr. Guthrie's anti-transgender bias. (4 CT 945, citing *Hersant v. Dept. of Social Services* (1997) 57 Cal.App.4th 997, 1002.) But as *Hersant* noted, the burden-shifting standard applies only in cases relying on circumstantial evidence of discriminatory motive. (*Hersant*, at p. 997 [observing that "direct evidence of such motivation is seldom available"].) The "*McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination[.]" (*DeJung v. Super. Ct.*, *supra*, 169 Cal.App.4th 533, 550.) "Direct evidence is evidence which, if believed, proves the fact of discriminatory animus without inference or presumption." (*Ibid.*)

Even a small amount of direct evidence of discriminatory motive creates a triable issue of fact. "When the plaintiff offers direct evidence of discriminatory motive, a triable issue as to the actual motivation of the employer is created *even if the evidence is not substantial . . . it need be 'very*

little.'" (*Godwin*, *supra*, 150 F.3d 1217, 1221, italics added and interpreting claims alleged under FEHA.)

Here, the superior court ignored direct evidence of Mr. Guthrie's discriminatory motive and instead "sp[un] the evidence" in Starbucks's favor. (See *Chuang*, *supra*, 225 F.3d at p. 1128 ["It is not the province of a court to spin such evidence in an employer's favor when evaluating its motion for summary judgment. To the contrary, all inferences must be drawn in favor of the non-moving party"].) As described above, Mr. Guthrie's anti-transgender statements and consistent, intentional misgendering of Ms. Wade prove his discriminatory animus, making summary judgment inappropriate. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 541 ["Determining the weight of discriminatory or ambiguous remarks is a role reserved for the jury"].)

b. The Court Applied The Wrong Standard For Plaintiff's Required Showing.

After wrongly applying the *McDonnell Douglas* burden-shifting standard, the court erred in applying that standard. It wrote that the fourth element of plaintiff's prima facie case is to establish "a causal connection between the adverse action and her protected classifications." (4 CT 945, citing *Guz*, *supra*, 24 Cal.4th 317, 354-356.) The court then cited the lack of a "causal connection" when it granted summary judgment on Ms. Wade's discrimination claim. (4 CT 946.)

Yet the plaintiff is not required to prove a causal connection as part of her prima facie case on the merits of her claim, much less at summary judgment. According to *Guz*, on which the superior court relied, the fourth element does not require the plaintiff to "establish . . . a causal connection," but rather "provide evidence that . . . some other circumstance suggests discriminatory motive." (*Guz*, *supra*, 24 Cal.4th at p. 355.) This is a markedly lower standard than that applied by the superior court and is one that Ms. Wade met.

Under the *McDonnell Douglas* burden-shifting standard, no plaintiff is required to prove causation in their prima facie case, even at trial. To the contrary, this initial showing "is 'not onerous' [citation]" and "is designed to eliminate at the outset the most patently meritless claims[.]" (*Guz*, 24 Cal.4th at pp. 354-355.) At summary judgment, the plaintiff must simply present sufficient evidence to "raise[] a rational inference that intentional discrimination occurred." (*Id.* at p. 357.)

An employer is only entitled to summary judgment if "considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Guz*, *supra*, 24 Cal.4th at p. 361.) The plaintiff can thus defeat summary judgment if she "produces admissible evidence which

raises a triable issue of fact material to the defendant's showing." (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 344.) The record demonstrates that Ms. Wade surpassed this low bar.

As described above, Ms. Wade presented sufficient evidence to establish her prima facie case. The parties do not dispute that Ms. Wade is a member of a protected class and that she was performing her job satisfactorily. The superior court identified an adverse employment action (the reduction of Ms. Wade's hours), though she submitted evidence of additional adverse employment actions. Ms. Wade also provided direct evidence of Mr. Guthrie's discriminatory motive—his contemporaneous social media posts and his persistent refusal to use her requested name and pronouns—as well as extensive circumstantial evidence suggesting a discriminatory motive and pretext, including Mr. Guthrie's hostile manner, his disregard for company policy supporting transgender employees,[8] and the end of his offers to help her advance in the company after she disclosed her transgender status.[9]

[8] Violating an antidiscrimination policy may be circumstantial evidence of discrimination. (*Gonzales v. Police Dept., City of San Jose, Cal.* (9th Cir. 1990) 901 F.2d 758, 761.)

[9] Close temporal proximity between disclosure of a protected status and an adverse employment action, together with other evidence, may satisfy a prima facie case and/or pretext. (*See Arteaga v. Brinks, Inc.*, *supra*, 163 Cal.App.4th 327, 353-54.)

