

CASE NO. A154612

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE**

JAY BROME

Plaintiff and Appellant,

v.

CALIFORNIA HIGHWAY PATROL

Defendant and Respondent.

APPELLANT'S OPENING BRIEF

After Judgment by the Superior Court for the State of California,
County of Solano, Case No. FCS047706, Hon. Michael Mattice

ROSEN BIEN GALVAN & GRUNFELD LLP

Gay Crosthwait Grunfeld – 121944

ggrunfeld@rbgg.com

*Lisa Ells – 243657

lells@rbgg.com

Benjamin Bien-Kahn – 267933

bbien-kahn@rbgg.com

101 Mission Street, Sixth Floor

San Francisco, California 94105-1738

Telephone: (415) 433-6830

Facsimile: (415) 433-7104

Attorneys for Plaintiff and Appellant

COURT OF APPEAL 1st APPELLATE DISTRICT, DIVISION 5	COURT OF APPEAL CASE NUMBER: A154612
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 243657 NAME: Lisa Ells FIRM NAME: Rosen Bien Galvan & Grunfeld LLP STREET ADDRESS: 101 Mission Street, Sixth Floor CITY: San Francisco STATE: CA ZIP CODE: 94105 TELEPHONE NO.: (415) 433-6830 FAX NO.: (415) 433-7104 E-MAIL ADDRESS: lells@rbgg.com ATTORNEY FOR (name): Appellant Jay Brome	SUPERIOR COURT CASE NUMBER: FCS047706
APPELLANT/ JAY BROME PETITIONER: RESPONDENT/ CALIFORNIA HIGHWAY PATROL REAL PARTY IN INTEREST:	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS	
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- (1)
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Date: November 28, 2018

Lisa Ells

 (TYPE OR PRINT NAME)



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INTRODUCTION

This case is about whether the Plaintiff-Appellant, retired California Highway Patrol Officer Jay Brome (“Officer Brome”), should be permitted to present to a jury his case of severe and pervasive discrimination, harassment and retaliation faced during his twenty-year, award-winning career employed by Defendant-Respondent California Highway Patrol (“CHP”), simply because he is gay. The harassment began during Officer Brome’s academy training, where he faced homophobic slurs and physical threats, and followed him from assignment to assignment—from the CHP’s San Francisco Area Office, where his career began in 1996, to the CHP’s Area Offices in Contra Costa and Solano, where he worked from 2008 until the psychological toll of the CHP’s hostile work environment became so intolerable that his doctor ordered him to take medical stress leave on January 15, 2015. Like many gay law enforcement officers, Officer Brome faced a hostile work environment because of his sexual orientation throughout his career—including pervasive homophobic slurs and other derogatory comments, vandalism and defacement of his workspace and property, a pattern of fellow officers refusing to respond to his calls for backup in dangerous situations, and the consistent failure of CHP management to take adequate action to address the discrimination and harassment he faced because he is gay.

After pursuing a workers’ compensation claim for approximately nine months due to the psychological harm he suffered at work—which was ultimately accepted in late October 2015—Officer Brome applied for industrial disability retirement, which took effect in late February 2016. In September 2016, less than seven months after he retired, Officer Brome filed a complaint with the Department of Fair Employment and Housing (“DFEH”) against the CHP.

The trial court committed reversible error in granting summary judgment to the CHP on the ground that Officer Brome's Fair Employment and Housing Act ("FEHA") claims for sexual orientation discrimination, harassment based on sexual orientation, failure to prevent harassment, and retaliation are all barred by the FEHA's one-year statute of limitations. In granting summary judgment, the trial court impermissibly failed to view the evidence in a light favorable to Officer Brome, and instead resolved doubts and ambiguities in the CHP's favor.

The trial court correctly assumed that Officer Brome's workers' compensation claim equitably tolled the FEHA statute of limitations, but erroneously concluded that the continuing violation doctrine did not apply to render his claims timely. Reversal is warranted here because the trial court did not review the evidence under the appropriate standard at summary judgment, and thus downplayed evidence that Officer Brome faced a continuing course of unlawful conduct into the limitations period—including having his life placed in danger by his fellow officers' continuing refusal to back him up in the field, the decision not to recognize Officer Brome's achievement of earning the CHP's Solano Area Office's Officer of the Year Award by breaking the tradition of publicly displaying the photograph of the current winner in the briefing room, and CHP management's continuing failure to address his complaints about the discrimination he faced because he is gay.

Had the trial court applied the correct legal standard, it would have necessarily found that there was a triable issue of fact as to whether the continuing violation doctrine applies to make Officer Brome's FEHA claims timely. The trial court also committed reversible error by refusing to allow the jury to decide whether the CHP constructively discharged Officer Brome by coercing him into industrial disability retirement less than seven months before he filed his DFEH complaint on September 15,

2016, well within the FEHA’s one-year statute of limitations. As the CHP did not move for summary judgment on the merits of Officer Brome’s FEHA claims, arguing only that they should be dismissed as untimely, well-established legal doctrine requires reversal of the summary judgment to allow Officer Brome the opportunity to present his case to a jury.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Factual Background

1. Officer Brome Is Harassed And Discriminated Against Because He Is Gay While Attending The CHP Academy

Jay Brome, an openly gay man, was hired by the CHP in 1996 and reported to the CHP Academy on February 26, 1996. (1 AA0178:23-25.)¹ At the CHP Academy, Officer Brome was discriminated against and harassed because of his sexual orientation: He was called a “fag” several times by an officer (1 AA0185:25-AA0186:3), his instructor told him to “take off your skirt and act like a man” in front of his entire company of trainees (1 AA0188:24-AA0189:12), and another officer held a gun to his head and threatened him, stating “I know you are gay, tell me you are gay and I will pull the trigger” (1 AA0187:1-10).

2. Officer Brome Suffers Harassment, Discrimination And Retaliation Because He Is Gay While Working As A CHP Officer In San Francisco From 1996 To 2001

After successfully completing his academy training despite suffering pervasive discrimination on the basis of his sexual orientation, Officer Brome began working as a CHP officer at the San Francisco Area Office (“San Francisco Office”) in September 1996. (1 AA0077; 1 AA0148; 1 AA0190:1-10.) Throughout his tenure there, Officer Brome’s fellow

¹ “AA__” and “RT__” refer to the appellant’s appendix and the reporter’s transcript.

officers routinely made derogatory comments about gay people in front of him on a daily basis. (1 AA0191:1-AA0192:8; see also 1 AA0197:23-AA0199:5; 1 AA0200:16-AA0202:10; 1 AA0203:21-AA0205:7.) In addition to commenting that a nearby gay bar was “sick” and discussing how they would refuse to provide medical assistance to gay people (1 AA0191:13-AA0192:5), other officers directed discriminatory comments and derogatory slurs at Officer Brome personally because of his sexual orientation (1 AA0192:18-24; 1 AA0195:24-AA0196:4; 1 AA0225:9-14; 1 AA0226:13-AA0227:2).

In September 1998, after Officer Brome reported another officer’s derogatory and homophobic comment about a female sergeant, his fellow officers began to ostracize him. (1 AA0181:7-19; 1 AA0182:6-AA0184:17.) He continued to suffer targeted harassment, including having a pink plastic rose shoved into his mail slot and finding his mailbox name tag defaced on multiple occasions with a “defective” sticker. (1 AA0182:6-AA0184:17; 1 AA0206:18-AA0207:7; 1 AA0211:2-20.) Officer Brome also began experiencing retaliatory conduct at work: For example, the CHP issued him a memo about citizen complaints received months earlier on October 2, 1998, shortly after he reported the homophobic comment about the female sergeant (1 AA0208:5-AA0210:15), denied him the opportunity to take Drug Recognition Expert training even though he had seniority over the heterosexual officer who was selected, and rejected him for two job positions he sought (1 AA0212:4-AA0215:19).

Officer Brome filed a sexual orientation discrimination and harassment complaint with the CHP on October 23, 1998. (1 AA0245; 1 AA0179:22-AA0180:15.) After an investigation, a Memorandum of Findings dated January 14, 1999 confirmed that fellow officers subjected Officer Brome “to incidents of inappropriate acts,” but nonetheless concluded that CHP management had not failed to act and had not

retaliated against him. (1 AA0247; 1 AA0216:21-AA0218:20.) Officer Brome continued to suffer ongoing sexual orientation harassment and discrimination at the San Francisco Office after filing his complaint, including homophobic taunts from fellow officers, defacement of a commendation Officer Brome received in 1999, and carving his name off a plaque on display in the office's briefing room in 2001. (1 AA0219:9-17; 1 AA0225:9-14; 1 AA0225:23-AA0227:2; 1 AA0228:1-5.) Fellow officers also put his life in danger by refusing to back him up in the field on a regular basis. (1 AA0193:1-15; 1 AA0221:12-AA0224:20.)

In 2001, Officer Brome, desperate to escape the pervasive hostile work environment of the San Francisco Office, requested and was granted a transfer to the Contra Costa Area Office ("Contra Costa Office"). (1 AA0081; 1 AA0156; 1 AA0229:23-AA230:6.) Before Officer Brome transferred, his locker was defaced and, on his last day at the San Francisco Office, his vehicle was keyed. (1 AA0231:5-AA0232:3; 1 AA0233:12-22.)

3. Officer Brome Transfers To The Contra Costa Office In January 2002, Where He Continues To Be Subjected To A Hostile Work Environment Because He Is Gay

Officer Brome transferred to the Contra Costa Office in January 2002, but learned from co-workers that other officers had been saying derogatory comments about him before he even began working there. (1 AA0234:23-24; 1 AA0235:1-8.) Officers continued to create an intolerable workplace for Officer Brome because of his sexual orientation in Contra Costa: Fellow officers made derogatory comments about homosexuality (1 AA0237:25-AA0238:7) and refused to back him up in the field, including three separate occasions where Officer Brome was the only officer at the scene of a fatal traffic collision, even though the standard practice is for multiple officers to respond due to the large amount of work required at the scene of a fatal accident (1 AA0236:3-6; 1 AA0238:22-

AA0239:23; 1 AA0263:9-AA0264:15; 2 AA0268:11-AA0269:9).

