

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. 18CEC02779
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Appeal from the Superior Court for the County of Fresno  
Honorable Kimberly A. Gaab

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**[PROPOSED] BRIEF OF AMICI CURIAE NATIONAL  
CENTER FOR LESBIAN RIGHTS, LAMBDA LEGAL  
DEFENSE & EDUCATION FUND, INC., AND NINE  
ADDITIONAL NONPROFIT ORGANIZATIONS IN  
SUPPORT OF PLAINTIFF-APPELLANT MADDIE WADE**

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**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: August 25, 2020

NATIONAL CENTER FOR  
LESBIAN RIGHTS

By: /s/ Julie Wilensky  
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## INTEREST OF AMICI<sup>1</sup>

Amici are the following nonprofit organizations with an interest in ensuring the equal treatment of lesbian, gay, bisexual, transgender, queer, and non-binary people in California and across the nation: National Center for Lesbian Rights, Lambda Legal Defense and Education Fund, Inc., American Civil Liberties Union of Northern California, American Civil Liberties Union of Southern California, California Rural Legal Assistance, Inc., Equality California, GLBTQ Legal Advocates & Defenders, Legal Aid at Work, Legal Services of Northern California, Transgender Law Center, and Transgender Legal Defense & Education Fund. Individual statements of interest of each Amicus are in the accompanying Application for Leave to File Amici Curiae Brief.

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<sup>1</sup> In accordance with California Rules of Court, rule 8.200(c)(3), no party or counsel for any party in the pending appeal authored this brief in whole or in part, and no party or counsel for any party in the pending appeal made a monetary contribution intended to fund the brief's preparation or submission. No person or entity other than counsel for amici made a monetary contribution intended to fund the preparation or submission of this brief.



## INTRODUCTION

Plaintiff-Appellant Maddie Wade, who worked for Starbucks for eight years, alleges discrimination, harassment, wrongful constructive termination, and intentional infliction of emotional distress based on the actions of her manager, Dustin Guthrie. After Mr. Guthrie learned Ms. Wade is transgender, he began to treat her negatively, including by cutting her hours and by referring to her exclusively by her former male name and male nicknames.

Transgender people in California and nationwide face significant adverse treatment in the workplace, including the misuse of their names and pronouns. Being subjected to such adverse treatment is stigmatizing and harmful. Like many other forms of workplace discrimination, it can cause serious emotional and psychological harms, including anxiety and depression. It also interferes with employees' ability to do their jobs. Shining a constant spotlight on an employee's transgender identity calls attention to a characteristic that is irrelevant to workplace performance. It sends a clear message both to the worker and to others that a transgender employee is not a valued, equal, or respected member of the workforce.

Under California law, failure to abide by an employee's requested name and pronoun is unlawful discrimination. It may also constitute unlawful harassment.

## **ARGUMENT**

### **I. Transgender People Face Significant Adverse Treatment in the Workplace.**

In California and nationwide, transgender people face significant workplace discrimination, harassment, and other mistreatment. Studies estimate there are approximately 1.4 million transgender adults in the United States,<sup>2</sup> and 92,000 transgender adults in California.<sup>3</sup> The National Transgender Discrimination Survey, a large-scale nationwide study of transgender people in 2011, found that 90% of those surveyed had experienced harassment, mistreatment, or discrimination on

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<sup>2</sup> Flores et al., UCLA Williams Inst., How Many Adults Identify as Transgender in the United States? (June 2016) 2 <<https://perma.cc/RV8T-NJKE>>.

