

**XII. Evidence of discrimination and harassment of other employees at UPS is admissible to show the totality of circumstances.**

Plaintiff XXXX offers evidence of incidents of racial discrimination and racially harassing conduct of other nonwhite UPS hourly employees throughout the time of his employment ( \_\_\_\_ through the present) to show the totality of the circumstances and the state of mind of the decision makers in the case of racial discrimination.

As to Plaintiff's harassment claim, evidence of UPS's treatment, through its management personnel, is relevant to the pattern or practice claim as well as to the claim of individual harassment of himself. Obviously a pattern or practice can only be established by showing a series of events and in order to show the totality of circumstances as they existed in and around the series of events directly related to Plaintiff Lu, the harassment of others in the workplace is a part of the totality of circumstances. Plaintiff XXXX will testify that he was affected by UPS management treatment of **all** nonwhite, not just Asians, because the less favorable treatment made him feel that nonwhites were of less value to UPS than whites. And, Plaintiff XXXX will offer testimony from other nonwhites at UPS who suffered the same feelings of being less valued as human beings under the systematic racially discriminatory systems established and maintained by UPS.

There is no reasonable basis for refusing the admission of any evidence of racially motivated conduct directed toward other nonwhites during the course of Plaintiff's employment. There is no law establishing that the effects of racial harassment are any less destructive than those of sexual harassment. In fact, it has been said in a Title VII context the "sexual harassment which creates a hostile or offensive work environment is every bit the arbitrary barrier to sexual equality at the workplace that racial discrimination is to racial equality". *Henderson v. Dundee*, 682 F.2d 897, 902 (11<sup>th</sup> Cir. 1982); accord, *Santa Rosa City Employees' Association v. City of Santa Rosa*, 1997 WL 732517 (N.D.Cal. VRW). And, in the case of sexual harassment, evidence of incidents of sexual harassment directed toward other employees in the work environment are relevant to an individual claim of sexual harassment. *Beyda v. City of Los Angeles*, 65 Cal.App.4<sup>th</sup> 511 (1998). In that case, the court held that a reasonable person may be affected by knowledge that other workers are being sexually harassed in the workplace,

even if that person does not personally witness the conduct. There is no valid reason why the same would not hold true for knowledge of racial harassment of other nonwhites.

The United States Supreme Court has emphasized that in attempting to carry the ultimate burden in a discrimination case, the plaintiff must have the opportunity to demonstrate that the employer's proffered reasons for its decision were not its true reasons. "in doing so, [a plaintiff] is not limited to presenting evidence of a certain type ... [and] may take a variety of forms." *Patterson v. McLean Credit Union*, 109 S.Ct. 2363, 2378 (1989). The Court held that it was error to instruct the jury that there was but one way in which the plaintiff in that case could meet her burden. *Ibid.* at 2378-79.

In the case of *Morris v. Washington Metropolitan Area Transit Authority*, 702 F.2d 1037 (D.C.Cir. 1983), the Court of Appeals reversed the District Court's evidentiary ruling barring the plaintiff from eliciting testimony from the retaliatory treatment by the employer of himself and other employees who had made other types of complaints to the employer. The plaintiff based his claim of retaliation on an incident wherein he complained to the employer concerning the treatment of black employees, whereas the testimony he offered related to retaliatory treatment by the employer toward himself and other employees who "other sorts of employee complaints". *Ibid.* at 309. The court held that the testimony, so long as the witness was competent, should have been admitted to show the employer's likely motive for the conduct at issue. In other words, the court refused to find any validity to confining the evidence to the employer's response to one specific kind of complaint because it is the response by the employer which is at issue and not the nature of the complaint. Likewise, in the case of racial discrimination, it is the response by the employer to nonwhites which is at issue and not the nature of the nonwhite.

Further, otherwise admissible evidence of UPS' discriminatory intent or motive should not be excluded on the basis that such evidence relates to a racial minority different from the racial minority to which the plaintiff belongs because to do so would violate the Fourteenth Amendment's guarantee of equal protection. The Civil Rights Act and the Equal Protection Clause both equally protect against racial discrimination. *Associated General Contractors of California, Inc., v. Coalition for Economic Equity*, 950 F.2d 1401, 1412 fn 8 (9<sup>th</sup> Cir. 1991). Therefore, legal analysis and reasoning

applicable to each is interchangeable. Under equal protection analysis of a challenge to a prosecutor's racial neutrality in exercising peremptory challenges during jury selection, the United States Supreme Court holds that the race of the person challenging the prosecutor need not match the race of the person or persons excused by the prosecutor. *Powers v. Ohio*, 111 S.Ct. 1364, 1373 (1991). The court said that to hold that the races must be identical would be to condone the arbitrary refusal to honor the mandate of racial neutrality. *Id.* The United States Supreme Court says, in essence, that to focus on focusing on the matching of racial identity was an inept constraint on challenges to racial discrimination in jury selection. As the Court explained, "race prejudice stems from various causes and may manifest itself in different forms." *Ibid.* at 1374.