Whenever Officer Brome complained to supervisors about the refusal of fellow officers to back him up, they promised to look into the situation, but Officer Brome never heard anything further and the problems continued unabated. (1 AA0238:22-AA0240:16.)

While at the Contra Costa Office, Captain Mike Maas sexually harassed Officer Brome by discussing his attraction to other male officers, asking Officer Brome if he thought other officers were gay, and insisting on detailing his sex life to Officer Brome. (1 AA0241:17-AA0243:21; 2 AA0317.) In November 2003, Officer Brome sent an email and then a letter to Chief Cathy Sulinski reporting that Captain Maas had made “unsolicited and unwelcome sexual comments” and “created a hostile work environment” for him, and stated that he would be filing a DFEH complaint against the CHP and Captain Maas. (2 AA0315; 2 AA0317.) In doing so, Officer Brome explained that he just wanted to work in an environment “free from sexual harassment.” (2 AA0317.) On May 6, 2004, Officer Brome’s doctor placed him on stress leave caused by Captain Maas’s sexual harassment, which lasted five months. (2 AA0258:4-AA0259:9; 2 AA0262:10-22; 2 AA0319.)

After Officer Brome returned to work, he was again left stranded at the scene of a fatal collision. (2 AA0263:9-AA0264:17.) He later learned that fellow officers were showing new officers pictures of him and another officer who was a lesbian and telling the new officers to watch out for them and to not say anything about gay people around them. (2 AA0265:13-AA0267:25.) In 2008, Officer Brome requested and was granted a transfer to the Solano Area Office (“Solano Office”) because of the hostile work environment in Contra Costa, in the hopes that the commander and CHP management team at the Solano Office would finally provide a harassment-free work environment. (2 AA0270:11-24.)

4. Officer Brome Transfers To The Solano Office In 2008, Where He Continues To Face Unrelenting Harassment And Retaliation Because He Is Gay

When Officer Brome transferred to the Solano Office, he continued to experience discriminatory, harassing and retaliatory conduct because of his sexual orientation: Officer Brome was surrounded by homophobic locker room talk (2 AA0271:13-AA0272:7; 2 AA0273:1-AA0274:13), and fellow officers made derogatory comments about his sexual orientation and the fact that Officer Brome had filed complaints about discrimination and harassment in the past. (2 AA0275:6-AA0277:9.) The homophobic locker room talk “lessened” during Officer Brome’s time working at the Solano Office “because they didn’t want to say things around me,” but it never stopped. (2 AA0271:13-AA0272:7.)

The CHP held annual blood drives at the Solano Office and encouraged officers to participate, but Officer Brome was not allowed to donate blood because the blood bank would not accept blood from a gay man. (2 AA0300:12-AA0301:20.) Officer Brome reported to his supervisors that it was upsetting that they openly sponsored discriminatory blood drives, but the CHP continued to hold the blood drives yearly nonetheless. (2 AA0301:10:-AA0302:11.) In 2014, the CHP rejected Officer Brome for a Court Officer position even though he was the most qualified and senior officer to seek the position. (2 AA0302:12-AA0303:25.)

At the Solano office, fellow officers routinely put Officer Brome’s safety at risk by refusing to back him up in dangerous situations, including numerous incidents from 2009 through 2014. (2 AA0279:25-AA0287:8; 2 AA0288:6-AA0292:24; 2 AA0295:22-AA0298:4; 2 AA0327; 3 AA0550:13-AA0551:20; 3 AA0558:25-AA0560:12; 3 AA0571:11-AA0575:11; 3 AA0586:20-24; 3 AA0591:5-AA0593:20; 3 AA0595:10-

15.) For example, when Officer Nathan White was Officer Brome's beat partner—meaning that their shifts overlapped so they were expected to back each other up while both were on duty (2 AA0284:15-AA0295:5)—Officer White refused to back up Officer Brome on multiple occasions in dangerous situations, which Officer Brome attributed to Officer White's "distaste for his sexuality" based on his refusal to speak with Officer Brome, as well as other officers reporting that Officer White was homophobic. (2 AA0282:9-16; 3 AA0595:10-15.) As one example, Officer Brome called for backup during a traffic enforcement stop on the freeway where he was impounding the vehicle because the driver was unlicensed. (2 AA0279:25-AA0280:22.) Impoundments can be especially dangerous because drivers often get upset that their vehicle—their property and means of transportation—is suddenly and unexpectedly being taken away. (2 AA0279:25-AA0281:15; 3 AA0573:7-16.) The driver and passenger at this particular stop became "extremely agitated" and the situation became "very intense," but Officer White and other CHP officers nonetheless would not respond to Officer Brome's repeated requests for backup. (2 AA0279:25-AA0282:16.)

On another occasion, Officer Brome called for backup multiple times during another traffic enforcement stop involving an impoundment and the driver again became "very agitated" about having his vehicle taken away. (2 AA0288:6-16.) Officer Brome's beat partner that shift, Officer Scott Landers, said on the open radio he was on the way but then canceled in a manner that did not notify other CHP officers that no backup was coming, forcing Officer Brome to deal with the potentially dangerous situation by himself. (2 AA0288:17-AA0289:21; 2 AA0290:18-AA0291:5.) Officer Brome attributed Officer Landers's failure to back him up, after broadcasting over the radio to other CHP officers that he was on the way, to Officer Landers's hostility toward Officer Brome's sexual

orientation. (2 AA0290:18-AA0291:19.) Officer Landers had previously displayed a homophobic bumper sticker at the Solano Office until Officer Brome asked that it be taken down. (2 AA0278:17-AA0279:17.)

Officer Brome was also twice involved in high-speed pursuits of stolen vehicles while Officer White was his beat partner and should have come to his aid, but did not. (2 AA0282:20-AA0284:20.) After a particularly dangerous high-speed chase of a stolen vehicle with four passengers inside (including three small children), Officer White and another officer came to the scene but stayed by their patrol car and refused to assist Officer Brome. (2 AA0283:21-AA0284:20.) On another occasion, Officer Brome responded to a dangerous situation on Officer White's beat involving a disabled vehicle on the freeway at a blind curve, but Officer White never came to the scene to help. (2 AA0285:7-25.) Yet another time, Officer Brome called for backup when investigating a hit and run accident, but Officer White did not respond even though he was Officer Brome's beat partner that day, forcing Officer Brome into the dangerous situation of responding to the house of the potential perpetrator on his own. (2 AA0286:11-AA0287:8.)

Officer Brome testified that there were so many "instances at enforcement stops where there weren't any other units [to back him up] and that it would be impossible to list them all," that he was the only officer "who did not receive backup on a daily basis" (3 AA0550:13-AA0551:8), and that "every time [he] went to work within [his] 12-hour day this would typically happen," testifying that "I'm writing tickets, I'm going to enforcement stops, I'm going to debris calls, I am working. And I could go a whole day and not see another unit unless I was responding to their scenes" (2 AA0300:1-11).

Officer Brome repeatedly reported to supervisors his concerns about officers not backing him up because of his sexual orientation, including

meeting with Captain Samuel Dickson and telling him “specifically about Officer White not providing me backup.” (2 AA0311:10-AA0312:6; 3 AA0551:9-20.) Despite reporting the threat to his safety caused by other officers’ refusal to back him up to multiple CHP supervisors over the years, “nothing was changing, and management was allowing that.” (*Ibid.*)

In April 2014, for example, Officer Brome responded to a dangerous accident on Officer Todd Fetterly’s beat—“it was a Friday morning during commute, it was eastbound, it was raining, and a car had spun out of control and collided with the center divider and was blocking one or possibly two of the lanes, the fast lane. And it was on the blind curve ... and so you couldn’t see approaching it ... and it was dangerous and I kept calling for backup.” (2 AA0295:22-AA0297:7.) Officer Fetterly never responded, apparently because he decided to go to Sacramento while on duty to get routine maintenance for his motorcycle. (2 AA0297:17-AA0298:4.) Captain Dickson testified that unless a sergeant had directed Officer Fetterly to leave his beat and drive to Sacramento for maintenance during his shift (leaving Officer Brome without backup), “that sounds on the face of it like it would be inappropriate.” (3 AA0591:5-AA0593:3.)² Yet after Officer Brome reported the incident at the end of his shift, CHP management did not address his concerns and instead reprimanded him for violating the chain of command by complaining to a lieutenant rather than a sergeant. (2 AA0298:5-AA0299:17.)

Captain Dickson knew that Officer Brome had made complaints to his sergeants in the past about not being backed up by fellow officers, which were ignored, and that Officer Brome believed Officer White was

² Officer Brome’s Solano Office Captain, Samuel Dickson, had been promoted to Assistant Chief by the time of his deposition. For clarity, Plaintiff-Appellant refers to him herein as Captain Dickson.

refusing to back him up because he was gay. (3 AA0586:20-24; AA0590:13-20; 3 AA0595:10-15.) Another CHP supervisor, Sergeant Jason Hekker, testified that Officer Brome changed his shift in an attempt “to get away from officers who were not backing him up ... based upon his sexual orientation.” (3 AA0571:2-22.) Yet despite Officer Brome’s multiple complaints about the discrimination, harassment and retaliation he experienced because of his sexual orientation, “CHP management refused to ever deal with the issues of how I was treated by the officers.... And at no point did they make the CHP take this seriously, take my complaint seriously, follow through on my complaints, take action against the officers or the other people involved.” (2 AA0302:22-AA0303:8.)