<sup>3</sup> Herman et al., UCLA Center for Health Policy Research and UCLA Williams Inst., Demographic and Health Characteristics of Transgender Adults in California: Findings from the 2015-2016 California Health Interview Survey (Oct. 2017) 2 <<https://perma.cc/C5PL-A95R>> (hereafter Demographic and Health Characteristics).

the job or were forced to take actions such as hiding their gender to avoid it.<sup>4</sup>

Transgender people of color face particularly high rates of workplace discrimination.<sup>5</sup> Data from the 2015 U.S. Transgender Survey, a national survey of nearly 28,000 transgender people, show that Native American, multiracial, and Black respondents were significantly more likely than white transgender people to have ever lost a job because of their gender identity or expression.<sup>6</sup> Of respondents who had or applied for a job in the year before the survey, 49% of Native American transgender women and 47% of Black transgender women reported being fired, being denied a promotion, or not being hired for a job they

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<sup>4</sup> Grant et al., Nat. Center for Transgender Equality & Nat. Gay and Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011) 56 <<https://perma.cc/8ST7-9MHE>> (hereafter *Injustice at Every Turn*).

<sup>5</sup> James et al., Nat. Center for Transgender Equality, *2015 U.S. Transgender Survey* (2016) 155 <<https://perma.cc/NN5E-F3PB>> (hereafter *U.S. Transgender Survey*).

<sup>6</sup> *U.S. Transgender Survey*, *supra*, at pages 6, 150 and figure 10.3.

applied for in the past year because they are transgender.<sup>7</sup> As these statistics show, workplace protections for transgender people are particularly important for those who already face discrimination based on other protected characteristics.

In California, the Legislature has recognized that transgender people face barriers to employment<sup>8</sup> and “disproportionately face discrimination, harassment, and violence in areas of life including housing, education, employment, health care, and law enforcement.”<sup>9</sup> In the U.S. Transgender Survey, 26% of respondents in California who held or applied for a job in the year before the survey reported being fired, denied a promotion, or not being hired in the past year because of their

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<sup>7</sup> James et al., Nat. Center for Transgender Equality, 2015 U.S. Transgender Survey: Report on the Experiences of American Indian and Alaska Native Respondents (2017) 11 and figure 12 <<https://perma.cc/C6AF-G3YL>>; James et al., Nat. Center for Transgender Equality, 2015 U.S. Transgender Survey: Report on the Experiences of Black Respondents (2017) 11 and figure 13 <<https://perma.cc/DN74-E334>>.

<sup>8</sup> Unemployment Insurance Code section 14005, subdivision (j)(14) (including “transgender and gender nonconforming individuals” in list of groups whose members qualify as “individuals with employment barriers”).

<sup>9</sup> Gender Recognition Act, as added by Statutes 2017, chapter 853, section (2), subdivision (e) <<https://perma.cc/3J2J-BSXE>>.

gender identity or expression.<sup>10</sup> Of California respondents who had a job in the year before the survey, 13% reported being verbally harassed at work because of their gender identity or expression.<sup>11</sup> 22% reported other forms of mistreatment in the workplace based on their gender identity or expression, such as “being forced to use a restroom that did not match their gender identity, being told to present in the wrong gender in order to keep their job, or having a boss or coworker share private information about their transgender status with others without their permission.”<sup>12</sup>

The impact of discrimination against transgender workers is significant and plays a major role in marginalizing transgender people and subjecting them to a wide range of economic, social, and health-related harms. Discrimination often has direct economic consequences, as “[a]ccess to employment is critical to

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<sup>10</sup> Nat. Center for Transgender Equality, 2015 U.S. Transgender Survey: California State Report (2017) 1 <<https://perma.cc/P568-7CKP>> (hereafter Cal. State Report). This is similar to the percentage of the national sample, 27%. (U.S. Transgender Survey, *supra*, at p. 12.)

<sup>11</sup> Cal. State Report, *supra*, at page 1.

<sup>12</sup> Cal. State Report, *supra*, at page 1.

people’s ability to support themselves and their families.”<sup>13</sup> Not being hired, being denied promotions, being paid less, or being terminated or constructively discharged from a job due to anti-transgender bias can have a life-altering financial impact. More than half of the respondents to the U.S. Transgender Survey who had lost their job because of their gender identity or expression had experienced homelessness during their lifetime.<sup>14</sup>

In California, as is the case nationally, transgender people have high rates of unemployment and poverty.<sup>15</sup> California respondents to the U.S. Transgender Survey had an unemployment rate three times higher than the nationwide rate at the time of the survey.<sup>16</sup> According to a recent study from the Williams Institute at UCLA School of Law, 41% of transgender

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<sup>13</sup> U.S. Transgender Survey, *supra*, at page 147.