In response to evidence that Mr. Guthrie reduced Ms. Wade's hours, Starbucks asserted that he reduced all employees' hours for business-related reasons. (4 CT 945.) The court found Starbucks's explanation to be pretext. (4 CT 962 ["the court concludes that plaintiff has presented evidence that only her hours were cut"].) Yet the court failed to weigh this finding as further evidence of discriminatory motive. (*Guz*, *supra*, 24 Cal.4th at p. 356 ["In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias"].)

Had the court properly evaluated the evidence, Ms. Wade would have satisfied her burden by showing that:

- Ms. Wade belongs to a protected class and was performing her job satisfactorily;
- After Ms. Wade told Mr. Guthrie she was transgender, he cut her hours and stopped supporting her career advancement, which with other acts, led to her constructive termination;
- Mr. Guthrie harbored longstanding anti-transgender animus and made contemporaneous disparaging statements on his social media accounts; and
- Mr. Guthrie's intentional and persistent misgendering of Ms. Wade, his insistence on calling her by her former name and male nicknames, and

his dramatic change in behavior after learning she is transgender suggest discriminatory motive.

For the foregoing reasons, the superior court erred in granting summary judgment to Starbucks on Ms. Wade's claim of workplace discrimination.

II. The Superior Court Erred In Granting Summary Judgment To Starbucks and Mr. Guthrie On Ms. Wade's Harassment Claim.

A. There Are Triable Issues As To Whether Mr. Guthrie Unlawfully Harassed Ms. Wade.

There are triable issues of fact as to whether Mr. Guthrie's treatment of Ms. Wade violated Government Code section 12940, subdivision (j)(1), which prohibits harassment based on sex, gender, gender identity, and gender expression.[10]

The Fair Employment and Housing Act's implementing regulations provide that "[h]ostile work environment sexual harassment occurs when unwelcome comments or conduct based on sex unreasonably interfere with an employee's work performance or create an intimidating, hostile, or offensive work environment." (Cal. Code Regs., tit. 2, § 11034(f)(2); see also *id.*

[10] Starbucks is strictly liable for Mr. Guthrie's actions because he was Ms. Wade's supervisor at the time of alleged harassment. (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 707 (*Roby*) ["When the harasser is a supervisor, the employer is strictly liable for the supervisor's actions"].)

§ 11034(f)(2)(A) ["The harassment must be severe or pervasive such that it alters the conditions of the victim's employment and creates an abusive working environment"].) Courts must consider the totality of the circumstances in evaluating an employee's claims. (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 142.)

In reviewing hostile work environment claims under Title VII of the 1964 Civil Rights Act, federal courts similarly emphasize the need to consider the totality of the circumstances.[11] The Ninth Circuit has explained, "As in most claims of hostile work environment harassment, the discriminatory acts [are] not always of a nature that [can] be identified individually as significant events; instead, the day-to-day harassment [is] primarily significant, both as a legal and as a practical matter, in its cumulative effect." (*Draper v. Coeur Rochester, Inc.* (9th Cir. 1998) 147 F.3d 1104, 1108.)

Recently, the state legislature codified its intent regarding interpretation and application of the workplace harassment standard, also emphasizing the importance of the harassed employee's subjective experience in the workplace. It declared that:

> [H]arassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives victims of their statutory right to work in a place free of discrimination when the

[11] "California courts frequently seek guidance from Title VII decisions when interpreting the FEHA and its prohibitions against sexual harassment." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 278.)

> harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being. (Gov. Code § 12923, subd. (a), eff. Jan. 1, 2019.)

Section 12923, subdivision (c) reiterates, "The existence of a hostile work environment depends upon the totality of the circumstances[.]"

The significance of the cumulative effect of harassment was demonstrated in *Roby v. McKesson Corp.*, *supra*, 47 Cal.4th 686. The California Supreme Court affirmed a jury verdict in favor of the employee, finding ample evidence of harassment where her supervisor made negative comments, behaved rudely, shunned the employee, and reprimanded her in front of others. (*Id.* at p. 710.) The Court observed, "[H]arassment focuses on situations in which the *social environment* of the workplace becomes intolerable because the harassment (whether verbal, physical, or visual) communicates an offensive message to the harassed employee." (*Id.* at p. 706.)

As in *Roby*, Ms. Wade suffered a multitude of slights and insults that rendered the social environment of her workplace intolerable, and communicated to her that she was no longer a valued employee after she disclosed her transgender status. The undisputed facts show that after Ms. Wade told Mr. Guthrie about her transgender status and transition, they

quickly went from being "two peas in a pod" to hostile, extremely limited contact. (3 CT 648-649; 4 CT 758.) Ms. Wade, Mr. Guthrie, and their coworkers all testified that Mr. Guthrie refused to use Ms. Wade's requested name and pronouns, and instead continued to use her previous male name and male nicknames such as "brother" and "man." (2 CT 324, 393; 3 CT 637, 645, 657, 675-656.) Mr. Guthrie confirmed that he took no steps to create a transition plan for Ms. Wade or otherwise recognize her transition as required by company policy. (2 CT 392, 402-404; 3 CT 495-496.) The superior court also concluded that Mr. Guthrie cut Ms. Wade's hours during this period. (4 CT 946.)

