

No. B291385

**IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION EIGHT**

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TAMIKA SCHMIDT, et al.,  
*Plaintiffs and Appellants,*

v.

SUPERIOR COURT, COUNTY OF VENTURA,  
*Defendant and Respondent.*

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From the Superior Court of California, Santa  
Barbara County  
The Honorable Thomas Anderle, Judge  
Case No. VENCI00479100

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**Application of the National Women's Law Center  
to File *Amicus Curiae* Brief in Support of  
Appellants Tamika Schmidt and Danielle Penny**

*and*

***Amicus Curiae* Brief of the National Women's Law Center  
in Support of  
Appellants Tamika Schmidt and Danielle Penny**

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**Application of the National Women’s Law Center  
to File *Amicus Curiae* Brief in Support of  
Appellants Tamika Schmidt and Danielle Penny**

Pursuant to Rule 8.200(c) of the California Rules of Court, the National Women’s Law Center respectfully applies for the Court’s permission to file the attached *amicus curiae* brief in support of Appellants Tamika Schmidt and Danielle Penny.

**Interest of *Amicus Curiae***

The National Women’s Law Center (NWLC), *amicus curiae*, is a nonprofit legal organization dedicated to advancing and protecting women’s legal rights and the rights of all people to be free from sex discrimination. Since 1972, NWLC has worked to secure equal opportunity in education and employment for girls and women through full enforcement of the Constitution, Title VII, and other laws prohibiting sex discrimination.

The NWLC Fund houses and administers the TIME’S UP Legal Defense Fund, which improves access to justice for victims of sex discrimination in the workplace. Since its founding last year, the TIME’S UP Legal Defense Fund has responded to over 4,000 requests for legal help. The TIME’S UP Legal Defense Fund has also awarded competitive grants to defray a portion of the costs of legal representation in over 150 matters involving workplace sex harassment, including a grant to support the appellants in the above captioned matter.

NWLC has extensive experience advocating on behalf of survivors of both workplace sex harassment and other forms of violence and discrimination based on sex or gender. Based on that experience, NWLC is familiar with the barriers that women,

particularly women of color, face in reporting workplace sex harassment and in motivating employers to address and prevent workplace sex harassment.

NWLC applies to appear as *amicus curiae* in the above captioned matter, as in other cases, based on an independent determination of the importance of the matter and the legal issues at stake. The attached brief is intended to assist the Court to understand how few women, in particular women of color, ultimately report sex harassment; the barriers to reporting sex harassment; and the consequences of reporting sex harassment. In addition, NWLC seeks to assist the Court with understanding the reasons, including gender-based stereotypes, that employers may not consider or comprehend the severity of complaints of sex harassment, particularly when the harassment involves conduct that is motivated by the woman's gender and race but does not necessarily involve coercion or unwanted sexual attention.

#### **Authorship and Contribution Statement**

No party or counsel for a party authored the proposed amicus brief in whole or in part. No party or counsel for a party made any monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution intended to fund the preparation or submission of the brief, other than the *amicus curiae*, its members, or its counsel in this appeal.

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***Amicus Curiae* Brief of the National Women’s Law Center  
in Support of  
Appellants Tamika Schmidt and Danielle Penny**

**I. Introduction**

Appellants Tamika Schmidt and Danielle Penny argue that the court below misunderstood the standard for sex harassment. Unfortunately, misunderstandings about sex harassment are widespread. This brief aims to correct these misunderstandings by sharing some insights from recent social science and law:

- Sex harassment is prevalent. It takes many different forms, including forms that do not involve coercion or unwanted sexual attention.
- Women face significant barriers to reporting sex harassment, especially women of color. Given this, there is no single “reasonable” response to sex harassment.

These insights may help the Court understand the errors made by the lower court in Ms. Schmidt and Ms. Penny’s case.

**II. Sex harassment is prevalent, and it does not always present as expected by the public or courts.**

If you are a woman, more likely than not, you have been subject to sex harassment at some point in your life. Estimates of the share of women who have experienced sex harassment, both in general and at work, range from about 40 to 80 percent.<sup>1</sup>

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<sup>1</sup> See Pamela J. Foster & Clive J. Fullagar, *Why Don’t We Report Sexual Harassment? An Application of the Theory of Planned Behavior*, 40 BASIC & APPLIED SOC. PSYCH. 148, 148 (2018) (40 to