<sup>14</sup> U.S. Transgender Survey, *supra*, at page 178.

<sup>15</sup> U.S. Transgender Survey, *supra*, at page 5; Cal. State Report, *supra*, at page 1 and endnote 2.

<sup>16</sup> Cal. State Report, *supra*, at page 1 and endnote 2.

people in California are living in poverty, compared to 23% of straight people who are not transgender.<sup>17</sup>

Discrimination against transgender people in employment and other areas of life is also linked to health disparities between transgender people and those who are not transgender, and a large body of research links the stress that results from discrimination and stigma against transgender people to negative mental and physical health outcomes.<sup>18</sup>

**A. The Misuse of a Transgender Person’s Name or Pronouns Is a Common Form of Workplace Discrimination and Harassment.**

Few discriminatory practices are more stigmatizing and harmful to transgender workers than when colleagues, employers, or others in the workplace intentionally refer to them

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<sup>17</sup> Choi et al., UCLA Williams Institute, State Profiles of LGBT Poverty in the United States (Dec. 2019) 43 and figure 91 <<https://perma.cc/E6R2-B9HJ>>.

<sup>18</sup> See, e.g., Demographic and Health Characteristics, *supra*, at page 4; Bockting et al., *Stigma, Mental Health, and Resilience in an Online Sample of the US Transgender Population* (2013) 103 Am. J. Pub. Health 943; see also Equality Act, Hearings before House Com. On Judiciary on H.R. No. 5, 116th Cong., (2019), written testimony of Ilan H. Meyer, Ph.D. <<https://perma.cc/M364-XU6T>> (summarizing 25 years of research on the impact of discrimination, prejudice, and stigma on the health and well-being of LGBT people).

by names and pronouns that negate their gender identities, such as referring to a transgender woman as “he” or using her former name after she has requested to be identified by a different name and pronoun. Here, Ms. Wade, a transgender woman, has presented evidence that Mr. Guthrie, her supervisor, insisted on using her prior male name and male nicknames (such as “brother” or “man”) after Ms. Wade expressly asked him not to do so. (3 CT 323-324, 637.) And Mr. Guthrie never used Ms. Wade’s chosen name or female pronouns. (2 CT 324.) Research has shown that the misuse of names and pronouns is one of the most common forms of disparate treatment faced by transgender employees. The National Transgender Discrimination Survey found that more than half of transgender respondents had been referred to by the wrong pronoun at work, “repeatedly and on purpose.”<sup>19</sup>

Courts and civil rights enforcement agencies across the country have recognized the significant harms caused by this type of discrimination and harassment. For example, after Tamara Lusardi, a civilian employee of the U.S. Army, notified

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<sup>19</sup> Injustice at Every Turn, *supra*, at page 57.



her colleagues of her gender transition, her supervisor “repeatedly referred” to her “by her former male name, by male pronouns, and as ‘sir.’” (*Lusardi v. McHugh* (E.E.O.C. Apr. 1, 2015, EEOC DOC 0120133395) 2015 WL 1607756, at \*3 (*Lusardi*)). Ms. Lusardi testified that her supervisor “seemed to especially call her male names when in the presence of other employees as a way to reveal that [she] is transgender . . . .” (*Id.* at \*11.) The EEOC concluded that the supervisor’s “actions and demeanor made clear” that his “use of a male name and male pronouns in referring to [Ms. Lusardi] was not accidental” and that his “repeated and intentional conduct was offensive and demeaning . . . and would have been so to a reasonable person in [Ms. Lusardi’s] position.” (*Ibid.*)

Similarly, when Alyx Tinker informed his coworkers and management at a security company that he was undergoing a gender transition and asked to be called by his new name and male pronouns, his supervisor “refused to comply with his request and regularly referred to or addressed” him as “she” or used a nickname for his former female name. (*Mass. Com. Against Discrimination v. Securitas Security Services USA, Inc.* (M.C.A.D. Aug. 9, 2019, No. 13-BEM-01906) 2016 WL 4426971, at