In addition to these undisputed facts, Ms. Wade testified that after her disclosure, Mr. Guthrie began to look at her with disgust, speak to her in a curt manner, and took steps to dramatically reduce their contact. Previous discussions of advancement stopped, and Mr. Guthrie no longer assisted Ms. Wade with her goal of obtaining a management position with Starbucks, including preparing her for and requesting an assessment for promotion to Assistant Manager. She felt ignored and isolated. (3 CT 640.) Ms. Wade also testified that Mr. Guthrie punished Ms. Wade and her team for minor infractions. (2 CT 326-329, 371-375.) Mr. Guthrie quickly and distinctly isolated Ms. Wade, communicated that she was no longer a valued team member, and halted her professional advancement.

Mr. Guthrie's refusal to use Ms. Wade's requested name and pronouns, particularly in conjunction with his dramatic change in behavior, further created an abusive atmosphere. Ms. Wade described her feelings of insecurity, anxiety, depression, alienation, embarrassment, and fear. (3 CT 637.) Her therapist referred her to a stress therapist to address the anxiety she experienced. (2 CT 348; 3 CT 639.)

Consistent with Ms. Wade's testimony, research shows that misgendering transgender individuals is associated with significant psychological distress, including "anxiety- and depression-related symptoms, stress, and perceiving more transgender stigma in society."[12] Use of a transgender person's correct name and pronouns has been documented to counter that stigma and psychological distress.[13] For these reasons, the question of whether misgendering creates a hostile work environment is best left to a jury. (Cf. *Ash v. Tyson Foods, Inc.* (2006) 546 U.S. 454, 456 ["Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign.

---

[12] McLemore, *A Minority Stress Perspective on Transgender Individuals' Experiences With Misgendering* (2016) 3 Stigma and Health 53, 58-59.

[13] See, e.g., Pollitt et al., *Predictors and Mental Health Benefits of Chosen Name Use Among Transgender Youth* (2019) Youth & Society 1, 16 [finding that transgender "[y]outh reported higher self-esteem, lower depressive symptoms, and less negative suicidal ideation when they were able to use their chosen name in more contexts"].)

The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage"].)

In addition to being subjectively offensive, Mr. Guthrie's behavior violated Starbucks's Workplace Guidelines. The superior court disregarded this fact on the basis that "Starbucks' internal policies do not set the standard for what constitutes harassment under the Fair Employment and Housing Act." (4 CT 947.) However, the Guidelines include a number of practical steps for supporting transgender employees and creating an inclusive workplace, mirroring those adopted in 2017 by the Department of Fair Employment and Housing. (2 CT 414-416; see Cal. Code Regs., tit. 2, § 11034.) Both the Starbucks policy and the 2017 regulations provide that employers should identify transgender employees by their requested gender, name, and pronouns, except when a legal name is necessary to meet a legally mandated obligation. (2 CT 414; Cal. Code Regs., tit. 2, § 11034, subds. (h)(3), (4).) Starbucks's antidiscrimination policy and the 2017 regulations both prohibit intentional and persistent misgendering, indicating that such treatment can create an objectively hostile work environment for transgender employees. (See 2 CT 415; Cal. Code Regs., tit. 2, § 11034, subd. (h).)

There are, at a minimum, triable issues of fact as to whether Mr. Guthrie's conduct created an abusive working environment, in light of the totality of the circumstances.

B. The Court Erred In Granting Summary Judgment On Ms. Wade's Harassment Claim.

The nuanced analysis required to evaluate claims of workplace harassment is "rarely appropriate for disposition on summary judgment," as these cases "involve issues not determinable on paper." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 286); accord Gov. Code § 12923, subd. (e).) Yet the superior court granted summary judgment to Starbucks and Mr. Guthrie, disregarding the subtleties and factual disputes described above. In doing so, it erred in multiple ways.

1. The Court Incorrectly Applied A Heightened Standard For Workplace Harassment.

As an initial matter, the court applied a heightened standard for workplace harassment that does not apply here. The court stated:

> To meet the "severe or pervasive" standard for harassment, plaintiff must demonstrate that her workplace was "permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment."