Sexual coercion and unwanted sexual attention may be the most familiar forms of sex harassment, but they are not the most common. Sex harassment most commonly occurs as a “broad range of verbal and nonverbal behaviors . . . that convey insulting, hostile, and degrading attitudes about members of one gender.”<sup>2</sup> This form of sex harassment, sometimes called “gender harassment,” aims to “insult, humiliat[e], or ostraci[ze]” its target.<sup>3</sup>

Though common, this form of sex harassment sometimes goes unrecognized. For example, in a case cited by the decision below, the court found no sex harassment when the defendant’s acts “appear[red] far more hostile and angry than . . . sexual.” *Johnson v. Tower Air, Inc.*, 149 F.R.D. 461, 469 (E.D.N.Y. 1993). This position wrongly suggests that hostile or angry conduct cannot be sex harassment. But such conduct can indeed be sex harassment if it is directed at one sex and not the other.

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75 percent, in general); Ksenia Keplinger et al., *Women at Work: Changes in Sexual Harassment Between September 2016 and September 2018*, PLOS ONE (July 17, 2019), at 2 (80 percent, workplace); Anita Raj et al., *Racial/Ethnic Disparities in Sexual Harassment in the United States, 2018*, J. INTERPERS. VIOLENCE 1, 7 (2019) (80 percent, in general); Ashleigh Shelby Rosette et al., *Intersectionality: Connecting Experiences of Gender With Race at Work*, 38 RES. ORGANIZATIONAL BEHAV. 1, 13 (2018) (estimates of 38 percent and 55 percent for workplace harassment).

<sup>2</sup> NATIONAL ACADEMY OF SCIENCES, ENGINEERING, AND MEDICINE, *SEXUAL HARASSMENT OF WOMEN 25* (2018) (internal marks omitted); see also Keplinger et al., *supra* note 1, at 5 (“[G]ender harassment is the most common type . . .”).

<sup>3</sup> NATIONAL ACADEMY OF SCIENCES, *supra* note 2, at 27.



Among the broader public, both men and women often do not identify “generalized sexist remarks and behavior” as sex harassment in the absence of obvious sexual interest or coercion.<sup>4</sup> Women are far less likely to report that they have experienced workplace sex harassment if the question is posed without a definition or examples; if they are asked about specific harassing behaviors, the reported rate of harassment nearly doubles.<sup>5</sup> Men are less likely than women to view any given conduct as sex harassment—especially conduct that is not obviously coercive.<sup>6</sup> They are also more likely than women to assign responsibility for an incident of sex harassment to the woman who was harassed.<sup>7</sup>

Notwithstanding these misconceptions, the law recognizes hostility towards women as sex harassment even in the absence of coercion or unwanted sexual attention. According to the Supreme Court, “[I]t is clear under California law that a plaintiff

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<sup>4</sup> See Louise F. Fitzgerald & Alayne J. Ormerod, *Perceptions of Sexual Harassment: The Influence of Gender and Academic Context*, 15 PSYCH. WOMEN Q. 281, 284, 289–90 (1991).

<sup>5</sup> See Dan Cassino & Yasemin Besen-Cassino, *Race, Threat and Workplace Sexual Harassment: The Dynamics of Harassment in the United States, 1997–2016*, 2019 GENDER, WORK & ORG. 1, 2 (2019) (reporting a jump from 25 percent to 40 percent).

<sup>6</sup> See Fitzgerald & Ormerod, *supra* note 4, at 289–90; Suzanne Valentine-French & H. Lorraine Radtke, *Attributions of Responsibility for an Incident of Sexual Harassment in a University Setting*, 21 SEX ROLES 545, 552 (1989); *cf.* Manish Madan & Mahesh K. Nalla, *Sexual Harassment in Public Spaces: Examining Gender Differences in Perceived Seriousness and Victimization*, 26 INT’L CRIM. JUST. REV. 80, 88 (2016) (concluding that women view public harassment as more likely than men do).

<sup>7</sup> See Valentine-French & Radtke, *supra* note 6, at 552.

may establish a hostile work environment without demonstrating the existence of coercive sexual conduct directed at the plaintiff or even conduct of a sexual nature.” *Miller v. Dept. of Corr.*, 36 Cal. 4th 446, 469 (2005).

To be sure, sex harassment must be “because of” the sex of the harassed person. Judicial Council of California Civil Jury Instructions (2017), CACI 2521A (listing the essential elements of harassment claim). But this does not necessarily mean that the harasser was motivated by “sexual desire,” Cal. Gov. Code § 12940(j)(4)(C), or “sexual animus,” or “a specific intent to discriminate against women or to target [plaintiffs] ‘as women.’” *EEOC v. Nat’l Ed. Ass’n, Alaska*, 422 F.3d 840, 844–45 (9th Cir. 2005).