\*1-2 (*Tinker*.) The supervisor “continued to refer to [Mr. Tinker] as female and a ‘girl,’ in situations where the reference could no longer be deemed accidental or unintentional.” (*Id.* at \*8 [noting for example that the supervisor “referred to [Mr. Tinker] as female no less than nine times in an email he wrote in 2013, at least two years after [he] identified as a transgender male.”]) As the court noted, Mr. Tinker “merely wanted to be treated respectfully . . . .” (*Ibid.*)

In another case, Allegra Schawe-Lane, who worked at an Amazon.com shipping facility, brought a lawsuit describing the discrimination and harassment she experienced after another employee learned Ms. Schawe-Lane is transgender and told other employees. (Complaint, *Schawe-Lane v. Amazon.com.KYDC LLC* (E.D.Ky. Aug. 9, 2017, No. 2:17-cv-00134-WOB-JGW) 2017 WL 3437565, at ¶¶ 65-71 (*Schawe-Lane*).)<sup>20</sup> In particular, “Amazon management and Ms. Schawe-Lane’s coworkers constantly and intentionally referred to Ms. Schawe-Lane using male pronouns and titles, despite knowing that she is a woman,” including even

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<sup>20</sup> The lawsuit was brought after the EEOC found the charges substantiated by the evidence. (*Schawe-Lane, supra*, 2017 WL 3437565, at ¶ 18.)

on some of the occasions when she complained about the discrimination she was experiencing. (*Id.* at ¶¶ 71(b), 73.)

The misuse of a transgender person’s name and pronouns in the workplace, in addition to constituting discriminatory treatment itself, is often part of a larger pattern of negative treatment. In this case, Ms. Wade provided evidence that her supervisor, Mr. Guthrie, reduced her working hours and denied her access to advancement opportunities, among other harmful actions, after he learned she is transgender. (See Pl.-Appellant’s Opening Br. pp. 37-38 [describing adverse actions].) In her lawsuit against Amazon, Ms. Schawe-Lane described a range of discriminatory and harassing treatment, including improper pay deductions and being singled out for “coaching” even though her work completion rate matched those of her coworkers. (*Schawe-Lane, supra*, 2017 WL 3437565, at ¶¶ 83, 118.) Similarly, a respondent to a study by the Anti-Violence Project described “managers sometimes poking fun, trying to push buttons, laughing . . . . There was snickering behind my back. Being sarcastic with the facial expressions. Saying ‘excuse me sir, I

mean ma'am.”<sup>21</sup> Another respondent said that he was “frequently misgendered” at his job and that staff would “out me [as being transgender] to clients and other staff frequently.”<sup>22</sup>

When transgender employees complain about this adverse treatment in the hope of correcting it, employers often fail to take appropriate corrective action. (See, e.g., *Lusardi, supra*, 2015 WL 1607756, at \*12 [noting “no evidence that the Agency took prompt and effective corrective action”]; *Tinker, supra*, 2016 WL 4426971, at \*9 [concluding that the company “did not take seriously any of [Mr. Tinker’s] complaints”].) A respondent to the Anti-Violence Project study said that “[t]he Human Resources department responded to my request that people stop misgendering me by pointing out that many people don’t misgender me, then did absolutely nothing.”<sup>23</sup> In the same study,

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<sup>21</sup> Ray et al., *Anti-Violence Project, Individual Struggles, Widespread Injustice: Trans and Gender Non-Conforming Peoples’ Experiences of Systemic Employment Discrimination in New York City* (2018) 22 <<https://perma.cc/9CZL-VG4C>> (hereafter *Individual Struggles*).

<sup>22</sup> *Individual Struggles, supra*, at page 18.

<sup>23</sup> *Individual Struggles, supra*, at page 20.