(4 CT 946, citing *Mokler v. County of Orange*, *supra*, 157 Cal.App.4th 121, 145; *Fisher v. San Pedro Peninsula Hospital* (1998) 214 Cal.App.3d 590, 609 (*Fisher*).) However, the requirement that a plaintiff demonstrate that her workplace was "permeated" with discrimination arises in cases of alleged sexual harassment where the plaintiff did not suffer any tangible job detriment. (See, e.g., *Mokler*, *supra*, at p. 142 ["'[W]hile an employee need not

prove tangible job detriment to establish a sexual harassment claim, the absence of such detriment requires a *commensurately higher showing* that the sexually harassing conduct was pervasive and destructive of the working environment,'" italics added and quoting *Fisher*, *supra*, at p. 610].) Ms. Wade alleges tangible job detriment in addition to a hostile work environment. This higher standard does not apply here, and the superior court erred by holding Ms. Wade to an incorrect legal standard.

2. The Court Unduly Limited The Evidence It Considered In Support Of Ms. Wade's Harassment Claim.

The court also erred when it determined that Ms. Wade's harassment claim was limited to "Guthrie's failure to use pronouns corresponding to plaintiff's gender identity, and Guthrie's apparent discomfort with and distance from plaintiff after she revealed her diagnosis and intent to transition to female." (4 CT 947.) Ms. Wade's claim is based on the entirety of her treatment by Mr. Guthrie, including his persistent use of her former name and male nicknames, hostile treatment, and the adverse employment actions described in Section I(A)(1) above. (See 4 CT 745, 751-752 (describing the basis for Ms. Wade's harassment claim); *Roby*, *supra*, 47 Cal.4th at p. 708 ("[D]iscrimination and harassment claims can overlap as an evidentiary matter"]; *Mokler*, *supra*, 157 Cal.App.4th at p. 142 [considering the totality of the circumstances].)

3. The Court Erroneously Concluded That Refusal To Use Correct Pronouns And Obvious Discomfort With Transgender Employees Could Not Constitute Actionable Harassment.

The court further erred when it determined that there was no triable issue as to whether Mr. Guthrie's repeated failure to use correct name and pronouns and his "apparent discomfort with and distance from plaintiff" after she disclosed her transgender status could constitute actionable harassment. (4 CT 947.) This holding departs from the framework articulated by the California Supreme Court, following the U.S. Supreme Court, that courts must provide nuanced and careful consideration of workplace harassment allegations:

> [T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' [Citation] . . . . [T]hat inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. . . . The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensibility to social context, will enable courts and juries to distinguish between simple teasing or roughhousing . . . and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

(*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 462, omissions in original and quoting *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 81-82.)

In concluding that Mr. Guthrie's repeated, intentional failure to use correct pronouns and his change in demeanor could not constitute unlawful harassment, the superior court relied on two cases of alleged workplace harassment that bear little resemblance to this matter. (4 CT 947, citing *McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 293-294 (*McCoy*) and *Jones v. Dept. of Corrections* (2007) 152 Cal.App.4th 1367, 1377-1378 (*Jones*).) The court stated that these decisions found that "much more severe conduct" did not "constitute actionable harassment." (*Ibid.*) This is not accurate.

The plaintiff in *McCoy*, *supra*, 216 Cal.App.4th at page 294, alleged that she experienced sexual harassment based on comments and conduct directed at others, which required a heightened showing of severity and pervasiveness that she could not meet. Ms. Wade is not required to make that same showing because Mr. Guthrie's conduct was directed at her. In *Jones*, *supra*, 152 Cal.App.4th at page 1379, the court affirmed summary judgment to the defendant, where the trial court concluded that the alleged incidents of harassment were "akin to being a collection of isolated and objectively non-discriminatory events." That is not the case here, where there is a distinct adverse course of conduct that began only after Ms. Wade told Mr. Guthrie that she was transgender.

The superior court erred in determining that failure to use correct pronouns and "apparent discomfort and distance from plaintiff" could not constitute unlawful harassment as a matter of law.

4. The Court Failed To Draw Inferences In Ms. Wade's Favor.

In granting summary judgment to Starbucks and Mr. Guthrie, the superior court inappropriately weighed the evidence and made findings of fact in their favor, rather than liberally construing Ms. Wade's evidence and resolving doubts in her favor. (See *Patterson v. Domino's Pizza*, *supra*, 60 Cal.4th 474, 499–500.) For example, the court cited as determinative the fact that "Guthrie never made any anti-trans comments or negative comments about plaintiff's transition or gender identity." (4 CT 947.) However, in lieu of explicit comments, Mr. Guthrie made his feelings known by calling her by her former name and male nicknames, repeatedly refusing to use her requested name and pronouns, reducing her work hours, and becoming hostile with Ms. Wade after learning she was transgender. (See, e.g., 2 CT 320, 324, 393; 3 CT 635-637, 675-676; 4 CT 773-774.)