Applying the United States Supreme Court's analysis in *Powers* to the instant situation requires this court for the same reasons not to exclude otherwise admissible evidence on the grounds that it tends to show racial discrimination against a racial minority other than the one to which the plaintiff belongs. Racial prejudice manifest in the form of prejudice or harassment against a member of a racial minority other than the one who which the plaintiff belongs is just another form of prohibited racial discrimination. "The Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts and proceedings of the State is most compelling in the judicial system." *Powers v. Ohio*, 111 S.Ct. 1364, 1373 (1991). Any ruling excluding otherwise admissible evidence of discriminatory intent or motive because it may evidence a racial bias against a member of a minority group other than the one to which the plaintiff belongs contravenes the mandate of the Fourteenth Amendment to the United States Constitution. And, to the extent that the otherwise relevant and admissible testimony of others is excluded based on their race, the plaintiff, under *Powers* has standing to bring this challenge to the court's constitutionally illegal exclusion. The discriminatory exclusion harms the excluded witness and the community at large. *Ibid.* at 1368.

The obvious relevancy of evidence of discrimination and harassment against members of other racial minorities is manifest from the fact that a person has standing to sue for racial discrimination under Title VII even if the plaintiff is not of the same race which is the subject of the racial discrimination allegation. In *Waters v. Hueblein, Inc.*,

547 F.2d 466 (9<sup>th</sup> Cir. 1976), the Ninth Circuit held long ago that a white woman had “standing” to pursue an individual claim under Title VII for racial discrimination against Black and Spanish-surnamed employees in her workplace. The holding was based on the fact that the benefits of interracial harmony are as great in the work environment as they are in the housing environment. *Id.* at 469. FEHA is interpreted by reference to the cases interpreting and construing Title VII. Thus, a parallel analysis should produce the result that plaintiff has “standing” to bring an action under FEHA for racial discrimination against Blacks and Hispanics at UPS. The question of standing, under California law, is one of the right to relief and goes to the existence of a cause of action against the defendant. *Pillsbury v. Karmgard*, 22 Cal.App.4<sup>th</sup> 743, 758 (1994); *Killian v. Millard*, 228 Cal.App.3d 1601, 1065 (1991). Thus, since plaintiff has standing to bring an action for discrimination against members of other protected categories, if they are in fact other categories, and since this complaint pleads such a causes of action (see paragraphs \_\_\_\_\_ of the Complaint), plaintiff should be allowed to put on evidence relevant to that cause of action.

The position that evidence of racial discrimination and harassment against other minority employees at the San Francisco facility is admissible in this case is consistent with the holding in *E.E.O.C. v. Mississippi College*, 626 F.2d 477 (5<sup>th</sup> Cir. 1980) that a white women had standing to assert that her employer, Mississippi College, discriminated against blacks on the basis of race in recruitment and hiring. The specific question address by that court was “Can a Person Charge Discrimination Against a Group of Which he is not a Member?” *Id.* at 481. The court there held that the plaintiff could do so because she was claiming a “violation of her own personal right to work in an environment unaffected by racial discrimination.” *Id.* at 483. In so doing, the court relied upon the United States Supreme Court’s construction of the meaning of the term “person aggrieved” contained in the federal Fair Housing Act (in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 93 S.Ct. 364 (1972) and the holding of the Ninth Circuit (in *Waters v. Heublein*, 547 F.2d 466, 469-470 (9<sup>th</sup> Cir. 1976), among other circuits, that the similarities between the language, design, and purpose of Title VII and the Fair Housing Act requires that the phrase “a person claiming to be aggrieved” in § 706 of Title VII must be construed in the same manner as the Supreme Court construed

the term “aggrieved person” in § 810 of the Fair Housing Act. Surely, if one has standing to make a claim of discrimination against a group of which he or she is not a member, that plaintiff must be allowed to present evidence to the jury to support the valid claims. So that even if Mr. Lu’s claims were seen to be assertions of discrimination against member of other “racial groups”, he has standing under the law to bring those claims to the extent that he is asserting a violation of his own personal right to a work environment unaffected by racial discrimination. Such is exactly what Mr. XXXX is asserting – that all minority workers at UPS were subjected to racial discrimination and harassment. He further claims that said working atmosphere damaged him by, among other ways, by effecting his psychological well-being at work and discouraging him from making application to make his way into management at UPS. Without making any distinction as to the particular type of racial discrimination and harassment, he is claiming that he work environment at UPS is affected by racial discrimination exercised by white management against nonwhite workers. Since Mr. XXXX has standing to make such assertions, he must be entitled to offer otherwise admissible evidence to the jury on those claims.

Further, the admission of such evidence is consistent with the law that harassment need not be directed specifically at employee in order to be admissible in that employee’s hostile work environment claim. *Pereira v. Schlag Electronics*, 902 F.Supp. 1095, \_\_\_ (N.D.Cal. 1995). So long as plaintiff was personally aware of the discrimination or harassment of those other nonwhites, those events may well have contributed to his experience of and the objective reality of a racially hostile work environment at UPS.