

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

**JAY BROME,**

Appellant,

Case No. A154612

v.

**CALIFORNIA HIGHWAY PATROL, et al.,**

Respondents.

Solano County Superior Court, Case No. FCS047706  
Hon. Michael Mattice, Judge

**RESPONDENT'S OPENING BRIEF**

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Case Name: *JAY BROME v. CALIFORNIA HIGHWAY PATROL, et al.* Court of Appeal No.: A154612

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## INTRODUCTION

Appellant Jay Brome’s own words combined with his undisputed sleeping on his rights establish why the trial court properly held that the statute of limitations barred this employment lawsuit. Appellant claims he was subjected to years of obvious sexual orientation discrimination, harassment, and retaliation as an officer with Respondent the California Highway Patrol (“CHP”), but he never sued during the entire length of his 20-year career. Instead, he delayed filing a claim until 20 months after he left his employment to pursue a claim, far beyond the one-year limitations period. At all times, Appellant was fully aware of his rights, and the CHP’s alleged misconduct which he first complained about in 1998. The CHP never gave any reason for Appellant to forebear from filing a timely claim with the Department of Fair Employment and Housing (“DFEH”).

In order to avoid the consequences of his epic dilatoriness, Appellant tried to show that both equitable tolling and the continuing violation applied and that, when combined, they somehow rendered his lawsuit timely. His attempt to do so would contort both doctrines far beyond their recognized purposes and applying them as Appellant suggests would eviscerate the one-year statute of limitation in the Fair Employment and Housing Act (“FEHA”).

Appellant cannot justify his delay based on filing a workers’ compensation claim in 2015. The filing of a workers’ compensation claim does not equitably toll the time to bring a FEHA lawsuit because it is a fundamentally different claim. The standards of liability under the no-fault workers’ compensation laws vastly differ from the standards for Appellant’s FEHA claims, which require a showing of animus towards Appellant due to his sexual orientation. A workers’ compensation action does not seek redress for the same harm as a FEHA action, and does not alert an employer to the nature or imminence of a discrimination claim.

Moreover, Appellant acted in bad faith by delaying his suit for more than a decade after he admits he abandoned internal CHP remedies. This delay unfairly prejudiced CHP and so does not allow Appellant to avoid the FEHA statute of limitations on equitable grounds.

Appellant also cannot rely on the continuing violation doctrine to salvage his FEHA action. Appellant cannot point to any act within the one-year limitations period before September 15, 2016, when Appellant finally filed his administrative complaint with the DFEH. This is because for more than a year Appellant had been on medical leave and not working. The actions occurring after Appellant left work were routine communications about benefits that are not illegal as a matter of law, and, in any event, are dissimilar to alleged employer misconduct outside the limitations period. Even assuming equitable tolling did apply, the limitation period would only extend to the last six weeks Appellant worked at CHP. There is no discrete act of discrimination during this six-week period, much less one like the earlier, alleged conduct.

Appellant's request for such a drastic expansion of existing tolling law borders on the absurd. Public policy would not be well-served by allowing employees to serve out their entire careers, retire, and then claim they were subjected to illegal conduct throughout the entirety of their employment. The court should affirm summary judgment in favor of the CHP.

## FACTUAL AND PROCEDURAL BACKGROUND

### I. FACTUAL BACKGROUND

#### A. Appellant Complains to The CHP About Being Harassed in 1998 and 2000.

Appellant began working for the CHP in 1996. (Appellant's Appendix in Lieu of Clerk's Transcript ("AA") at 1 AA0178:23-25.) Appellant attended the CHP Academy from February to September 1996. (1 AA0013, ¶ 19.) Appellant alleges that, during his Academy training, a fellow cadet called him a "fag" several times. (1 AA0185:25-0186:3.) Appellant also contends that another cadet held a gun to Appellant's head and asked Appellant to "tell me you are gay and I will pull the trigger," and that an Academy instructor told Appellant to take off his skirt and act like a man. (1 AA0187:1-10; 1 AA0189:5-12.)

Appellant began his career as an officer in the San Francisco CHP office in September 1996. (1 AA0013, ¶ 20.) Appellant claims that a fellow San Francisco officer called him a derogatory name, including profanity, because he was gay. (1 AA 0192:18-24.) He also alleges that another officer told him to "get some man meat on [his] legs" in the locker room. (1 AA0195:24-0196:4.) Appellant contends he was also ridiculed while urinating in the bathroom when two officers mocked him by referencing the "Golden Gaaaaate" Bridge. (1 AA0226:13-0227:2.)

In addition to allegations of harassment directed at him, Appellant also contends that he was subjected to a great deal of negative talk about gay members of the public. (1 AA0191:1-0192:8.) For example, various officers were working an undercover detail targeting gay men in the restrooms of the Transbay Terminal. According to Appellant, the officers used derogatory terms to refer to these targets, and disparaged the men in a CHP newsletter describing the operation. (1 AA0197:23-0198:23; 1

AA0200:16-0202:10.) Appellant alleges that the same newsletter also contained an obituary of a gay man with the same name as one of the officers, which he interpreted as a joke suggesting that officer was gay. (1 AA0203:21-0205:7.)

While in San Francisco, Appellant was offended by an officer's comment telling other officers to watch out because a lesbian sergeant "probably has a strap-on." (1 AA0181:7-19.) Appellant claims that after he reported this offensive comment to his superiors, his fellow officers ostracized him. (1 AA0184:4-17.)