77% of respondents who reported a discriminatory incident to human resources felt that the response was inadequate.<sup>24</sup>

**B. Discrimination and Harassment, Including Misusing a Transgender Employee’s Name or Pronouns, Harms Transgender Workers and Interferes with Their Ability to Do Their Jobs.**

Discrimination and harassment in the workplace, including the misuse of transgender employees’ names or pronouns, harms transgender workers and interferes with their ability to do their jobs. Treating a transgender employee inconsistent with their gender identity—for example, treating a transgender woman as a man by calling her a male name—is demeaning and negates a transgender person’s identity. As a team of researchers put it after interviewing and surveying more than 1,000 transgender employees: “[I]magine how it would feel if you revealed your authentic self to those you work with and see every day, only to have them reject, ostracize, or ignore you as a result.”<sup>25</sup>

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<sup>24</sup> Individual Struggles, *supra*, at page 20.

<sup>25</sup> Thoroughgood et al., *Creating a Trans-Inclusive Workplace* (Mar.-Apr. 2020) Harvard Business Review <<https://perma.cc/EW8C-GMMH>>; see also Mizock et al., *Transphobia in the Workplace: A Qualitative Study of Employment Stigma* (2018) 3 *Stigma & Health* 275 (describing range of experiences of transgender employees with bias and discrimination in the workplace).

Refusing to use a transgender person’s name and pronouns discriminates against transgender people. It treats them differently from, and less favorably than, all other employees, who are referred to by names and pronouns that match their gender. The negative impact of that disparate treatment is apparent. By referring to a transgender worker in a way that negates their gender, an employer both compromises the employee’s privacy and safety by publicly disclosing their transgender status without the employee’s consent, and at the same time, disrespects and stigmatizes transgender identity.

Being singled out for negative treatment based on a protected characteristic makes it more difficult for any employee to do their job. As a respondent to the Anti-Violence Project study explained, “constantly having to . . . advocate for people to use my pronouns, and correct people when they make offensive comments is exhausting and is a distraction from my ability to do my job.”<sup>26</sup> Not surprisingly, research has confirmed that being referred to by the wrong name and pronouns results in

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<sup>26</sup> Individual Struggles, *supra*, at page 18.

psychological distress, including “anxiety- and depression-related symptoms [and] stress . . . .”<sup>27</sup>

## **II. Intentional Misuse of a Transgender Employee’s Name or Pronouns Violates the FEHA.**

The Fair Employment and Housing Act (FEHA) establishes that discrimination in employment because of “sex, gender, gender identity, [and] gender expression” violates the State’s public policy, and the right to be free from such discrimination is a civil right. (Gov. Code § 12920; *Id.* § 12921, subd. (a).) The FEHA specifies that it is unlawful to “discriminate . . . in terms, conditions, or privileges of employment” because of a person’s “sex, gender, gender identity, [and] gender expression . . . .”<sup>28</sup>

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<sup>27</sup> McLemore, *A Minority Stress Perspective on Transgender Individuals’ Experiences with Misgendering* (2016) 3 Stigma and Health 53, 59; McLemore, *Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals* (2014) 14 Self and Identity 51, 60 (finding a correlation between frequency of misgendering and negative views of self); see also *Hampton v. Baldwin* (S.D.Ill. Nov. 7, 2018, No. 3:18-CV-550-NJR-RJD) 2018 WL 5830730, at \*2 (describing expert testimony at evidentiary hearing “explain[ing] that misgendering transgender people can be degrading, humiliating, invalidating, and mentally devastating . . . .”).

<sup>28</sup> The FEHA further provides: “Sex’ also includes, but is not limited to, a person’s gender. ‘Gender’ means sex, and includes a person’s gender identity and gender expression. ‘Gender expression’ means a person’s gender-related appearance and behavior whether or not stereotypically associated with the

(Gov. Code § 12940, subd. (a).) The FEHA also prohibits harassment because of a person’s “sex, gender, gender identity, [and] gender expression . . . .” (*Id.* § 12940, subd. (j)(1).) These provisions must “be construed liberally” to accomplish their purposes, which are to “provide effective remedies to eliminate these discriminatory practices.” (*Id.* § 12993, subd. (a); *Id.* § 12920).