Despite the pervasive discrimination and harassment Officer Brome suffered during his career, he excelled at his job and was selected as the CHP’s 2013 Officer of the Year for the Solano Office in October of that year. (2 AA0293:16-AA0294:20.) Although the Solano Office custom had been to display a photograph of the current Officer of the Year recipient on the wall of the briefing room for the following year (e.g., the photograph of the 2012 Officer of the Year would be displayed in 2013), when Officer Brome received the award, his photograph was not put up. (2 AA0304:16-AA0306:9.) Instead, the photograph of the previous year’s winner remained displayed, even though Officer Brome complained repeatedly to multiple supervisors about the very public slight. (2 AA0305:14-AA0306:22.) As of the day he left the Solano Office to go on stress-related medical leave because of the CHP’s persistent harassment in January 2015, Officer Brome’s 2013 Officer of the Year photograph had never been displayed. (2 AA0306:1-9.)

5. Officer Brome Takes Medical Leave And Files A Workers' Compensation Claim Due To The Psychological Toll Of The Hostile Work Environment At The CHP, But The Claim Is Not Accepted For More Than Nine Months

Officer Brome went out on medical leave on January 15, 2015.

(2 AA0252:9-11; 2 AA0307:11-15.) Officer Brome's doctor took him off work after he became suicidal due to the psychological toll of working in the CHP's fervently anti-gay work environment. (2 AA0307:11-24; AA0308:4-20; 3 AA0561:3-24.) Officer Brome brought his doctor's note to the Solano Office that evening and submitted a workers' compensation claim for "work related stress" on a CHP 121 Form to the sergeant on duty. (2 AA0308:15-AA0309:14; 2 AA0329.) He testified:

As I moved from office to office and the problems weren't corrected and management refused to do anything about it, then it became unbearable mentally so that I was isolating myself, I was in fear. I was in fear of my life because I wasn't getting backup. I was afraid to do my job because I knew if I would stop somebody or there was an incident that I wouldn't get the backup. And at the end I was suicidal.

(3 AA0561:17-24.) When the Sergeant to whom Officer Brome submitted the workers' compensation claim texted him to ask clarifying questions, Officer Brome responded the next morning: "I went to my doctor. Im [sic] off until further notice.... I have been in counseling my entire career due to the harassment and hostile work environment at the chp. I would prefer no contact from you or anyone at the solano chp office." (2 AA0329.)

Captain Dickson understood that Officer Brome was complaining about sexual harassment and a hostile work environment (3 AA0582:12-AA0585:5; 3 AA0597:1-11), and sent an email to other CHP managers shortly after receiving the workers' compensation claim stating: "Wow. [¶] Given the history, we need to do everything in writing on this one." (3 AA0615.) Captain Dickson also emailed Assistant Chief Paul Fontana

and described Officer Brome's statement that he was taking medical leave "due to the harassment and hostile work environment" at the CHP as a "brewing situation," as Captain Dickson recognized that Officer Brome was making "a potential complaint that needs to be addressed." (3 AA0597:12-AA0598:12.)

On January 16, 2015, Captain Dickson sent a letter to Officer Brome regarding his workers' compensation claim. (2 AA0329-AA0331.) Captain Dickson wrote that he was "concerned" regarding Officer Brome's allegation that he experienced harassment and a hostile work environment at the CHP, offered to arrange for him to speak with an Equal Employment Opportunity counselor, and explained that the CHP "remain[s] committed to provide a safe and healthy work environment that is free of discrimination and harassment for all employees and want to work with you to that end." (2 AA0331.) Although Captain Dickson had met with Officer Brome in the past about other officers' refusals to back him up in the field because of his sexual orientation (2 AA0311:5-AA0312:6), and about how upsetting it was that the CHP refused to display Officer Brome's Officer of the Year photograph in the briefing room (2 AA0306:16-22), Captain Dickson nonetheless wrote that "this is the first time [Solano] Area has been advised of your stress issue." (2 AA0329.) On January 21, 2015, Officer Brome's peace officer powers were suspended because of his "claimed psychological impairment" and he was directed to surrender his weapon, badge and identification card. (2 AA0333-AA0334.)

The State Compensation Insurance Fund ("SCIF") initially denied Officer Brome's workers' compensation claim in April 2015 based on a doctor's report from 2004, more than ten years before he submitted the claim. (2 AA0338:21-AA0339:6; 3 AA0606-AA0607.) Because the SCIF relied on this clearly out-of-date doctor's report to deny his claim, Officer Brome received only four State-authorized counseling sessions during the

first eleven months he was out on leave. (2 AA0345:2-AA0346:8.) During this time period, the CHP contacted Officer Brome on multiple occasions to warn that they were emptying his time banks of vacation time while his workers' compensation claim was pending, and that once his time banks were emptied, they would stop paying him. (2 AA0345:2-AA0347:9; 3 AA0611;3 AA0606-AA0607.) Officer Brome contacted the CHP multiple times while his claim was pending, raising his concern that the SCIF wrongly denied his claim based on the decade-old doctor's report and asking for help getting his counseling sessions restarted, to no avail. (2 AA0337:13-AA0338:20; 3 AA0606-AA0607; 3 AA0613.)

The CHP sent Officer Brome a letter on October 7, 2015, advising him that the CHP intended to apply for industrial disability retirement on his behalf and that he could not appeal the decision to terminate his employment. (2 AA0357.) The letter was so concerning and unexpected that Officer Brome reached out to a representative of the Highway Patrolman's Association to ask whether the CHP's letter was appropriate. (2 AA0339:16-AA0340:4; 2 AA0342:13-23.) Before the CHP could act on its stated intent to force Officer Brome into retirement, however, the SCIF accepted his workers' compensation claim on October 27, 2015. (2 AA0388 ¶ 10.)

6. Officer Brome Begins Industrial Disability Retirement On February 29, 2016, And Files His DFEH Complaint Less Than Seven Months Later, On September 15, 2016

Officer Brome began receiving counseling sessions again after his workers' compensation claim was belatedly accepted, but it remained stressful and traumatic for him to have any contact with the CHP or even to drive near the Solano Office due to his posttraumatic stress disorder. (2 AA0312:24-AA0313:6; 3 AA0562:14-AA0564:15.) He applied for service retirement pending industrial disability retirement in late 2015 and

began his industrial disability retirement on February 29, 2016, ending his employment with the CHP. (2 AA0359-AA0360; 2 AA0388 ¶ 12; 2 AA0349:22-AA0350:17.)

On July 26, 2016, Officer Brome filed a Government Tort Claim (2 AA0362-AA0375), and on September 15, 2016, he filed a DFEH complaint and received his right to sue letter (2 AA0377-AA0384).

B. Procedural Background

1. Officer Brome Files Suit On September 16, 2016

On September 16, 2016, Officer Brome filed a civil complaint against the CHP and eight individual officers. (1 AA0010-AA0040.) He asserted four causes of action under the FEHA, for sexual orientation discrimination, harassment based on sexual orientation, failure to prevent harassment, and retaliation, as well as a common law cause of action for intentional infliction of emotional distress. (*Ibid.*) The four FEHA claims are all based on the same underlying allegations of discriminatory, harassing and retaliatory conduct and the CHP's failure to prevent this harassment. (1 AA0030-AA0036 ¶¶ 101-141.) The CHP filed its Answer on November 21 and an Amended Answer on November 30, 2016. (3 AA0708; 1 AA0041-AA0044.) On August 15, 2017, Officer Brome dismissed all claims against the individual defendants. (3 AA0711.)

2. The Trial Court Erroneously Granted The CHP's Summary Judgment Motion Based Solely On The Statute Of Limitations

The CHP filed a motion for summary judgment on December 1, 2017. (1 AA0046-AA0049; 3 AA0711.) The CHP's sole argument in support of summary adjudication of Officer Brome's FEHA claims³ was

³ Officer Brome does not challenge on appeal the dismissal of his intentional infliction of emotional distress claim.

that the undisputed facts established that the claims were untimely. (1 AA0051-AA0075.) On March 2, 2018, Officer Brome filed his opposition, arguing that his workers' compensation claim tolled the statute of limitations and the continuing violation doctrine rendered his FEHA claims timely; and, in the alternative, because the CHP constructively discharged him the day his industrial disability retirement began, Officer Brome's FEHA claims were timely filed even without the equitable tolling and continuing violation doctrines. (2 AA0399-AA0417.)

The trial court entered a tentative ruling in the CHP's favor on March 16, 2018, finding no triable issue of fact as to the timeliness of Officer Brome's FEHA claims. (3 AA0681.) Officer Brome contested the tentative and requested argument. (*Ibid.*) After a hearing, the court issued a brief four-page order on March 20, 2018, granting the CHP's motion for summary judgment, in relevant part, on the ground that "[u]ndisputed material facts establish that Plaintiff's action is barred by the applicable statutes of limitations." (3 AA0682.)

3. Officer Brome's Timely Appeal

The judgment was entered on April 17, 2018 (3 AA0686-AA0687), and the CHP filed notice of entry of judgment on April 30, 2018 (3 AA0694-AA0699; 3 AA0713). Officer Brome timely filed an Amended Notice of Appeal from the judgment on May 29, 2018. (3 AA0700.)

STATEMENT OF APPEALABILITY

This appeal is taken from a final judgment, which is appealable pursuant to Code of Civil Procedure, section 904.1, subdivision (a)(1).

STANDARD OF REVIEW

The standard of appellate review of a summary judgment is *de novo*. (*Coral Construction, Inc. v. City & County of San Francisco* (2010) 50 Cal.4th 315, 336.) "A trial court properly grants a motion for summary

judgment only if no issues of triable fact appear and the moving party is entitled to a judgment as a matter of law. [Citations.]” (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460; see also Code Civ. Proc., § 437c, subd. (c).) The reviewing court conducts an independent assessment of the record to determine whether there are triable issues of material fact, considering all evidence submitted to the trial court “other than that to which objections were made and sustained.” (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 308 (*Sandell*).)