The court also concluded that "[t]he leering and threats to write-up employees were directed at other non-trans employees, and therefore are not linked to plaintiff's gender identity." (4 CT 947.) Yet the record contains evidence that Mr. Guthrie only began leering at Ms. Wade and threatening to

write her up after she disclosed her transgender status (see 2 CT 329; 3 CT 636-637), and that the non-transgender employees Mr. Guthrie threatened included those on Ms. Wade's shift teams. (See 2 CT 326-329, 374-375.)

The court went on to state that "[t]here is no evidence that the reduction in hours related to plaintiff's gender identity." (4 CT 947.) But the court had earlier concluded that Ms. Wade "has presented evidence that only her hours were cut." (4 CT 946.) She also testified that her hours were reduced only after she told Mr. Guthrie about her transition. (See 2 CT 321; 3 CT 637.)

The court minimized Mr. Guthrie's ongoing misgendering of Ms. Wade as a failure to comply with "an equivocal request." (4 CT 944.) To the contrary, Ms. Wade testified that she informed Mr. Guthrie that her name was Maddie and that she used female pronouns. She told him it would be fine to not use pronouns at all, but she explicitly said she did not want her former name or male pronouns to be used. This was not "equivocal." Mr. Guthrie's continued use of her former name and male nicknames was objectively and subjectively offensive, caused her significant distress, and violated the law.

Finally, the court found Ms. Wade's January 2018 message to an all-store text chain praising Mr. Guthrie and the team to be dispositive evidence that the workplace was not hostile. (4 CT 947.) But the court ignored the circumstances under which the text was sent. The group text chain contained all of the employees from the Milburn store, so Ms. Wade's message was a public expression of support for her coworkers. The court also failed to acknowledge the timing of the message—just after Ms. Wade spoke with Mr. Guthrie in person and sent a private letter to him about her concerns. (See 3 CT 638.)

Victims of workplace harassment may outwardly present a positive attitude toward their harassers for a variety of reasons, including in an attempt to stop the harassment. The superior court wrongly construed Ms. Wade's message as conclusive evidence that the workplace environment was not hostile. In doing so, it ignored evidence that Mr. Guthrie's conduct was otherwise "unwelcome," which is the "gravamen of any sexual harassment claim" and "turns largely on credibility determinations committed to the trier of fact." (See *Meritor Savings Bank, FSB v. Vinson* (1986) 477 U.S. 57, 68.)

5. The Court Erred In Applying The Parties' Respective Burdens At Summary Judgment.

The superior court also erred when it required Ms. Wade to prove her claim of harassment as the non-moving party at summary judgment. It wrote:

> Plaintiff must prove that she was subjected to verbal or physical conduct of a harassing nature that was based on her protected class, and that the conduct was sufficiently severe or pervasive to create an objectively and subjectively hostile working environment.

(4 CT 947 [emphasis added], citing *Fisher*, *supra*, 214 Cal.App.3d at pp. 608-609.) To the contrary, it was not Ms. Wade's burden to prove her legal claim to survive a motion for summary judgment. It was Starbucks's and Mr. Guthrie's burden to show that Ms. Wade had not and could not be reasonably expected to establish one or more elements of her cause of action.

Had the court applied the correct legal standards, Ms. Wade would have satisfied her burden based on evidence that:

- Mr. Guthrie became hostile toward Ms. Wade after she told him that she was transgender, including avoiding her, using a curt tone, "leering" at her, punishing her and her team for minor infractions, changing her schedule, reducing her hours, and denying her advancement opportunities;

- Mr. Guthrie failed to prepare a transition plan with Ms. Wade and then persistently misgendered her for months, repeatedly calling her by her former name and male nicknames in knowing violation of Starbucks's Workplace Guidelines;
- Mr. Guthrie created an intimidating, hostile, and offensive work environment for Ms. Wade, causing her significant anxiety and stress that required a referral to a workplace stress therapist.

For the above reasons, the superior court's grant of summary judgment to Starbucks and Mr. Guthrie on Ms. Wade's claim of unlawful harassment was improper and should be reversed.

III. The Superior Court Erred In Granting Summary Judgment To Starbucks On Ms. Wade's Wrongful Constructive Termination Claim.

A. There Are Triable Issues As To Whether Starbucks Constructively Terminated Ms. Wade.

There are also triable issues of fact as to whether Starbucks constructively and wrongfully terminated Ms. Wade in violation of fundamental public policy.

The doctrine of constructive termination is intended to address employer attempts to avoid liability by engaging in conduct that causes an employee to quit, rather than risk affirmatively terminating their

employment. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244 (*Turner*).) A constructive termination is legally regarded as a firing because the termination, although initiated by the employee, is done against their will. (*Ibid.*) In *Turner*, the Supreme Court established the following standard:

> The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. (*Id.* at p. 1246.)