Consistent with the statute, the FEHA’s implementing regulations on “Terms, Conditions, and Privileges of Employment” provide 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 Act . . . .” (Cal. Code Regs., tit. 2, § 11034, subd. (h)(3).) An employer “must identify the employee in accordance with the employee’s gender identity and preferred

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person’s assigned sex at birth.” (Gov. Code § 12926, subd. (r)(2).) The FEHA’s implementing regulations define “gender identity” as including “transgender.” (Cal. Code Regs., tit. 2, § 11030, subd. (b).) The regulations also define “transitioning” and further provide that “[i]t is unlawful to discriminate against an individual who is transitioning, has transitioned, or is perceived to be transitioning.” (*Id.* § 11030, subd. (f); *Id.* § 11034, subd. (i)(4).)



name” except when using the employee’s legal name is “necessary to meet a legally-mandated obligation . . . .” (*Id.* § 11034, subd. (h)(4).)

Accordingly, when a transgender employee requests to be identified with a particular name or pronoun, an employer’s intentional misattribution of the employee’s name or pronouns is unlawful discrimination and may also constitute harassment based on sex, gender identity, or gender expression in violation of the FEHA.<sup>29</sup> (See, e.g., *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 709 [noting that “discrimination and harassment claims can overlap as an evidentiary matter” and that “nothing prevents a plaintiff from proving these two violations with the same (or overlapping) evidentiary presentations”].)

#### **A. Discrimination**

When an employer intentionally misuses a transgender employee’s name and pronouns in the workplace, that employer

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<sup>29</sup> It may also be unlawful disability discrimination and/or harassment, as gender dysphoria can be a disability under the FEHA. (See Gov. Code § 12926.1, subd. (c); see also, e.g., *Tay v. Dennison* (S.D.Ill. May 1, 2020, No. 19-cv-00501-NJR) 2020 WL 2100761, at \*3 [denying motion to dismiss federal disability discrimination claim brought by transgender incarcerated person challenging prison’s housing assignment policy].) Ms. Wade has not raised disability discrimination claims.

singles out the transgender employee by refusing to treat them consistent with their gender identity, as the employer would do for non-transgender employees. Although Ms. Wade has not alleged that her supervisor’s misuse of her name and pronouns was an independent discriminatory act, the law would permit such a claim, as this disparate treatment is unlawful under the FEHA.<sup>30</sup>

The FEHA prohibits “discriminat[ing] . . . in terms, conditions or privileges of employment.” (Gov. Code § 12940, subd. (a).) This prohibited discrimination includes “[d]isparate treatment,” which occurs when an “employer . . . treats some people less favorably than others because of their [protected characteristic].” (*Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 1317 [quoting *Teamsters v. United States* (1977) 431 U.S. 324, 335-36, fn. 15].) To constitute prohibited discrimination, such disparate treatment must involve

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<sup>30</sup> Ms. Wade’s discrimination claim is based on multiple adverse employment actions, including but not limited to Mr. Guthrie reducing her hours. (See Pl.-Appellant’s Opening Br., pp. 36-37.) Ms. Wade contends that Mr. Guthrie’s misuse of her name and pronouns supports an inference that his other adverse actions towards her were motivated by a discriminatory intent. (See *id.* at pp. 41-42.)

“some official action taken by the employer.” (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706 [emphases omitted].) Section 12940(a) “must be interpreted liberally and with a reasonable appreciation of the realities of the workplace . . . .” (*Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1053-54) (*Yanowitz*.)

The FEHA’s implementing regulations specify that an employer’s failure to respect a transgender worker’s gender—including with respect to names and pronouns—unlawfully discriminates in the “Terms, Conditions, and Privileges of Employment.” (See Cal. Code Regs., tit. 2, § 11034.) The regulations contain several provisions requiring employers to treat all employees consistent with their gender identity. For example, employers “shall permit employees to use facilities that correspond to the employee’s gender identity or gender expression, regardless of the employee’s assigned sex at birth.” (*Id.* § 11034, subd. (e)(2)(A).) And as noted above, the regulations require that an employer use an employee’s requested “gender, name, and/or pronoun . . . .” (*Id.* § 11034, subds. (h)(3), (h)(4).)