“[S]ummary judgment “is a drastic measure which should be used with caution so that it does not become a substitute for trial.” [Citations.]” (*Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 806.) The reviewing court “view[s] the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing [his] evidentiary submission while strictly scrutinizing defendants’ own showing and resolving any evidentiary doubts or ambiguities in plaintiff’s favor.” [Citation.]” (*Ibid.*)

“[T]he evidence must be incapable of supporting a judgment for the losing party in order to validate the summary judgment.” [Citation.] “Thus even though it may appear that a trial court took a “reasonable” view of the evidence, a summary judgment cannot properly be affirmed unless a contrary view would be unreasonable as a matter of law in the circumstances presented.” [Citations.]

(*Sandell, supra*, 188 Cal.App.4th at p. 308.)

When the defendant moves for summary judgment on statute of limitations grounds, the defendant bears the initial burden of production and also the burden of persuasion that there is no triable issue of fact as to each element of its affirmative defense. (*Anderson v. Metalclad Insulation Corp.* (1999) 72 Cal.App.4th 284, 289-90; see also Code Civ. Proc., § 437c, subd. (p)(2).) “Resolution of statute of limitations issues is ordinarily a question of fact, and [defendant] could prevail on its motion only if “the uncontradicted facts established through discovery are susceptible of only

one legitimate inference” [Citation.]” (*State Compensation Ins. Fund v. Superior Court* (2010) 184 Cal.App.4th 1124, 1132.)

ARGUMENT

I. TRIABLE ISSUES OF FACT EXIST AS TO WHETHER THE STATUTE OF LIMITATIONS HAD RUN ON OFFICER BROME’S FEHA CLAIMS

The trial court committed reversible error in granting summary judgment to the CHP on the ground that Officer Brome’s FEHA claims are barred as a matter of law by the statute of limitations, improperly denying him the opportunity to prove his case to a jury. The trial court failed to view the evidence in a light most favorable to Officer Brome’s position, and instead improperly resolved evidentiary ambiguities in the CHP’s favor in clear contravention of the summary judgment standard.

As an initial matter, the trial court was correct to assume Officer Brome’s pending workers’ compensation claim tolled the statute of limitations, extending the limitations period to December 5, 2014—about six weeks before Officer Brome went out on medical leave due to the intense psychological toll of the severe and pervasive discrimination, harassment and retaliation he faced over his twenty-year, award-winning career with the CHP because he is gay.

However, the trial court erred in concluding that Officer Brome could not, as a matter of law, meet the continuing violation standard. The evidence before the trial court, had it applied the correct standard, was more than sufficient to support the reasonable inference that the CHP’s unlawful conduct during the limitations period was sufficiently similar to the earlier sexual orientation discrimination Officer Brome suffered during his CHP career so as to constitute a continuing course of unlawful conduct.

Furthermore, Officer Brome presented evidence sufficient to survive summary judgment as to the other two prongs of the continuing violation

test: A factfinder could reasonably have concluded that the discrimination had not yet acquired a degree of permanence because Officer Brome's supervisors continued to represent that they wanted to work with him to resolve his concerns, and the record amply establishes that the CHP's egregious mistreatment of Officer Brome occurred with sufficiently reasonable frequency. Accordingly, because Officer Brome's evidence was sufficient to create triable issues of fact as to whether the continuing violation doctrine applies, this Court should reverse the trial court's order finding Officer Brome's FEHA claims untimely as a matter of law.

Alternatively, this Court should reverse the trial court's conclusion that there was no material factual dispute as to whether Officer Brome's FEHA claims accrued when he began his industrial disability retirement on February 29, 2016. A reasonable jury could conclude from the record evidence that the CHP constructively discharged Officer Brome by knowingly permitting working conditions so intolerable that he was coerced into retirement less than seven months before he filed his DFEH complaint on September 15, 2016, well within the FEHA's one-year statute of limitations.

The CHP did not move for summary judgment on the merits of Officer Brome's FEHA claims, arguing only that the statute of limitations provides a complete defense as a matter of law. Because there are triable issues of fact as to whether Officer Brome's FEHA claims are time-barred, reversal of summary judgment is required.

II. OFFICER BROME'S WORKERS' COMPENSATION CLAIM TOLLED THE STATUTE OF LIMITATIONS

The trial court correctly assumed that equitable tolling applied to Officer Brome's FEHA claims, as the California Supreme Court has recognized that a plaintiffs' pending workers compensation claim can extend the relevant limitations period. (*McDonald v. Antelope Valley*

Community College District (2008) 45 Cal.4th 88, 96, 101 (*McDonald*) [citing *Elkins v. Derby* (1974) 12 Cal.3d 410 (*Elkins*)].) The record here more than supports the propriety of the trial court’s assumption that Officer Brome was entitled to equitable tolling of the statute of limitations while his workers’ compensation claim was pending—for the 285-day period from January 15, 2015, when Officer Brome filed his claim, through October 27, 2015, when the claim was granted. (3 AA0690-AA0691; 2 AA0329; 2 AA0388 ¶ 10.)

A. The Doctrine Of Equitable Tolling

Equitable tolling is a judicially created doctrine that operates “to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff’s claims—has been satisfied.” [Citation.]” (*McDonald, supra*, 45 Cal.4th at p. 99.) Although equitable tolling is not codified in any statute, “its legitimacy is unquestioned.” (*Id.* at pp. 99-100.) “[T]he effect of equitable tolling is that the limitations period *stops running* during the tolling event, and begins to run again only when the tolling event has concluded.” (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370 (*Lantzy*)). “[T]he tolled interval, no matter when it took place, is tacked onto the end of the limitations period, thus extending the deadline for suit by the entire length of time during which the tolling event previously occurred.” (*Id.* at pp. 370-71.)

The doctrine of equitable tolling “applies “when an injured person has several legal remedies and, reasonably and in good faith, pursues one.”” [Citation.]” (*McDonald, supra*, 45 Cal.4th at p. 100.) A plaintiff demonstrates that he or she is entitled to equitable tolling by establishing “three elements: ‘timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff.’ [Citations.]” (*McDonald, supra*, 45 Cal.4th at p. 102.) While tolling is an equitable issue

for the court, whether the plaintiff establishes the relevant elements is a question of fact. (*Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736, 745-46, 755.)

B. Officer Brome’s Workers’ Compensation Claim For Work-Related Stress Due To Sexual Orientation Harassment Provided Timely Notice To The CHP

To establish the first element of equitable tolling, the plaintiff must show that the first claim was timely filed and that it “ ‘ “alert[ed] the defendant in the second claim of the need to begin investigating the facts which form the basis for the second claim.” ’ ’ ” (*McDonald, supra*, 45 Cal.4th at p. 102, fn. 2.)

Officer Brome submitted his workers’ compensation claim for “work related stress” on January 15, 2015. (2 AA0329.) FEHA claims filed on that date would have been timely. When the Sergeant to whom Officer Brome submitted the workers’ compensation claim contacted him via text message about it, Officer Brome texted back on the morning of January 16, 2015, stating: “I have been in counseling my entire career due to the harassment and hostile environment at the chp” (*ibid.*), and Captain Dickson testified that he understood, based on this statement, that Officer Brome was complaining that he had been sexually harassed and subjected to a hostile work environment because he is gay (3 AA0635; 3 AA0582:12-AA0585:5; 3 AA0597:1-11).

Moreover, the record shows that Officer Brome met with his supervisors, including Captain Dickson, prior to filing his workers’ compensation claim “and told him specifically about Officer White not providing me backup” (2 AA0311:10-AA0312:6; 3 AA0551:9-20), and that Officer Brome complained to supervisors that his Officer of the Year photograph was not displayed as past winners’ photographs had been (2 AA0305:14-AA0306:22). Captain Dickson knew Officer Brome had

made complaints to sergeants in the past about not being backed up by fellow officers because he is gay. (3 AA0586:20-24; 3 AA0595:10-15.) Sergeant Hekker, one of Officer Brome’s supervisors, similarly testified that he knew Officer Brome had filed complaints about harassment and discrimination prior to his transfer to the Solano Office (3 AA0568:23-AA0570:3), and that Officer Brome changed his shift in an attempt “to get away from officers who were not backing him up” because he is gay (3 AA0571:11-22).

Taken together, this evidence is more than sufficient to substantiate the trial court’s correct assumption that Officer Brome’s workers’ compensation claim put the CHP on notice of the need to investigate the facts underlying Officer Brome’s FEHA claims for discrimination, harassment, retaliation, and failure to prevent harassment, which are all predicated on the same factual allegations. (1 AA0030-AA0036 ¶¶ 101-141.) Officer Brome’s supervisors understood the claim to arise out of his experience of being persistently subjected to a hostile work environment because of his sexual orientation. Tellingly, Officer Brome’s captain sent an email shortly after receiving the workers’ compensation claim stating: “Wow. [¶] Given the history, we need to do everything in writing on this one” (3 AA0615), and described Officer Brome’s workers’ compensation claim and accompanying text to his supervisor as a “brewing situation” (3 AA0597:12-AA0598:12). There is simply no question, based on this record, that the CHP had timely notice of the need to investigate the facts underlying Officer Brome’s FEHA claims.

C. Equitable Tolling Would Not Prejudice The CHP

Officer Brome also provided evidence that demonstrates the second prong of the equitable tolling doctrine, lack of prejudice, or that “the facts of the two claims [are] identical or at least so similar that the defendant’s investigation of the first claim will put him in a position to fairly defend the

second.’’ (McDonald, supra, 45 Cal.4th at p. 102, fn. 2.) The two causes of action need not require proof of the same elements—in fact, in *Elkins v. Derby*, the Supreme Court held that the defendant would not be prejudiced by equitably tolling the statute of limitations for a tort claim against the plaintiff’s employer during the pendency of his workers’ compensation claim, even though the workers’ compensation claim, unlike the tort claim, did not require proof of the employer’s fault. (*Elkins, supra*, 12 Cal.3d at p. 418.) “The critical question is whether notice of the first claim affords the defendant an opportunity to identify the sources of evidence which might be needed to defend against the second claim.” (*Collier v. City of Pasadena* (1983) 142 Cal.App.3d 917, 925 (*Collier*).