The legal definition of sex harassment thus includes behavior that is “rude, overbearing, obnoxious, loud, vulgar, and generally unpleasant” but lacks any sexual or sexist overtones. *See id.* at 845. Such behavior can become sex harassment when it is directed at a member or members of one sex but not the other. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (“The critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not . . . .”); *EEOC*, 422 F.3d at 845 (“[T]he ultimate question under *Oncale* is whether [defendant’s] behavior affected women more adversely than it affected men.”).

For example, in one Ninth Circuit case, an employer’s sex harassment consisted solely of supporting an employee accused of

rape while not supporting his female accuser—the employer’s conduct involved no coercion or sexual attention. *See Fuller v. Idaho Dept. of Corr.*, 865 F.3d 1154, 1161–64 (9th Cir. 2017). In another case, the court examined evidence not only of how the harasser treated the plaintiff, but also of how the harasser treated other women, to place the conduct in context. *See Zetwick v. Cty. of Yolo*, 850 F.3d 436, 445 (9th Cir. 2017) (holding that such so-called “me too” evidence is relevant to the defendant’s treatment of women in general); *see also Pantoja v. Anton*, 198 Cal. App. 4th 87, 115, 119 (2011) (holding that “me too” evidence bears on the harasser’s motives and credibility). By asking not only whether conduct is overtly sexual or coercive, but also whether it targets one sex, these courts properly took a more expansive view of sexual harassment.

### **III. Reporting sex harassment is difficult; there is no single “reasonable” response to harassment.**

In assessing Ms. Penny’s testimony, the court below noted:

[Ms. Penny] is a very outspoken person; very assertive; certainly not timid. It is inconceivable that she would have submitted to any kind of harassment, let alone sexual harassment, by Jacques without immediately voicing angry and loud objections, to everyone in the vicinity who would listen.<sup>8</sup>

The court’s focus on women’s response to harassment is both typical and misplaced. In many courts’ eyes, the proper response to harassment is prompt, direct reporting to a supervisor, without display of emotion. “Courts have been almost

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<sup>8</sup> Decision at 45.

uniform in finding a harassed employee's failure to formally report sexual harassment . . . to be unreasonable"; even a delay in reporting can hurt a woman's case.<sup>9</sup>

Juries as well as judges "clearly expect that a *real* victim will speak up, both publicly and privately, creating the image of an idealized woman who behaves in the proper, socially constructed way in the face of offensive conduct."<sup>10</sup> And among the wider public, after any high-profile accusation of sex harassment committed years earlier, there comes the inevitable challenge: "Why didn't she say something at the time?"<sup>11</sup>

People make such assumptions not only about others; they also misjudge their own response. In studies asking individuals how they would respond if they were sexually harassed, people consistently predict that they would report harassment at rates far higher than actually occur.<sup>12</sup>

Contrary to this ideal, most people who experience workplace sex harassment respond only by avoiding the harasser or the situation (though even this may not be practically

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<sup>9</sup> See L. Camille Hebert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?*, 82 IND. L.J. 711, 721–22 (2007).

<sup>10</sup> Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 131 (1995).

<sup>11</sup> Cf. Hebert, *supra* note 9, at 736 (describing this response as it followed Anita Hill's accusations of sexual harassment by Justice Clarence Thomas).

<sup>12</sup> See Fitzgerald et al., *supra* note 10, at 119; Hebert, *supra* note 9, at 735.

possible).<sup>13</sup> A small proportion (around 12 percent) speak informally to the harasser or a supervisor;<sup>14</sup> a smaller proportion (around 6 percent) lodge a formal complaint;<sup>15</sup> and even fewer—one percent or less—pursue legal action.<sup>16</sup> Assuming that most people are reasonable, the reasonable response to sex harassment is evidently not a prompt, formal report.

Reluctance to report sex harassment has many causes. A natural reaction of “denial, apathy, or self-blame” can inhibit

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<sup>13</sup> See Fitzgerald et al., *supra* note 10, at 120 (concluding that avoidance is the most common response); Manish Madan & Mahesh K. Nalla, *Sexual Harassment in Public Spaces: Examining Gender Differences in Perceived Seriousness and Victimization*, 26 INT’L CRIM. JUST. REV. 80, 83 (2016) (“In the context of sexual harassment in public spaces, victimization is unavoidable for many women.”).

<sup>14</sup> Hebert, *supra* note 9, at 735.