As the regulations make clear, an employer’s misuse of a transgender employee’s name or pronouns—refusing to treat the employee consistent with their gender identity—constitutes

explicit disparate treatment in the terms, conditions, and privileges of employment. When an employer singles out an employee who is a transgender woman, for example, by referring to her by a former male name or with male pronouns, this is disparate treatment based on gender identity: the employer is treating a transgender employee differently from, and less favorably than, non-transgender women, who are treated consistently with their gender identities. It is also disparate treatment based on sex, because the employer is treating a transgender woman differently from, and less favorably than, other women in the workplace.

Courts and civil rights enforcement agencies have recognized that such treatment is a form of unlawful discrimination based on sex and/or gender identity. (See, e.g., *Prescott v. Rady Children's Hospital-San Diego* (S.D.Cal. 2017) 265 F.Supp.3d 1090, 1099-1100 [denying motion to dismiss sex discrimination claim based on defendant hospital staff's "continuous" misgendering of transgender boy]; *Eric S. v. Shinseki* (E.E.O.C. Apr. 16, 2014, EEOC DOC 0120133123) 2014 WL 1653484, at \*2 [reversing dismissal of transgender employee's sex discrimination claim based on employer's refusal

to change the employee’s name in the employer’s records]; see also *Bd. of Educ. of Highland v. U.S. Dept. of Educ.* (S.D.Ohio 2016) 208 F.Supp.3d 850, 879 [entering preliminary injunction ordering school district to “treat Jane Doe as the girl she is, including referring to her by female pronouns and her female name,” as well as permitting her to use the girls’ restrooms].)

## **B. Harassment**

The misuse of a transgender person’s correct name and pronouns in the workplace can also constitute unlawful harassment under the FEHA based on sex, gender, gender identity, and gender expression.<sup>31</sup> The Legislature recently codified “its intent with regard to application of the laws about harassment.” (Gov. Code § 12923.) In particular:

[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 harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim’s

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<sup>31</sup> Workers who are not transgender may also experience the misuse of pronouns as a form of harassment. (See, e.g., *Nichols v. Azteca Restaurant Enterprises, Inc.* (9th Cir. 2001) 256 F.3d 864, 870 [describing “relentless campaign of insults, name-calling, and vulgarities” against male restaurant worker, including “co-workers and a supervisor repeatedly refer[ing] to Sanchez in Spanish and English as ‘she’ and ‘her’” and mocking him for “walking and carrying his serving tray ‘like a woman’”].)

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).) The Legislature also approved the standard in Justice Ginsburg's concurrence in *Harris v. Forklift Systems* (1993) 510 U.S. 17 that in a workplace harassment suit, "the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment." (Gov. Code § 12923, subd. (a) [quoting *Harris v. Forklift Systems*, *supra*, 510 U.S. at pp. 25-26 (conc. opn. of Ginsburg, J.)].) Rather, "[i]t suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job." (*Ibid.*) The Legislature further confirmed that "[t]he existence of a hostile work environment depends upon the totality of the circumstances" and that "[h]arassment cases are rarely appropriate for disposition on summary judgment." (Gov. Code § 12923, subs. (c), (e).)

As a general matter, disregarding a transgender employee's gender identity by intentionally or repeatedly misusing their name or pronouns easily meets the criteria for unlawful

harassment. Being subjected to such treatment is degrading and humiliating and likely to cause serious psychological harm and emotional distress; it is highly likely to affect a transgender person's "ability to perform the job as usual" by calling unwanted attention to their transgender identity in a demeaning and stigmatizing manner; and it is similarly likely to "undermine the victim's personal sense of well-being" by negating a core aspect of personal identity. (See Part I.B, *supra*; Gov. Code § 12923, subd. (a).) This form of adverse treatment is not "[m]inor or relatively trivial," but is "reasonably likely to impair . . . [the] employee's job performance . . . ." <sup>32</sup> (See *Yanowitz, supra*, 36 Cal.4th at p. 1054-55; Part I.B, *supra*.)