Here, as in *Elkins*, Officer Brome’s later-filed claims are based on the same underlying harm as his workers’ compensation claim. Like the plaintiff in *Elkins*, Officer Brome’s later-filed claims sound in tort and thus require proof of an additional element—namely, his employer’s fault—but, like the defendant in *Elkins*, there is no prejudice to the CHP because notice of the workers’ compensation claim gave it the opportunity to fairly defend against the later-filed claims. (See *Elkins, supra*, 12 Cal.3d at pp. 412-18.)

The CHP cannot claim prejudice because it had plenty of notice of the need to identify the sources of evidence needed to defend against these claims. The evidence before the trial court discussed above—including testimony from Officer Brome, Captain Dickson and Sergeant Hekker—shows that Officer Brome’s supervisors had been on notice even before he filed his workers’ compensation claim of the details of the hostile work environment Officer Brome suffered because he is gay, including, *inter alia*, CHP officers’ failures to back him up in dangerous situations in the field, the refusal to publicly display Officer Brome’s Officer of the Year photograph, and CHP management’s failure to take action to adequately address Officer Brome’s complaints about the harassment. (2 AA0305:14-

AA0306:22; 2 AA0311:10-AA0312:6; 3 AA0551:9-20; 3 AA0568:23-AA0570:3; 3 AA0571:11-22; 3 AA0582:12-AA0585:5; 3 AA0597:1-11.) When the CHP learned through the workers' compensation claim that Officer Brome was taking medical leave due to the resulting psychological toll, they had every opportunity to investigate the facts in order to defend against his later-filed FEHA claims. (2 AA0329; 3 AA0582:12-AA0585:5; 3 AA0597:1-11.) In fact, the CHP had already begun identifying sources of evidence needed to defend against Officer Brome's FEHA claims even before his workers' compensation claim was filed. Captain Dickson testified that he "spoke to the sergeants and directed them to have conversations with the involved officers and find out ... what actually occurred and their version of events, and I had discussions with lieutenants about it." (3 AA0588:7-23.)

This evidence and Captain Dickson's emails shortly after receiving Officer Brome's worker's compensation claim stating: "Wow. [¶] Given the history, we need to do everything in writing on this one" (3 AA0615), and describing Officer Brome's medical leave and accompanying text message as a "brewing situation" (3 AA0597:12-AA0598:12), strongly support a finding that the CHP knew that it needed to prepare to defend against Officer Brome's later-filed FEHA claims. The CHP cannot now claim that they would be prejudiced by equitable tolling, and the trial court's assumption that this prong of the test is met cannot be disturbed.

D. Officer Brome Acted Reasonably And In Good Faith In Filing His FEHA Claims

The last equitable tolling prong focuses on the plaintiff's good faith and reasonable conduct in pursuing the alternate remedy. (*McDonald, supra*, 45 Cal.4th at p. 102, fn. 2.) Nothing in the record even hints that Officer Brome acted in bad faith or unreasonably in filing his FEHA claims less than eleven months after his workers' compensation claim was granted,

particularly in light of his psychological state. Officer Brome was actively suicidal when he went out on medical leave (2 AA0308:15-20), and was subsequently diagnosed with posttraumatic stress disorder (3 AA0562:14-AA0564:4). He testified it was stressful and traumatizing for him to have any contacts with the CHP or even to drive near the Solano Office: Because his counselor's office was off the same freeway exit as the Solano Office, he "had to take a different route" as he "couldn't even drive by the CHP office." (3 AA0562:14-AA0564:15; 2 AA0312:24-AA0313:6.)

While courts have identified various hypothetical scenarios where a plaintiff may not be able to establish good faith and reasonable behavior, none are applicable here. For instance, the Second Appellate District has speculated in dicta that this prong of the tolling test might not be met where a plaintiff "deliberately misled the defendant into believing the second claim would not be filed" or perhaps where a plaintiff "delayed filing the second claim until the statute on that claim had nearly run, even after crediting the tolled period." (*Collier, supra*, 142 Cal.App.3d at p. 926.)

The record does not support a finding that Officer Brome acted unreasonably or in bad faith in filing his FEHA claims with well over a month left on the tolled statute of limitations. No court has held similar timing establishes bad faith or unreasonable conduct, particularly for a plaintiff similarly situated to Officer Brome. (Cf. *Marcario v. County of Orange* (2007) 155 Cal.App.4th 397, 409 [reversing trial court's refusal to apply equitable tolling during pendency of grievance, even though civil action not filed until seven months after grievance denied].) Indeed, Officer Brome's delay is more than understandable in light of his suicidal thoughts and posttraumatic stress disorder, which made it exceedingly difficult for him to have any contacts with the CHP or even to drive past the office where he had worked (2 AA0308:15-20; 2 AA0312:24-AA0313:6; 3 AA0562:14-AA0564:15), let alone to prepare and file a formal DFEH

complaint regarding the hostile work environment that had caused the psychological harm he was still addressing. The trial court did not err in assuming Officer Brome acted reasonably and in good faith, and that equitable tolling applies.

III. THE TRIAL COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE CONTINUING VIOLATION DOCTRINE DOES NOT APPLY TO OFFICER BROME'S FEHA CLAIMS

Although the trial court correctly pushed the commencement of the statute of limitations period from September 16, 2015 back to December 5, 2014 (3 AA0690-AA0691), it erred when it found no triable issues of fact as to whether the continuing violation doctrine preserves Officer Brome's FEHA claims. Because the trial court failed to view the evidence in the light most favorable to Officer Brome, it must be reversed.

The continuing violation doctrine is an exception to the FEHA's one-year statute of limitations under which "a FEHA complaint is timely if discriminatory practices occurring outside the limitations period continued into that period." (*Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714, 721 (*Dominguez*)). The doctrine "allows liability for unlawful employer conduct occurring outside the statute of limitations if it is sufficiently connected to unlawful conduct within the limitations period." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 802 (*Richards*)). The Supreme Court has held that the doctrine applies to FEHA retaliation claims, in addition to discrimination and harassment claims. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1059-60 (*Yanowitz*)).

For the continuing violation doctrine to apply, the plaintiff must establish that "(1) the conduct occurring within the limitations period is similar in kind to the conduct that falls outside the period; (2) the conduct was reasonably frequent; and (3) it had not yet acquired a degree of

permanence.” (*Dominguez, supra*, 168 Cal.App.4th at p. 721 [citing *Richards, supra*, 26 Cal.4th at p. 823].)

The Supreme Court has emphasized that “courts applying the continuing violation doctrine have tended toward a broader view of that doctrine when the cause of action involves ongoing harassment” (*Richards, supra*, 26 Cal.4th at p. 817), and that “[i]n light of the legislative directive that the FEHA be liberally construed ‘to safeguard the employee’s right to hold employment without experiencing discrimination’ (citation), [the FEHA statute of limitations] should not be interpreted to impose serious practical difficulties on an employee’s ability to vindicate this right through litigation if it can be reasonably interpreted otherwise” (*id.* at p. 821). Between *Richards*’ generous view of the continuing violation doctrine in cases such as this, as well as the law’s general disinclination against dismissing potentially meritorious claims at the summary judgment stage, reversal here is more than warranted.

A. The Trial Court Erroneously Concluded That Officer Brome Failed To Present Sufficiently Similar Evidence Of Harassing, Discriminatory Or Retaliatory Conduct Within The Limitations Period

The trial court granted summary judgment to the CHP based solely on its erroneous determination that there was no triable issue of fact as to whether Officer Brome could establish the “sufficiently similar” prong of the continuing violation doctrine. (3 AA0683.) The court stated that no evidence was presented that the CHP subjected Officer Brome to unlawful conduct based on his sexual orientation on or after December 5, 2014 sufficiently similar to the earlier misconduct about which Officer Brome testified (*ibid.*)—and which the CHP did not dispute (3 AA0051-AA0075).

The trial court committed reversible error by failing to consider all the evidence presented in the light most favorable to Officer Brome. Viewed under the correct standard, the record evidence supports the

reasonable inference that Officer Brome continued to be subjected to discriminatory, harassing and retaliatory conduct based on his sexual orientation from December 5, 2014 on—including having his life placed in danger by his fellow officers’ refusal to provide back up to Officer Brome in the field, being subjected to anti-gay slurs, the decision to not recognize Officer Brome’s achievement of earning the CHP Solano Area Office’s Officer of the Year award by breaking the office’s tradition of hanging the current year’s winner photo in the office briefing room, and CHP management’s perpetual failure to address his complaints about the hostile work environment—and that the conduct within and outside the limitations period is sufficiently similar to be viewed as a continuing violation.

1. Courts Must Take A Flexible Approach In Assessing Whether Conduct Is Sufficiently Similar

The Supreme Court emphasized that courts applying the “sufficiently similar in kind” element must “recogniz[e] ... that similar kinds of unlawful employment conduct, such as acts of harassment or failures to reasonably accommodate disability, may take a number of different forms (citation). . . .” (*Richards, supra*, 26 Cal.4th at p. 823.) In *Richards*, the Supreme Court reasoned that although the employer failed to accommodate the wheelchair-using plaintiff in different ways inside and outside the limitations period—including failing to address blocked access to hallways, a supply room, parts of the lunchroom, and the wheelchair ramp outside the limitations period, and the failure to develop an evacuation plan or to address blocked access to certain hallways and to the microwave within the limitations period (*id.* at pp. 806-810)—all the failures to reasonably accommodate the plaintiff’s disability taken together were sufficiently related to constitute a continuing course of conduct. (*Id.* at pp. 821-22.)