<sup>15</sup> Pamela J. Foster & Clive J. Fullagar, *Why Don’t We Report Sexual Harassment? An Application of the Theory of Planned Behavior*, 40 BASIC & APPLIED SOC. PSYCH. 148, 148 (2018); see also Chloe Grace Hart, *The Penalties for Self-Reporting Sexual Harassment*, 33 GENDER & SOC. 534, 536 (2019) (estimating between 5 and 30 percent).

<sup>16</sup> See Dan Cassino & Yasemin Besen-Cassino, *Race, Threat and Workplace Sexual Harassment: The Dynamics of Harassment in the United States, 1997–2016*, 2019 GENDER, WORK & ORG. 1, 2 (2019) (0.2 percent); Fitzgerald et al., *supra* note 10, at 123 (about 1 percent); see also Lilia M. Cortina & Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review*, in THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR 469, 484 (Julian Barling & Cary L. Cooper, eds., 1990) (analyzing the frequencies of different responses to harassment and reaching similar conclusions).

reporting.<sup>17</sup> Indeed, one study found that 25 percent of women experiencing harassment “attributed it to their own behavior”<sup>18</sup>— a figure that suggests more about misperceptions of harassment, and women’s internalizing those misperceptions, than about harassment’s true causes. Sex harassment may also lead to depression, anxiety, or post-traumatic stress disorder,<sup>19</sup> all of which can deter reporting. And psychological and emotional responses may vary over time within the same person, in a mix of “confusion,” “self-blame,” “fear/anxiety,” “depression,” “anger,” and “disillusionment.”<sup>20</sup> This further inhibits reporting.

Social factors also limit reporting. Women are often “socialized to avoid conflict,” and instead are taught to “maintain . . . relationships.”<sup>21</sup> Perhaps because of this, “[n]onassertive or passive reactions are common responses to inappropriate social behavior,” including sex harassment, “in

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<sup>17</sup> See Fitzgerald et al., *supra* note 10, at 120.

<sup>18</sup> *Id.*

<sup>19</sup> See NiCole T. Buchanan et al., *Unique and Joint Effects of Sexual and Racial Harassment on College Students’ Well-Being*, 31 BASIC & APPLIED SOC. PSYCH. 267, 274 (2009); Cassino & Besen-Cassino, *supra* note 16, at 2; Anita Raj et al., *Racial/Ethnic Disparities in Sexual Harassment in the United States, 2018*, J. INTERPERS. VIOLENCE 1, 7, 16 (2019).

<sup>20</sup> See Fitzgerald et al., *supra* note 10, at 128.

<sup>21</sup> L. Camille Hebert, *Why Don’t “Reasonable Women” Complain About Sexual Harassment?*, 82 IND. L.J. 711, 730–31 (2007).

order to allow the other person to save face and to preserve a relationship.”<sup>22</sup>

Women of color, such as Ms. Schmidt and Ms. Penny, are especially vulnerable to harassment. In interviews, Black and Asian women have reported that “the harassment they faced based on gender was difficult to separate from the bias they experienced due to race.”<sup>23</sup> From 1997 to 2016, there was a decline in the reported rate of sex harassment against women in general—but against Black women, the rate stayed stubbornly high.<sup>24</sup> Moreover, when Black women experience frequent harassment (as occurred here), it tends to cause more psychological stress than it causes White women.<sup>25</sup>

What is worse, women of color can face additional obstacles to reporting harassment. For instance, socially, Black women may be reluctant to risk appearing antagonistic. They are often stereotyped as “tough, strong, dominating, and argumentative”; to counteract this, they may “fe[el] a greater need to engage in

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<sup>22</sup> *Id.* at 732–33.

<sup>23</sup> Ashleigh Shelby Rosette et al., *Intersectionality: Connecting Experiences of Gender With Race at Work*, 38 RES. ORGANIZATIONAL BEHAV. 1, 13 (2018) (reviewing the literature).

<sup>24</sup> See Cassino & Besen-Cassino, *supra* note 16, at 7; see also Buchanan et al., *supra* note 19, at 278 (“[E]thnic minorities reported higher rates [of sexual harassment] than Whites . . . .”); accord Rosette et al., *supra* note 23, at 13.

<sup>25</sup> See *id.*

impression management strategies,”<sup>26</sup> including hesitating to report harassment.

But even more than psychological and social factors, “the most common reason” that people don’t report harassment “is fear—fear of retaliation, of not being believed, of hurting one’s career, or of being shamed and humiliated.”<sup>27</sup> In one study, 60 percent of people who chose not to report “believed they would be blamed for the incident if they made a formal complaint.”<sup>28</sup> Another 60 percent “believed complaints would be ineffective because nothing would be done.”<sup>29</sup> It was only for harassment involving “explicit sexual coercion” that the hope of stopping the behavior by filing a report could “outweigh the fear of retaliation.”<sup>30</sup>

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<sup>26</sup> *See id.* at 5, 10 (reviewing the literature).

