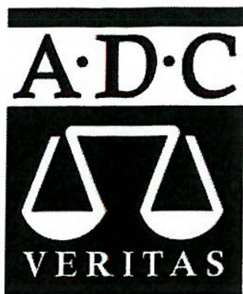

Association of Defense Counsel of Northern California and Nevada

ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

August 29, 2017

Presiding Justice Jim Humes
Associate Justice Kathleen M. Banke
Associate Justice Sandra L. Margulies
California Court of Appeal
First Appellate District, Division One
350 McAllister Street
San Francisco, California 94102-1213

Re: ***Nakai v. Friendship House Association of American Indians, Inc. et. al.***
Court of Appeal No. A147966
Date of Opinion: 8/10/2017
Request for Publication (Cal. Rules of Court, rule 8.1120)

Dear Honorable Justices:

Pursuant to California Rules of Court, rule 8.1120 (a), the Association of Southern California Defense Counsel and the Association of Defense Counsel of Northern California and Nevada (hereinafter "Associations") request that this Court publish its August 10, 2017, opinion.

INTEREST OF THE ASSOCIATIONS

The Associations are among the nation's largest and preeminent regional organizations of lawyers who routinely defend civil actions. They are comprised of more than 1,800 attorneys in Southern and Northern California, who are certainly interested in the development of California law. The Nevada members are similarly interested because Nevada courts often follow the law and rules adopted in California.

The Associations afford their members with professional fellowship, specialized continuing legal education and a forum for the exchange of information and ideas. They also act as a liaison between the defense bar and the courts and the Legislature. The Associations are therefore active in assisting courts on issues of interest to their members, having appeared numerous times as amicus curiae in the California Supreme Court and the Court of Appeal.

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The Associations' members regularly defend civil cases involving alleged discrimination and many other types of cases in which "protected classes" and employer duties are at issue. Thus, they are particularly interested in cases involving alleged discrimination, especially marital discrimination as there are relatively few cases directly on point in this area, and any duties concerning the employer.

REASONS WHY THE OPINION SHOULD BE PUBLISHED

California Rules of Court, rule 8.1105(c) provides that an "opinion of a Court of Appeal . . . *should* be certified for publication in the Official Reports" if the opinion falls within any *one* of nine categories. (Emphasis added.) Here, the Opinion satisfies several of the enumerated criteria. As discussed below, publication is warranted because the Opinion "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions;" "[m]odifies, explains, or criticizes with reasons given, an existing rule of law;" "[i]nvolves a legal issue of continuing public interest;" and "[m]akes a significant contribution to legal literature" by reviewing and discussing the law on important and recurring issues. (Rule 8.1105(c) (2), (3), (6) and (7).)

First, as the Court's opinion notes, FEHA expressly prohibits discrimination based upon marital status. These cases often involve issues of continuing public interest since most all Californians are either an employer or an employee or both. The Court's opinion further notes that California courts can look to federal precedent in the areas of discrimination. FEHA actually codifies marital status as a protected class. Yet, no federal statute expressly prohibits marital status discrimination. While there is some limited federal authority on the issue, it is just that, limited. Accordingly, unlike other protected classes which are codified under FEHA, marital status discrimination does not have a direct federal corollary for which California employers, employees, and attorneys may look to for precedent. The result is very few precedential decisions for guidance in this area. The Associations are not aware of any published opinion involving the *prima facie* requirements for a marital status discrimination claim since *Chen v. County of* Orange (2002) 96 Cal.App.4th 926 was decided over a decade ago in 2002. The time is ripe for another.

This decision provides a direct example of why the facts complained of do not arise to the level of marital discrimination under FEHA. The analysis of "conduit case" versus actual marital discrimination claims will assist employers, employees, and their counsel in determining whether or not an employee has in fact asserted a claim of marital discrimination. Since *Chen*, there have been few, if any, opinions which clearly delineate the distinction between a conduit case (succinctly described as those involving office political problems, family dynamics, or the particulars relating to one's spouse) compared to actual discrimination situations (where the martial state itself, not the spouse, is the substantial motivating factor in an adverse employment action). Thus, publication is warranted under Rule 8.1105(c)(2), (3), and (6).

Second, the Court's opinion correctly deals with an important public policy--that workplace safety is a prime concern for employers. Thus, the Court's holding that terminating the plaintiff based upon threats, or even perceived threats, of violence provides an employer with a non-discriminatory basis for termination.

Third, the Court's opinion addresses the "at-will" relationship of employers and employees. The opinion notes that "…[it] does not mean FEHA imbues at-will employees with any contractual due process rights in connection with their employment." This decision provides additional insight as to the distinction between the "at-will" relationship and the allegations of discriminatory conduct. FEHA does not alter the "at-will" employment relationship and does not create any contractual or due process rights.

Fourth, the Court's opinion establishes a rule that employers do not have a duty to investigate workplace violence claims <u>before</u> terminating the alleged <u>perpetrator</u>. In establishing this rule, the Court's opinion distinguishes "at-will" employment cases with "good cause" contractually required type cases. Further, this rule makes sense as the investigatory requirements of FEHA are intended to protect the victim, not embolden the perpetrator. In the absence of any *prima facie* showing, an employee cannot maintain any failure to prevent, investigate, or remedy a FEHA violation claim.

Fifth, the Court's opinion sets forth both the analytical framework for a defense motion for summary judgment and for trial under FEHA discrimination claims. Establishing that these existing rules of procedure are utilized in cases involving marital discrimination claims under FEHA is significant. The utilization of these rules in this case is illustrative of the plaintiff's burden in defending the motion for summary judgment by presenting "substantial evidence". This case is illustrative of plaintiff's failure to rebut a motion for summary judgment by establishing a *prima facie* case and by proffering substantial evidence of pretext, not simply a plaintiff's own allegations absent proper evidentiary support.

Conclusion: For the reasons explained above, this Court's Opinion meets the criteria for publication under rule 8.1105(c) of the California Rules of Court, and therefore should be published. Thus, the Associations urge this Court to order publication of the Opinion.

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Respectfully submitted,

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