In *Lusardi*, for example, the EEOC found that the supervisor's "repeated and intentional" use of a male name and

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<sup>32</sup> Courts have rejected the argument that treating a transgender person inconsistent with their gender identity is only a "perceived slight[]." (*Rumble v. Fairview Health Services* (D.Minn. Mar. 16, 2015 No. 14-cv-2037 (SRN/FLN)) 2015 WL 1197415, at \*25.) In *Rumble*, the court denied a hospital's motion to dismiss a patient's sex discrimination claim, concluding that "misgendering of [plaintiff] could be considered objectively offensive behavior" where a hospital clerk intentionally gave a transgender male patient a hospital bracelet identifying him as "female." (*Id.* at \*26.)

pronouns in referring to Ms. Lusardi, a transgender woman, was “offensive and demeaning to Complainant and would have been so to a reasonable person in Complainant’s position.” (*Lusardi, supra*, 2015 WL 1607756, at \*11.) The agency concluded that Ms. Lusardi proved her claim of hostile work environment based on sex and that the employer was liable for the supervisor’s harassment. (*Id.* at \*13.) Other courts and enforcement agencies have also found actionable hostile work environment or harassment claims where the evidence or allegations included the intentional and repeated misuse of a transgender person’s name or pronouns. (See, e.g., *Tinker, supra*, 2016 WL 4426971 [enforcement agency finding employer liable on transgender man’s hostile work environment claim where evidence included the supervisor’s intentional and repeated misuse of the employee’s name and pronouns]; *Tay v. Dennison, supra*, 2020 WL 2100761, at \*2 [denying motion to dismiss incarcerated plaintiff’s equal protection claim of harassment based on gender identity, where allegations included that “correctional and medical staff constantly misgender Plaintiff, referring to her as ‘mister’ and using male pronouns even though they are aware that she is a transgender woman.”].)



In sum, for a reasonable transgender plaintiff, an employer’s intentional or repeated misuse of their name or pronouns would “unreasonably interfere[] with the plaintiff’s work performance or create[] an intimidating, hostile, or offensive working environment.” (Gov. Code § 12923, subd. (b).)

### CONCLUSION

For the reasons above, Amici respectfully request that the Court 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: August 25, 2020

NATIONAL CENTER FOR  
LESBIAN RIGHTS

By: /s/ Julie Wilensky  
Julie Wilensky  
Asaf Orr

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forthcoming

## CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I certify that this brief contains 4,895 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: August 25, 2020

NATIONAL CENTER FOR  
LESBIAN RIGHTS

By: /s/ Julie Wilensky  
Julie Wilensky

## PROOF OF SERVICE

I, Julie Wilensky, declare as follows:

I am more than 18 years of age and not a party to this action. I am employed in the County of San Francisco, California. My business address is 870 Market Street, Suite 370, San Francisco, California 94102.

On August 25, 2020, I served true copies of the following document:

**PROPOSED BRIEF OF AMICI CURIAE NATIONAL CENTER FOR LESBIAN RIGHTS, LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC., AND NINE ADDITIONAL NONPROFIT ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLANT MADDIE WADE**

on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**BY ELECTRONIC COURT FILING SYSTEM:** I submitted the document using the court authorized e-filing service at TrueFiling.com.

**BY MAIL:** I placed the document in a sealed envelope, postage prepaid for first-class mail, and deposited with the U.S. Postal Service on the same day.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 25, 2020, in Oakland, California.

/s/ Julie Wilensky  
Julie Wilensky

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<p>Clerk of the Court Fresno County Superior Court Hon. Kimberly A. Gaab 1130 O Street Fresno, California 93721</p>	<p>Superior Court</p> <p><i>Via U.S. Mail</i></p>
<p>California Supreme Court</p>	<p><i>By electronic court filing system pursuant to Cal. Rules of Court, rule 8.212</i></p>