Following *Richards*, this Court emphasizes the importance of taking a broad view of what constitutes similar conduct, explaining that “Courts are to be mindful of the variety of different forms acts of harassment can take in evaluating the similarity prong of the continuing violation doctrine.” (*Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 1005 (*Birschtein*); see also *Dominguez, supra*, 168 Cal.App.4th at p. 721 [noting that the Supreme Court in *Richards* “suggested a flexible approach to determining similarity”].) The Supreme Court and Court of Appeal cases

do not require that the conduct occurring within the limitations period have occurred outside the limitations period as well. Instead, they focus on whether conduct within the limitations period may be viewed as part of a continuing violation because there is evidence that the former was related to the latter.

(*Dominguez, supra*, 168 Cal.App.4th at p. 724 [although plaintiff’s supervisor only made derogatory comments about her sexual orientation outside limitations period, disruptive actions within the limitations period—including blocking access to work stations and forcing her to redo work—was sufficiently connected to more explicit harassment]; see also *Yanowitz, supra*, 36 Cal.4th at pp. 1049-50, 1059 [supervisor’s solicitation of negative feedback about and criticism of plaintiff in retaliation for her refusal to fire a female sales associate outside limitations period sufficiently related to criticism during meeting with executives within limitations period]; *Birschtein, supra*, 92 Cal.App.4th at p. 1006 [overtly sexual remarks by supervisor outside limitations period sufficiently related to persistent staring within limitations period].)

2. There Is A Triable Issue Of Fact As To Whether The CHP's Misconduct Within The Limitations Period Is Sufficiently Similar To Earlier Pervasive Sexual Orientation Harassment And Retaliation

In analyzing the similarity prong, the trial court here failed to take into account all the evidence or to draw reasonable inferences and resolve ambiguities in Officer Brome's favor, as required at summary judgment. As a result, the court incorrectly concluded that Officer Brome "failed to allege or present in opposition any harassing, discriminatory, or retaliatory conduct within the limitations period that is sufficiently similar in kind to the conduct outside the limitations period." (3 AA0683.)

The evidence in the record, however, is more than sufficient to create a triable issue of fact as to whether the CHP's unlawful conduct on or after December 5, 2014 is sufficiently similar to the earlier pervasive harassment. This evidence includes co-officers' routine refusals to back up Officer Brome in dangerous situations in the field, pervasive use of derogatory and homophobic language directed both at Officer Brome and generally about gay people, the undermining of Officer Brome's achievements by defacing or refusing to publicly display awards and commendations that he earned, rejecting Officer Brome for job positions he sought and instead selecting less experienced officers, and failing to adequately address Officer Brome's many complaints about the hostile work environment he was experiencing.

First, although the trial court stated that "Plaintiff does not allege or produce any evidence that a fellow officer failed or refused to assist or backup Plaintiff during the limitations period" (3 AA0683), the record evidence supports the reasonable inference that officers continued to refuse to back up Officer Brome in the field throughout the time he was working at the Solano Office, including on and after December 5, 2014, and that despite repeatedly reporting his concerns to his supervisors, they did not

take adequate action to prevent the harassment. (2 AA0300:1-11; 2 AA0311:10-AA0312:6; 3 AA0550:13-AA0551:20; 3 AA0561:17-24.)

The record establishes that fellow CHP officers would not back up Officer Brome in highly dangerous situations (3 AA0572:10-AA0575:19; 3 AA0593:4-20)—including during traffic enforcement stops involving vehicle impoundments (2 AA0280:4-AA0281:15; 2 AA0288:6-AA0289:21; 2 AA0290:18-AA0291:8), responding to the scenes of accidents at dangerous locations such as blind curves (2 AA0285:7-AA0285:25; 2 AA0295:22-AA0297:3), responding to the scenes of fatal accidents (1 AA0238:22-AA0239:23; 2 AA0263:9-AA0264:3), and even during high-speed pursuits (2 AA0282:20-AA0284:14).⁴ There is also sufficient record evidence to support the reasonable inference that the pattern of officers refusing to back Officer Brome up in the field was motivated by their hostility towards his sexual orientation as well as retaliation for his prior complaints about sexual orientation harassment and

⁴ The trial court erroneously characterized one such incident in a light favorable to the CHP as “an instance in April [2014] when Officer Fetterly failed to respond to the scene because he was in Sacramento to have maintenance performed on a motorcycle” (3 AA0683.) Yet the record evidence supports the reasonable inference that this incident was not so benign. Officer Brome responded to an extremely dangerous accident on Officer Fetterly’s beat (2 AA0296:8-AA0297:7), but Officer Fetterly never responded to calls for backup, apparently because he elected to go to Sacramento while on duty to get routine maintenance for his motorcycle (2 AA0297:17-AA0298:4). Captain Dickson testified that unless a sergeant directed Officer Fetterly to leave his beat during his shift, his decision to leave Officer Brome with no backup would be “inappropriate.” (3 AA0591:5-AA0593:3.) Yet after Officer Brome reported the incident to a lieutenant because no sergeants were present, CHP management not only failed to address his legitimate and serious concerns, but instead reprimanded him for violating the chain of command. (2 AA0297:17-AA0299:17.)

discrimination. (2 AA0282:9-16; 2 AA0290:18-AA0291:8; 3 AA0551:3-8; 3 AA0558:25-AA0560:12; 3 AA0571:11-22; 3 AA0595:10-15.)

Officer Brome testified that there were “multiple instances at enforcement stops where there weren’t any other units [to back him up] and that it would be impossible to list them all,” that he was the only officer “who did not receive backup on a daily basis” (3 AA0550:13-AA0551:8), and that it was typically his experience every time he worked that he “could go a whole day and not see another unit unless I was responding to their scenes” (2 AA0300:1-11). The evidence that fellow officers were refusing to back up Officer Brome in the field on countless occasions and that this would happen “on a daily basis” at minimum is sufficient to create a triable issue of fact as to whether this ongoing course of unlawful conduct continued during the limitations period.

The record evidence also shows that Officer Brome reported to his supervisors his concerns about officers not backing him up because of his sexual orientation on multiple occasions, but that the CHP did not take adequate action to prevent the harassment. (2 AA0311:10-AA0312:6; 3 AA0551:3-20; 3 AA0588:7-23; 3 AA0595:10-15.) He testified:

As I moved from office to office and the problems weren’t corrected and management refused to do anything about it, then it became unbearable mentally so that I was isolating myself, I was in fear. I was in fear of my life because I wasn’t getting backup. I was afraid to do my job because I knew if I would stop somebody or there was an incident that I wouldn’t get the backup. And at the end I was suicidal.

(3 AA0561:17-24; see also 2 AA0302:22-AA0303:8 [“From my experience in my entire career CHP management refused to ever deal with the issues of how I was treated by the officers. And when I would go to another office the rumor mill, the CHP rumor mill would be there before I even got to that office. And at no point did they make the CHP take this seriously, take my complaint seriously, follow through on my complaints, take action against

the officers or the other people involved.”].) This evidence, and the fact that Officer Brome went out on leave because he was suicidal due to CHP management’s refusal to take appropriate action, is sufficient to create a triable factual dispute whether CHP management’s unlawful actions continued during the limitations period and were sufficiently connected to the earlier inadequate responses by CHP management to be part of a continuing course of unlawful conduct targeted at Officer Brome because he is gay.

Second, although the trial court stated that “Plaintiff does not allege or produce any evidence that anyone made derogatory comments to him or regarding gay men during the limitations period” (3 AA0683), the record evidence supports the reasonable inference that Officer Brome’s fellow officers engaged in homophobic locker room talk throughout the time he was working at the Solano Office, including on or after December 5, 2014 (2 AA0271:13-AA0272:7; 2 AA0273:1-AA0274:13). When asked whether the homophobic comments persisted during the entire time he was at Solano, Officer Brome testified that they “lessened.” (2 AA0272:1-7.) The clear implication of that testimony, viewed most favorably to Officer Brome, is that the discriminatory insults and slurs occurred less often, but still occurred. At no point did Officer Brome testify that the comments ever stopped. At the summary judgment stage, this evidence is more than sufficient to create a triable factual dispute as to whether the homophobic comments by fellow officers continued during the limitations period.

Third, the trial court failed to account for all evidence presented and to resolve ambiguities in Officer Brome’s favor with respect to what the court characterized as the CHP’s “failure to display Plaintiff’s Officer of the Year photograph in the briefing room at some unidentified point in 2014.” (3 AA0683.) The undisputed evidence demonstrates that the Solano Office had a policy of displaying the photograph of the current

Officer of the Year recipient on the briefing room wall for the following year, but that when Officer Brome was awarded the 2013 Officer of the Year for the Solano Area Office in October 2013, nobody ever replaced the photograph of the previous year's winner with Officer Brome's photograph, even after he complained to his supervisors. (2 AA0293:16-AA0294:20; 2 AA0304:16-AA0306:22.)

The record evidence permits the reasonable inference that this public slight was not merely an oversight by CHP management, as Officer Brome testified that he complained to multiple supervisors about "how upsetting it was, and no one did anything about it." (2 AA0305:14-0306:22.) Nor does the evidence support the trial court's characterization of this ongoing failure to address the differential treatment of Officer Brome compared to previous winners as a discrete incident occurring "at some unidentified point in 2014," as the undisputed record evidence establishes that despite Officer Brome's complaints to his supervisors, the previous year's winner's Officer of the Year photograph was displayed in the briefing room "up until the day [Officer Brome] left Solano" on January 15, 2015, well within the limitations period. (2 AA0306:1-9.)