In sum, "[t]he essence of the test is whether, under all the circumstances, the working conditions are so unusually adverse that a reasonable employee in plaintiff's position would have felt compelled to resign." (*Id.* at p. 1247, internal quotations omitted.) In addition, "the employer must either deliberately create the intolerable working conditions that trigger the resignation or, at a minimum, must know about them and fail to remedy the situation in order to force the employee to resign." (*Id.* at pp. 1249-1250.)

Subsequent constructive termination decisions have also considered the cumulative effect of events and actions preceding the resignation. For example, in *Draper v. Coeur Rochester*, *supra*, 147 F.3d 1104 at page 1106, the employee experienced harassment at the hands of a supervisor and ultimately quit because of the intolerable working conditions and indications

that management would not take steps to remedy them. The court reversed summary judgment for her employer where the employee complained directly to the supervisor harassing her and others "apparently to no avail," and "concluded that there was no chance that the harassment would stop or that anything would be done to alleviate the intolerable conditions." (*Ibid.*)

Like the plaintiff in *Draper*, Ms. Wade experienced discrimination and harassment and made repeated complaints that went unheeded. In late 2017, Ms. Wade asked Mr. Guthrie to explain his poor treatment of her. (3 CT 638.) Unable to obtain any explanation, as he assured her that she was meeting expectations and that he had no complaints about her performance, she told him that she felt as if she was being punished. (*Ibid.*) Their relationship continued to deteriorate and, in early 2018, Ms. Wade wrote a letter to Mr. Guthrie describing her dismay and confusion over her treatment. (*Ibid.*) She indicated that she felt it might be better for her to limit her working hours, even though she testified that she did not want to. *(Ibid.*) Mr. Guthrie did not respond or acknowledge her letter. (*Ibid.*) Ms. Wade concluded that she could no longer remain at the Milburn location and transferred in hopes that her experience would improve and she could continue with the company. (*Ibid.*)

Before transferring to her new location, Ms. Wade spoke with her new store manager, Joy Garner, and described Mr. Guthrie's treatment of her at

the Milburn location. (2 CT 319-320.) Ms. Wade asked to speak with her new District Manager, Tatiana Stockton, to discuss her experience at the Milburn location. (2 CT 343, 346.) Although she received assurances that a meeting would be arranged, it never happened. (*Ibid.*) Ms. Stockton eventually contacted Ms. Wade to schedule a time to speak but then failed to respond after Ms. Wade provided her availability. (3 CT 459, 639.) During this time, Ms. Garner instead tried to persuade Ms. Wade to meet with Mr. Guthrie, at his request, which Ms. Wade told her she did not want to do. (2 CT 343; 3 CT 638-639.) Ms. Garner also failed to take any steps to address Ms. Wade's new concerns regarding misgendering by customers. (3 CT 639.) When Ms. Wade raised the issue with her, Ms. Garner only laughed. (*Ibid.*)

By June 2018, Ms. Wade had worked for months in a hostile and unwelcoming work environment and saw her multiple attempts to raise her concerns with her managers ignored. The company knowingly allowed intolerable conditions to exist without remedy, ultimately forcing Ms. Wade to quit. She did not want to end her career and lose her income and healthcare coverage, particularly in light of the interruption it would pose to her medical transition to treat her gender dysphoria. (See 2 CT 351; 3 CT 639.) Terminating her employment was risky and painful for Ms. Wade, but the company had failed to take any steps to remedy her treatment and she felt she had no other choice.

There are, at a minimum, triable issues of fact as to whether Starbucks constructively and wrongfully terminated Ms. Wade in violation of public policy.

B. The Court Erred In Granting Summary Judgment On Ms. Wade's Constructive Wrongful Termination Claim.

The superior court's grant of summary judgment to Starbucks is premised on the erroneous conclusion that, by the time of Ms. Wade's termination, her working conditions were not intolerable. (4 CT 943-44.) Its order contains two inappropriate factual conclusions—(1) that "the conditions at Guthrie's store were not so intolerable"; and (2) that "Starbucks remedied the situation by granting plaintiff's request to transfer." (4 CT 944.)

The first conclusion, regarding store conditions, suffers from the same errors described in Section II(B) above. Ms. Wade presented at least triable issues of fact as to the intolerable discrimination and harassment she experienced, see Sections I(A) and II(A) *supra*, thereby foreclosing summary judgment. The second conclusion, that granting Ms. Wade's transfer request remedied all issues, is also faulty for multiple reasons. First, the court relies on the fact that "in this case, Guthrie is the only person plaintiff alleges to have mistreated her in any way." (4 CT 943.) But that is not accurate with regard to Ms. Wade's constructive termination claim. Mr. Guthrie created

the intolerable conditions, but every manager that Ms. Wade contacted (Mr. Guthrie, Ms. Garner, and Ms. Stockton) ignored or minimized her concerns, confirming that Starbucks had no interest in addressing Mr. Guthrie's behavior or retaining her as an employee.