<sup>27</sup> Louise F. Fitzgerald et al., *Why Didn’t She Just Report Him? The Psychological and Legal Implications of Women’s Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 122 (1995); *see also* Pamela J. Foster & Clive J. Fullagar, *Why Don’t We Report Sexual Harassment? An Application of the Theory of Planned Behavior*, 40 BASIC & APPLIED SOC. PSYCH. 148, 150 (2018) (as barriers to reporting, listing “fear of retaliation, not being believed, nothing being done, and relinquishing privacy”); Appellants’ Opening Br. at 89 (stating that one of the women who was harassed did not report for fear of retaliation)

<sup>28</sup> Fitzgerald et al., *supra* note 27, at 126.

<sup>29</sup> *Id.*; *see also* Foster & Fullagar, *supra* note 27, at 156 (listing as a factor in the decision to report “knowing the harasser would be punished if the incident was reported”).

<sup>30</sup> Fitzgerald et al., *supra* note 27, at 126.



Fear of retaliation is, unfortunately, justified. Employers do indeed retaliate against employees who report sex harassment, by giving worse evaluations, denying promotions, imposing transfers, and even firing.<sup>31</sup> And “the most assertive responses often incur[] the greatest costs.”<sup>32</sup>

Retaliation may reflect negative attitudes towards people who report harassment. In a 2019 study, participants assumed the role of manager and read about a hypothetical incident of workplace sex harassment before deciding on an employment outcome.<sup>33</sup> When the harassed person in the story reported the incident, participants (both men and women) were less likely to recommend the person for promotion, in comparison both to people whose harassment went unreported and to people whose harassment was reported by a third party.<sup>34</sup> Participants perceived the people who reported their harassment as “significantly less moral, warm, and socially skilled.”<sup>35</sup> These same attitudes may influence judges’ and juries’ views of plaintiffs in sex harassment cases.

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<sup>31</sup> *See id.* at 122–23; Chloe Grace Hart, *The Penalties for Self-Reporting Sexual Harassment*, 33 GENDER & SOC. 534, 536 (2019) (surveying the literature and concluding that “many of those who report their sexual harassment experience retaliation”).

<sup>32</sup> Fitzgerald et al., *supra* note 27, at 122.

<sup>33</sup> Hart, *supra* note 31.

<sup>34</sup> *See id.* at 546.

<sup>35</sup> *See id.* at 547.

#### IV. Conclusion

Some important insights about workplace sex harassment emerge from recent social science and law. Sex harassment is prevalent, and it does not always involve coercion or unwanted sexual attention. Women, especially women of color, seldom report or take formal action in response to sex harassment; they also face significant obstacles to doing so. Finally, there is no single “reasonable” response to harassment. The Court should keep these insights in mind while reconsidering the experiences of Ms. Schmidt and Ms. Penny and the decision below.

DATED: October 14, 2019

Respectfully submitted,  
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## Certificate of Compliance

Counsel of Record hereby certifies pursuant to Rule 8.204(c)(1) of the California Rules of Court that the enclosed brief of *amicus curiae* the National Women's Law Center is produced using 13-point Roman type and, including footnotes, contains 2,846 words. Counsel used Microsoft Word in preparing the brief, and relies on that program's computer word count.

DATED: October 14, 2019

COVINGTON & BURLING LLP

By: /s/ Gretchen Hoff Varner

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## Proof of Service

I am a resident of the United States. My business address is 1999 Avenue of the Stars, Los Angeles, CA 90067. I am employed in the City and County of Los Angeles. I am over the age of 18 years, and not a party to the within cause. My electronic service address is slove@cov.com. On October 14, 2019, I served the documents described as

Application of the National Women's Law Center  
to File *Amicus Curiae* Brief in Support of  
Appellants Tamika Schmidt And Danielle Penny  
and

*Amicus Curiae* Brief of the National Women's Law Center  
in Support of Appellants Tamika Schmidt and Danielle Penny

as follows:

I served the documents to all parties through **TrueFiling**, and no error was reported. I also enclosed a copy of the documents in an envelope and deposited the sealed envelope **with the US Postal Service**, postage prepaid, addressed to:

Santa Barbara County Superior Court  
Attn: Hon. Thomas Anderle  
1100 Anacapa Street  
P.O. Box 21107  
Santa Barbara, CA, 93121-1107

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed October 14, 2019.

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