A reasonable jury could find that the CHP's failure to take any action to address the continuing refusal to display Officer Brome's Officer of the Year photograph in the briefing room was part and parcel of both the constant denigration and unequal treatment he faced at the CHP because he was gay and the CHP's pattern of failing to address his related complaints. Officer Brome testified about the connection to CHP's inadequate response to incidents earlier in his career where officers defaced his workspace and commendations because of hostility toward his sexuality and in retaliation for his complaints about discrimination and harassment: "Not having my picture put up for officer of the year ... re-triggers what I went through in San Francisco of having my name carved off a plaque, or having my other -

- my locker vandalized, my car vandalized, it re-triggers all of that.”
(3 AA0562:14-AA0563:13.) The trial court erred in deciding that no juror could reasonably conclude that the CHP’s intentional decision to break with its practice of publicly honoring Officers of the Year by refusing to display Officer Brome’s photograph could be viewed as part of CHP’s ongoing, twenty-year continuing course of discriminatory and retaliatory conduct.

Fourth, the trial court also acknowledged that there was evidence that the CHP failed to select Officer Brome “for a Court Officer position at some unidentified point in 2014” (3 AA0683.) Officer Brome testified that he was denied the Court Officer position even though “I was the senior officer to put in for it” and “I was the most qualified to put in for it, and it was given to a junior officer.” (2 AA0302:12-19.) As there was no evidence in the record establishing that Officer Brome was denied this position outside the limitations period, under the summary judgment standard, where all ambiguities and doubts must be resolved in the non-moving party’s favor, a jury could reasonably conclude that this incident occurred on or after December 5, 2014, and was sufficiently similar to prior incidents where he was denied positions and training opportunities that were instead given to officers with less seniority than him. (1 AA0212:4-AA0215:19.)

The evidence in the record is thus more than sufficient to create a material factual dispute as to whether acts of harassment, discrimination and retaliation targeting Officer Brome continued on or after December 5, 2014. The record evidence also permits the reasonable inference that this misconduct was sufficiently similar to the earlier unlawful conduct that Officer Brome suffered during his employment with the CHP to be viewed as a part of a continuing course of harassment based on Officer Brome’s sexual orientation. The trial court’s erroneous decision to the contrary must

be reversed, particularly when combined with the additional evidence of ongoing bad acts after Officer Brome went out on leave, discussed next.

3. There Is A Triable Issue Of Fact Whether The CHP's Conduct After Officer Brome Went Out On Medical Leave Is Sufficiently Similar To The Earlier Sexual Orientation Discrimination, Harassment And Retaliation

Even if this Court were only to consider the CHP's unlawful conduct targeting Officer Brome after he went on medical leave due to the psychological toll of the CHP's hostile work environment, there is enough evidence in the record to create a triable issue of fact as to whether the "sufficiently similar" prong is met under the flexible approach employed by this Court that requires "mindful[ness] of the variety of different forms acts of harassment can take" (*Birschtein, supra*, 92 Cal.App.4th at p. 1005.) As the Second Appellate District held in *Dominguez*, the type of unlawful conduct occurring within the limitations period need not have occurred earlier, so long as the evidence supports the inference that the misconduct within the limitations period was related to what the employer did to the plaintiff outside the limitations period. (*Dominguez, supra*, 168 Cal.App.4th at p. 724.)

The record here includes evidence of unlawful actions by CHP management against Officer Brome while he was on leave sufficiently connected to CHP's management's earlier failures to take adequate action to address his complaints so as to constitute a continuing course of conduct. A reasonable jury could view the January 16, 2015 letter by Captain Dickson to Officer Brome as harassment. In that letter, Captain Dickson falsely claimed "this is the first time Area has been advised of your stress issue," even though Officer Brome had repeatedly met with Captain Dickson and other supervisors about officers' refusals to back him up in the field because he is gay and about how upsetting it was that the CHP refused to display his Officer of the Year photograph. (2 AA0329.) A reasonable

jury could find the letter to be sufficiently connected to CHP management's twenty-year history of downplaying and failing to adequately address Officer Brome's complaints to be part of a continuing course of conduct.

The evidence also shows that the State Compensation Insurance Fund ("SCIF") initially denied Officer Brome's workers' compensation claim based on an out-of-date doctor's report from 2004, more than ten years before he submitted the claim (2 AA0338:21-AA0339:6; 3 AA0606-AA0607), and that as a result, Officer Brome was only provided four counseling sessions for the first eleven months of his leave (2 AA0345:2-AA0346:8). The CHP also contacted Officer Brome on multiple occasions during this time period, warning that they were emptying his time banks of vacation time while his workers' compensation claim was pending and threatening to stop paying him. (2 AA0345:2-AA0347:9; 3 AA0611; 3 AA0606-AA0607.) These ominous communications justifiably caused Officer Brome great stress and hindered his ability to recover from the psychological toll caused by the CHP. (2 AA0345:2-AA0347:21; 3 AA0554:18-AA0555:6; 3 AA0606-AA0607.) The CHP also sent Officer Brome a letter on October 7, 2015 from the Solano Office Captain who replaced Captain Dickson, telling Officer Brome that the CHP intended to apply for industrial disability retirement on his behalf, and that he could not appeal the decision. (2 AA0357.) The letter was so unexpected and concerning to Officer Brome that he reached out to a representative of the Highway Patrolman's Association to ask whether the CHP's unilateral retirement decision was appropriate. (2 AA0339:16-AA0340:4; 2 AA0342:13-23.)

The CHP knew that the injury for which Officer Brome was seeking workers' compensation was caused by the pervasive discrimination and harassment he was exposed to while working at the CHP because he is gay. Captain Dickson went so far as to describe it as a "brewing situation."

(3 AA0597:12-AA0598:12.) The jury could reasonably conclude that the CHP had the motive and opportunity to interfere with the workers' compensation claim by submitting the ten-year-old doctor's report to the SCIF in retaliation for Officer Brome's complaints about sexual orientation harassment and discrimination, causing Officer Brome's time banks to be drained and limiting him to a mere four counseling sessions over a nearly eleven-month period after he went out on medical leave, despite the fact that he was suicidal and suffering from posttraumatic stress disorder. Viewed in the light most favorable to Officer Brome, there is a triable issue of fact as to whether this evidence was sufficiently related to CHP management's earlier ongoing failure to address Officer Brome's complaints about the hostile work environment to meet the "sufficiently similar" prong of the continuing violation doctrine.

B. The Discrimination, Harassment And Retaliation Officer Brome Suffered Because He Is Gay Had Not Acquired A Degree Of Permanence Prior To The Expiration Of The Limitations Period

Although the trial court did not rely on the second prong of the continuing violation test in granting the CHP's summary judgment motion (3 AA0682-AA0684), there is no question that sufficient record evidence exists to find a factual dispute as to whether Officer Brome's FEHA claims had acquired a degree of permanence before the limitations period ended. When viewed in a light favorable to Officer Brome, the evidence supports the inference that the CHP's words and actions gave him reason to believe that further efforts to informally end the discrimination and harassment would not be futile prior to the expiration of the limitations period.

In *Richards*, the Supreme Court held that an employer's unlawful conduct only acquires a degree of permanence where "an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end

harassment will be futile.” (*Richards, supra*, 26 Cal.4th at p. 823.) The Supreme Court emphasized that “permanence” is only achieved when the employer “mak[es] clear to the employee in a definitive manner” that informal resolution is not an option, such that “the employee is on notice that further efforts to end the unlawful conduct will be in vain.” (*Ibid.*)

This Court explained in *Birschstein v. New United Motor Manufacturing, Inc.* that this formulation “appear[s] designed to ease application of the [continuing violation] doctrine,” noting that *Richards* instructed that the permanence element is “not to be taken literally” and concluded that courts ““have tended toward a broader view of th[e] doctrine when the cause of action involves ongoing harassment or ongoing failure to accommodate disability.... [and] have been inclined to find a continuing violation under these circumstances, either concluding the employer’s actions had little “permanence” or else giving little weight to the permanence factor.”” (*Birschstein, supra*, 92 Cal.App.4th at pp. 1005-06 [quoting *Richards, supra*, 26 Cal.4th at p. 817].)

There is a triable issue of fact in this case as to whether the CHP’s statements and actions in response to Officer Brome’s informal and formal complaints over the years were so clear and definitive as to reasonably put him on notice that it was futile to attempt any further efforts to informally end the discrimination and harassment. In fact, Captain Dickson wrote Officer Brome a letter on January 16, 2015, the day after he went out on medical leave, expressing concern about Officer Brome’s allegations of harassment and a hostile work environment, recommending he speak with an Equal Employment Opportunity counselor, and asserting that the CHP “remain[s] committed to provide a safe and healthy work environment that is free of discrimination and harassment for all employees and want to work with you to that end.” (2 AA0331.) Captain Dickson further wrote: “I genuinely hope you allow us the opportunity to work together to resolve

your work-related issues.” (*Ibid.*) Even assuming the CHP was not being sincere in its offer to engage in informal efforts to resolve Officer Brome’s concerns, it cannot now claim that Officer Brome should have known to disbelieve the CHP and that his only option was to file suit.

The CHP argued below that Officer Brome’s claims acquired a degree of permanence when he filed a DFEH complaint in 2003 while working at the Contra Costa Office—even though a reasonable jury could conclude this complaint was primarily based on the sexual harassment by Captain Maas (2 AA0315; 2 AA0317)—or at some unidentified point after Office Brome transferred to the Solano Office in 2008 and realized the harassment and discrimination was continuing. (1 AA0065-AA0067.) The CHP contended that Officer Brome’s prior complaints put this case on all fours with the Second Appellate District’s opinion in *Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1403 (*Jumaane*), holding that the harassment and retaliation the plaintiff faced had become permanent outside the limitations period as a matter of law.

Jumaane, however, is inapposite. In that case, there was no factual dispute that the plaintiff should reasonably have known that it was futile to attempt to informally resolve his claims of racial discrimination and harassment; in fact, the plaintiff in *Jumaane* specifically testified that, long before he filed his claim, “he no longer had any hope that the racism would end, and he knew future efforts to make changes would be futile.” (*Jumaane, supra*, 241 Cal.App.4th at p. 1404.) Officer Brome, by contrast, testified that in 2008, he requested and received a transfer from Contra Costa to Solano in the hopes that the transfer would provide for a harassment-free work environment. (2 AA0270:11-24.) While he was subjected to discrimination and harassment at the Solano Office and believed that the CHP did not adequately address his complaints there, Officer Brome did not testify—in contrast to the plaintiff in *Jumaane*—that

he believed it to be futile to attempt to informally end the discrimination and harassment before he went out on medical leave.