Second, the court incorrectly inferred that Starbucks's approval of Ms. Wade's transfer remedied the situation. (See 4 CT 949.) There is no evidence that Starbucks initiated or approved the transfer to remedy Ms. Wade's concerns or that it took steps to address Mr. Guthrie's violation of company policy. Moreover, after the transfer, Starbucks's managers did nothing to act on Ms. Wade's complaints despite her requests for assistance. At summary judgment, the court is required to draw all inferences in favor of the non-moving party—yet it did precisely the opposite.

Third, the superior court read *Turner v. Anheuser-Busch, Inc.*, *supra*, 7 Cal.4th 1238, to limit its analysis to conditions at "the time of the employee's resignation." (4 CT 949.) At the time of Ms. Wade's resignation, the court reasoned, she had transferred to a new location and had not worked with Mr. Guthrie in eleven weeks, so there was no triable issue as to whether her working conditions were intolerable at the time of her resignation. (*Ibid.*) To the contrary, *Turner* elsewhere clarifies that the court must evaluate the claim "under all the circumstances[.]" (*Turner*, *supra*, at p. 1247.)

As described above, Ms. Wade presented evidence that she had worked for months in a discriminatory and harassing environment. She testified that she endured "accumulated stress" during her employment, ultimately receiving a referral to a stress therapist because her work environment was "adversely affecting [her] mental and physical health." (2 CT 344, 348; 3 CT 639.) Ms. Wade faced significant risks in ending her employment, particularly in light of her ongoing medical needs. (See 2 CT 350-351; 3 CT 639.) Left untreated, gender dysphoria can lead to "debilitating distress." (*Edmo v. Corizon, Inc.*, *supra*, 935 F.3d 757, 69.) A jury could therefore reasonably weigh the cumulative evidence and find that the conditions at Starbucks would have to have been so "unusually adverse" for Ms. Wade that she felt compelled to resign and thus halt her medical transition, risking renewed dysphoria and associated distress. (See *Turner*, *supra*, 7 Cal.4th at p. 1247.) Yet the court erroneously weighed the facts at summary judgment and failed to liberally construe the evidence in Ms. Wade's favor.

Finally, the court described the record as containing alternate reasons for Ms. Wade's resignation—her inability to meet with Ms. Stockton, Ms. Garner's failure to follow company policy, unrelated stress, and Ms. Garner's failure to address unrelated employee concerns. (4 CT 959.) However, Ms. Wade's testimony confirms that she quit because of Mr. Guthrie's treatment

and her inability to get any response from her managers. (2 CT 342-345; 3 CT 639.)

Ms. Wade testified that the primary reason she decided to stop working at Starbucks was because Ms. Garner showed no interest in helping her speak with District Manager Stockton, and instead tried to persuade her to talk with Mr. Guthrie. (2 CT 342-343.) The pattern that Ms. Wade observed of Ms. Garner immediately brushing off employee concerns only confirmed her belief that Ms. Garner would not help her. (*Ibid.*) Ms. Wade also cited "[t]he accumulated stress that [she] had during that time frame," which included her time with Mr. Guthrie, as well as her transition and other issues with Ms. Garner. (2 CT 348.) To the extent Ms. Wade's testimony can be read as disputable, the court was obligated to resolve all doubts in her favor rather than draw factual conclusions better left for the jury.

Had the court applied the correct legal standards, Ms. Wade would have satisfied her burden because she produced evidence that:

- Mr. Guthrie discriminated against and harassed Ms. Wade, as described in Sections I and II above;
- Ms. Wade tried to express concerns about her mistreatment to Managers Guthrie and Garner and District Manager Stockton;
- None of Ms. Wade's managers took steps to address Mr. Guthrie's behavior or otherwise remedy the situation;

- Ms. Wade suffered significant stress and anxiety because of the conditions at Starbucks;
- There is no evidence that Starbucks intended Ms. Wade's transfer to remedy her hostile work environment or that it took any steps to address Mr. Guthrie's behavior; and
- Ms. Wade did not want to resign and leaving Starbucks posed significant threats to her mental health and gender transition.

Therefore, there remains a triable issue as to whether the cumulative effect of what occurred after Ms. Wade told Mr. Guthrie she was transgender would have led a similarly situated employee to quit, foreclosing summary judgment on Ms. Wade's constructive discharge claim.

IV. The Superior Court Erred In Granting Summary Judgment to Starbucks and Mr. Guthrie on Ms. Wade's Intentional Infliction Of Emotional Distress Claim.

In granting summary judgment on Ms. Wade's fourth cause of action for intentional infliction of emotional distress, the superior court concluded that there was no evidence of extreme and outrageous conduct or emotional distress. (4 CT 948.) Both findings were in error.

