

In February 2005, ERA joined an amicus brief filed in the California Supreme Court and authored by the Legal-Aid Society-Employment Law Center in a case addressing the issue of (1) whether the use of sexually coarse and vulgar language in the workplace constitute harassment based on sex within the meaning of the Fair Employment and Housing Act (FEHA); and (2) whether the potential imposition of liability under FEHA for sexual harassment based on such speech infringe on defendants' rights of free speech under the First Amendment or the state Constitution. Lyle was employed as a writer's assistant on the *Friends* television show and took notes of writers' comments during sessions in which they discussed plot stories for the show. As part of her job duties, Lyle was required to copy down sexually coarse, vulgar, and demeaning language used by the writers. After she was fired for purportedly failing to take notes fast enough, Lyle filed suit against Warner Brothers, alleging race and sex discrimination, racial and sexual harassment, and retaliation. The trial court granted defendants' motion for summary judgment. The Court of Appeals affirmed in part and reversed in part the trial court's decision, finding triable issue of fact with respect to Lyle's harassment claim. The court specifically rejected defendants' claim the First Amendment protected their speech.

The California Supreme Court granted defendants' petition for review of the issues identified above. Amici argued that sexually coarse, vulgar, and demeaning language in the workplace could constitute harassment because of sex under FEHA, even if not directed at the plaintiff personally. Amici also challenged defendants' "creative necessity" or "business necessity" defense. Finally, Amici argued that discriminatory conduct has no First Amendment protection. The court heard oral arguments on February 14, 2006.

ERA's response to the April 20, 2006 ruling dismissing the case is as follows:

- Today's ruling is an unfortunate but narrow ruling regarding California Fair Employment and Housing Laws as they relate to workplace protections against sexual harassment.
- The court seemed particularly persuaded by very specific facts. They looked closely at the work environment and even went so far as to look at the content of the television show. Additionally, the court looked at the fact that the behavior and conduct were not directed at the plaintiff. Although case law has established that harassing conduct and comments do not have to be directed at a person to constitute sex harassment, in this case the court seemed to concentrate on the fact that both men and women had participated in the behavior.
- Given the fact-intensive nature of this ruling, employers should be wary to interpret today's ruling as a license to engage in vulgar and crude sexual language in the workplace. The court itself said that in reaching its conclusion, they were not suggesting that the use of this language would never constitute harassment because of sex.