Rather, the evidence shows that Officer Brome continued to make informal complaints to his supervisors about the sexual orientation harassment and discrimination he suffered throughout 2014 (2 AA0297:17-AA0299:17; 2 AA0305:14-AA0306:22; 2 AA0311:10-AA0312:6; 3 AA0551:9-20), which at minimum creates a triable issue of fact as to whether Officer Brome knew that attempts at informal resolution would be futile. Taken together with the undisputed evidence that CHP management expressly told Officer Brome in the January 16, 2015 letter that they desired to work with him informally to resolve his concerns (2 AA0331), the evidence certainly permits the reasonable inference that the discrimination and harassment had not already acquired a degree of permanence prior to the expiration of the limitations period.

C. The CHP’s Discriminatory, Harassing And Retaliatory Conduct Toward Officer Brome Occurred With Reasonable Frequency

The CHP asserted for the first time at the summary judgment hearing that Officer Brome could not establish as a matter of law the third prong of the continuing violation inquiry (RT 12:4-11), that its discriminatory, harassing and retaliatory conduct occurred with “reasonable frequency.” (*Richards, supra*, 26 Cal.4th at p. 823.) By failing to raise the issue in its moving papers, the CHP deprived Officer Brome the opportunity to submit evidence to demonstrate the existence of a material factual dispute on this element, and has thus waived this argument on appeal. (See *14859 Moorpark Homeowner’s Ass’n v. VRT Corp.* (1998) 63 Cal.App.4th 1396, 1403 fn. 1 [declining to consider a new theory raised by respondent on appeal “in a manner that prevents [appellant] from developing the underlying facts. (Eisenberg et al., *Cal. Practice Guide: Civil Appeals and Writs* (The Rutter Group 1997) ¶ 8:241, p. 8-106.)”].)

Nonetheless, the existing evidence in the record is more than sufficient to create a triable issue of fact on this element. In applying the “reasonable frequency” prong, the Supreme Court looks to the entire course of challenged conduct by the employer to determine whether it “occurred with sufficient frequency to constitute a continuous and temporally related course of conduct.” (*Yanowitz, supra*, 36 Cal.4th at p. 1059.) The evidence here shows that the CHP’s unlawful conduct occurred with reasonable frequency, including pervasive homophobic slurs and derogatory comments targeted at Officer Brome and at gay people generally, the defacement of Officer Brome’s workspace and property, the undermining of his achievements by defacing and refusing to display commendations he earned, the pattern of fellow officers refusing to respond to his calls for backup in dangerous situations, and CHP management’s consistent failure to take adequate action in response to Officer Brome’s complaints about the hostile work environment. (See Statement of Facts and Procedural History, A.1. – A.5., *supra*.) Officer Brome has presented more than enough evidence to establish a triable issue of fact on this final prong of the continuing violation doctrine, mandating reversal of the trial court’s summary judgment.

IV. OFFICER BROME RAISED A TRIABLE ISSUE OF FACT AS TO HIS CONSTRUCTIVE DISCHARGE CLAIM

In addition to improperly dismissing his continuing violation theory as a matter of law, the trial court also erred in concluding that Officer Brome could not establish a triable issue of fact as to whether he was constructively discharged by the CHP’s knowing and intentional refusal to address the intolerable working conditions that forced him to take industrial disability retirement. Because the record evidence is sufficient to support such a finding, the jury could reasonably conclude that Officer Brome’s FEHA claims did not accrue until he began his industrial disability

retirement on February 29, 2016 (2 AA0359-AA0360; 2 AA0349:22-AA0350:17), less than seven months before he filed his DFEH complaint on September 15, 2016 (2 AA0377-AA0384), and well within the FEHA's one-year statute of limitations.

“Constructive discharge occurs when the employer’s conduct effectively forces an employee to resign.” (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244 (*Turner*).) A plaintiff establishes that he or she was constructively discharged by showing “the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee’s resignation that a reasonable employer would realize that a reasonable person in the employee’s position would be compelled to resign.” (*Id.* at p. 1251.)

The Second Appellate District has held that when the plaintiff’s theory is that he or she was coerced into taking disability retirement by the employer’s intolerable working conditions, “the cause of action accrues when the employment is actually terminated,” i.e., “the day plaintiff commence[d] [his or] her disability retirement,” and “not when the alleged intolerable working conditions occur.” (*Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1320 (*Colores*).) In such circumstances, “the *true* logic of plaintiff’s case [is] that the [employer], through its agents, allegedly made plaintiff’s working conditions so intolerable that her preexisting medical condition worsened to the point where she was no longer able to function in her duties and *needed to remove herself from her job*, and thus was *effectively* constructively discharged.” (*Id.* at p. 1318.)

The Second Appellate District relied on two Supreme Court opinions to conclude that a cause of action for constructive discharge accrues on the date that the plaintiff commences disability retirement, rather than when the intolerable working conditions that form the basis for the constructive discharge occurred. (*Colores, supra*, 105 Cal.App.4th at p. 1320.) The

Court explained that in *Mullins v. Rockwell International Corp.*, the Supreme Court held that “in breach of contract actions alleging constructive wrongful termination of employment, it is the actual termination of employment that starts the statute of limitations period running, not when the alleged intolerable working conditions occur” (*id.* [citing *Mullins v. Rockwell International Corp.* (1997) 15 Cal.4th 731, 733-34 (*Mullins*)]); and that in *Romano v. Rockwell International, Inc.*, the Supreme Court held that in wrongful termination cases—including for violations of the FEHA—“the statute of limitations begins to run on the date the employment is actually terminated” (*id.* [citing *Romano v. Rockwell International, Inc.* (1996) 14 Cal.4th 479, 483-84]). The Second Appellate District reasoned that these holdings taken together mean that a wrongful termination claim based on a constructive discharge accrues when an employee commences disability retirement, “since the act of taking disability retirement was the functional equivalent of a constructive discharge.” (*Id.*)

The trial court erred by primarily focusing on the whether the working conditions were “so intolerable or aggravated at the time of Plaintiff’s retirement” (3 AA0683-AA0684), when the relevant inquiry should have been whether Officer Brome went out on medical leave as a result of working conditions created or knowingly permitted by the CHP that were sufficiently intolerable or aggravated that they compelled him to resign. (*Turner, supra*, 7 Cal.4th at p. 1251.) Officer Brome’s theory of constructive discharge, like that of the plaintiff in *Colores*, is that he was forced to take medical leave on January 15, 2015 by the intolerable working conditions which the CHP knowingly permitted to continue for years, and that he was ultimately forced to take industrial disability retirement on February 29, 2016, about seven months before he filed his DFEH complaint, within the one-year FEHA limitations period.

While the trial court also stated that the working conditions were not sufficiently intolerable at the time Officer Brome went out on medical leave (3 AA0684), as discussed at length in Argument III.A.2, *supra*, the court erroneously drew inferences and resolved ambiguities in the CHP's favor in downplaying the severity and pervasiveness of the unlawful discrimination and harassment that Officer Brome suffered in his last weeks at the CHP's Solano Office. The record evidence is sufficient to create a triable issue of fact as to whether Officer Brome was subjected by the CHP to intolerable working conditions right up until he was compelled to take medical leave due to the psychological toll caused by those very working conditions.

The standard is high to establish a constructive discharge, but particularly at the summary judgment stage, the record evidence—including the routine refusals of fellow officers to back up Officer Brome in dangerous situations, the pervasive use of derogatory and homophobic language, the continuing refusal to publicly display the photograph of Officer Brome being awarded the Officer of the Year honor, and the CHP's continuing failure to adequately address Officer Brome's complaints about the hostile work environment, all of which resulted in him fearing for his life and becoming suicidal by the time he went out on medical leave (see Statement of Facts and Procedural History, A.5. – A.6., *supra*.)—is more than enough to create a triable issue of fact as to whether his working conditions were sufficiently intolerable and aggravating to permit a finding that Officer Brome was constructively discharged.

The trial court's erroneous conclusion to the contrary—based on its failure to consider all the evidence of Officer Brome's intolerable working conditions in the light favorable to him—must be reversed. A jury should decide whether Officer Brome was constructively discharged, in which case his FEHA claims accrued on the date his industrial disability retirement

commenced, less than seven months before he filed his DFEH complaint and well within the FEHA statute of limitations.

CONCLUSION

The trial court erred in granting summary judgment despite the existence of triable issues of fact as to whether Officer Brome's FEHA claims were time-barred, necessitating reversal of the judgment for the defendant based on its statute of limitations affirmative defense.

DATED: November 29, 2018

Respectfully submitted,

ROSEN BIEN
GALVAN & GRUNFELD LLP

By: /s/ Lisa Ells

Lisa Ells

Attorneys for Plaintiff and Appellant

**CERTIFICATE OF COMPLIANCE PURSUANT TO
CALIFORNIA RULES OF COURT RULE 8.204(c)(1)**

Pursuant to California Rules of Court Rule 8.204(c)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 13,619 words.

DATED: November 29, 2018

ROSEN BIEN
GALVAN & GRUNFELD LLP

By: /s/ Lisa Ells

Lisa Ells

Attorneys for Plaintiff and Appellant

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is 101 Mission Street, Sixth Floor, San Francisco, CA 94105-1738.

On November 29, 2018, I served true copies of the following document(s) described as:

APPELLANT'S OPENING BRIEF

on the Superior Court as follows:

Clerk of the Court
Solano County Superior Court
580 Texas Street
Fairfield, CA 94533

XX BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Rosen Bien Galvan & Grunfeld LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on November 29, 2018, at San Francisco, California.



Karen Stilber