A. Violation Of The Fair Employment And Housing Act May Constitute Extreme And Outrageous Conduct.

The superior court concluded that Ms. Wade had not made a showing of extreme and outrageous conduct. (4 CT 948.) However, as described above, Ms. Wade presented evidence of the discrimination and harassment she experienced while working at Starbucks, which raises at least triable issues as to whether she suffered "extreme and outrageous conduct . . . with the intention of causing, or reckless disregard of the probability of causing, emotional distress." (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.)

Workplace discrimination can constitute extreme and outrageous conduct. (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 81 ["[A]n employer's discriminatory actions may constitute . . . outrageous conduct redressable under a theory of intentional infliction of emotional distress"].) Therefore, if this Court finds that there is a triable issue as to whether Starbucks and Mr. Guthrie violated the Fair Employment and Housing Act, then the grant of summary judgment on Ms. Wade's claim of intentional infliction of emotional distress should also be reversed.

B. There Are Triable Issues As To Whether Ms. Wade Experienced Emotional Distress.

The superior court further concluded that there was "[no] evidence of severe emotional distress." However, Ms. Wade testified as to her "accumulated stress" from working at Starbucks, and to feeling "insecure, anxious, depressed, alienated, embarrassed, and afraid" while working there. (2 CT 344; 3 CT 637.) Her therapist informed her that "the toxic workplace environment was adversely affecting [her] mental and physical health," and referred her to a stress therapist for additional care. (2 CT 348; 3 CT 639.)

In addition, after her constructive discharge, Ms. Wade's gender transition "stopped . . . in its tracks," and she later "slid[] back into gender dysphoria." (3 CT 639.) She testified that leaving Starbucks "took away all of my security of transition. It took away all of my income. . . . I lost all my medical care." (2 CT 350-351.) She continues to struggle with anxiety, depression, and a lack of self-confidence. (2 CT 351.)

The superior court, relying on *Fletcher v. Western National Life Insurance Co.* (1970) 10 Cal.App.3d 376 (*Fletcher*), held that the above description of Ms. Wade's emotional state was not actionable. (4 CT 948.) However, *Fletcher* declared that "requisite emotional distress may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry."

(*Fletcher*, *supra*, at p. 397.) There, the plaintiff's feelings of anxiety and fear of financial ruin were adequate to justify an award for emotional distress. (*Ibid*.) Ms. Wade's description of emotional distress closely tracks that of the plaintiff in *Fletcher*, raising at least a triable issue of fact as to her claim for intentional infliction of emotional distress.

CONCLUSION

For the foregoing reasons, this Court should reverse the order granting summary judgment in favor of Starbucks and Dustin Guthrie on all causes of action and remand the case to the superior court for further proceedings.

Dated: April 23, 2020 PETER LAW GROUP

By /s/
Arnold P. Peter
Eyal Farahan

Dated: April 23, 2020 IMPACT FUND

By /s/
Lindsay Nako
David S. Nahmias

Attorneys for Plaintiff and Appellant
Maddie Wade

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, we hereby certify that this brief contains 13,870 words, including footnotes. In making this certification, we have relied on the word count of the computer program used to prepare the brief.

Dated: April 23, 2020 PETER LAW GROUP

By /s/
Arnold P. Peter
Eyal Farahan

Dated: April 23, 2020 IMPACT FUND

By /s/
Lindsay Nako
David S. Nahmias

Attorneys for Plaintiff and Appellant
Maddie Wade

PROOF OF SERVICE

Wade v. Starbucks, et al.
Civil No. F079838

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 1230 Rosecrans Avenue, Suite 150, Manhattan Beach, California 90266.

On April 23, 2020, I served the foregoing document described as APPELLANT'S OPENING BRIEF on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

[X] (By Mail)

I placed a true copy thereof enclosed in a sealed envelope addressed as shown above. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice I place all envelopes to be mailed in a location in my office specifically designated for mail. The mail then would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Manhattan Beach, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

[X] (State Court)

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 23, 2020 in Manhattan Beach, California.

/s/
Andrea Ramirez

SERVICE LIST

Tracey A. Kennedy — By TrueFiling
SHEPPARD MULLIN RICHTER & HAMPTON LLP
333 South Hope Street, 43rd Floor
Los Angeles, CA 90071-1422
Attorney for Defendants and Respondents,
STARBUCKS CORPORATION AND DUSTIN GUTHRIE

Clerk of the Court — By U.S. Mail
Fresno County Superior Court
Hon. Kimberly A. Gaab
1130 O Street
Fresno, California 93721

Lindsay Nako — By TrueFiling
David S. Nahmias
IMPACT FUND
2080 Addison Street, Suite 5
Berkeley, CA 94704
Attorney for Plaintiff and Appellant

California Supreme Court — [By electronic filing pursuant to Cal. Rules of Court, rule 8.212]