Appellant alleges he suffered anonymous slights that he attributed to being gay as well. Appellant claims he found a pink plastic rose in his mail slot, and that his mail slot name tag was defaced with a vehicle tag that said "defective." (1 AA0206:18-0207:7; 1 AA0211:2-20.) Similarly, a certificate on display in the briefing room commending Appellant was allegedly defaced, and Appellant's personal vehicle was keyed. (1 AA0219:9-17; 1 AA0233:12-22.)

Appellant received a Memorandum of Direction based on citizen complaints about him. Although the memorandum was neutral in tone and Appellant never received any discipline, Appellant subjectively believed he received the memorandum either based on his sexual orientation or in retaliation for his complaint to supervisors about the harassing behavior. (1 AA0208:11-0210:15.) Appellant was also unsuccessful in applying for two specialized positions, which he attributed to his sexual orientation. (1 AA0212:4-0215:24.) Further, Appellant alleges that a fellow officer instructed another officer not to provide Appellant backup at a scene. (1 AA0221:12-0222:12.)

In October 1998, Appellant filed a formal complaint with the CHP alleging harassment and discrimination on the basis of his sexual orientation. (1 AA0245.) The CHP conducted an investigation. After the

conclusion of the investigation, Appellant received a memorandum informing him that he had been subjected to inappropriate acts, but that he had not been retaliated against. (1 AA0217:1-0218:20; 1 AA0247.) The memorandum further stated that the entire office would undergo training regarding the CHP's discrimination policies, but Appellant claims such training never occurred. (*Id.*) Accordingly, Appellant made a second internal complaint in 2000, and the CHP commenced a second investigation into his complaints. (1 A 0220:9-221:11; 1 AA0225:23-0226:12.)

In late 2001, Appellant requested, and was granted, a transfer to the Contra Costa County CHP office. (1 AA0234:23-24.) Appellant's stated reason for requesting the transfer was to escape the harassing environment he experienced in San Francisco. (1 AA0229:23-0230:6.)

Appellant claims that the Contra Costa officers, too, made derogatory remarks about homosexuality. (1 AA0237:25-0238:7.) Appellant also alleges that, as he had experienced in San Francisco, the officers in Contra Costa failed to back him up at incident scenes, including fatal traffic collisions. (1 AA0236:3-6; 1 AA0238:22-0239:1.) According to Appellant, he complained to his superiors about the lack of backup, but to no avail. (1 AA0239:24-0240:16.)

Appellant further alleges that, while in Contra Costa County, he was harassed by a gay CHP captain. (1 AA0022 at ¶ 57.) Appellant claims the captain discussed his own attraction to certain CHP officers, discussed his sex life in detail, and asked Appellant to speculate about whether other officers were gay. (1 AA0241:17-0243:21.)

**B. In 2003, Appellant Files a DFEH Complaint Alleging Harassment.**

By 2003, Appellant became upset that his complaints continued to go unanswered. (2 AA0255:18-22; 2 AA0315.) Appellant emailed the area Chief, Cathy Sulinski, to express his belief that the internal EEO process at

the CHP did not work, and informed her that he would be filing a complaint with the DFEH. (*Id.*) Appellant also told the Chief that he had been in therapy and on medication for a year and was ready to put his issues out in the open. Appellant said he “just want[ed] to work in an environment that [was] businesslike and free from sexual harassment.” (2 AA0317.) Appellant filed a DFEH complaint sometime in 2003, due to the harassment he faced at work. (2 AA0256:10-0257:20; 2 AA0258:4-0259:9; 2 AA0262:10-22.) Appellant did not, however, file a lawsuit.

**C. In 2008, Appellant Transfers to the Solano County CHP Office but Claims He Overheard Offensive Remarks, Was Not Backed Up at Incident Scenes, and Other Various Grievances He Attributes to His Sexual Orientation.**

Once again, in 2008, Appellant requested a transfer to escape the allegedly harassing work environment in Contra Costa County. (2 AA0270:11-24.) Once again, the CHP granted his transfer request and Appellant moved to the Solano County CHP office. (*Id.*) However, Appellant alleged that things were just as bad in Solano, which was the third CHP office he had worked in. (2 AA0271:13-0272:7.)

Appellant claims that homophobic locker room talk “permeated” the ranks of the officers in Solano. (2 AA0271:13-0272:7.) The officers referred to gay people as “faggots” or “fags” and used the word “gay” to refer to things with a negative connotation. (2 AA0273:1-0274:13.) However, Appellant admits that over the years in Solano, this type of talk lessened around him because officers were aware of his presence. (2 AA0272:1-7.)

Appellant also claims he was the target of gossip that centered around his homosexuality. For example, Officer Nathan White told other officers that Appellant would stare at him in the locker room. (2 AA0275:6-11.)

Another officer allegedly made up a poem about Appellant being gay. (2 AA0276:21-0277:9.)

**1. Appellant Claims Officers Do Not “Back Him Up” in Solano Because of His Sexual Orientation in 2009 and 2010 But the Last Specific Incident of Officers Not Backing Him Up Occurs in 2014.**

Appellant alleges that, at Solano, he continued to experience problems with fellow officers failing to back him up at incident scenes, which Appellant attributed to his being gay. (2 AA0279:25-0291:8.) Appellant claims that Officer White gossiped about Appellant allegedly staring at him in the locker room, and also failed to assist Appellant in 2009 when Appellant pulled over an agitated, unlicensed driver and requested help. (2 AA0279:25-0281:23.) Appellant attributed Officer White’s failure to respond to the request for help to Appellant’s sexual orientation, because others had told Appellant that Officer White was homophobic. (2 AA0282:9-16.)

According to Appellant, Officer White again failed to back him up on two separate occasions when Appellant pursued stolen vehicles going through a toll plaza, and when Appellant responded to a disabled vehicle at a dangerous blind curve. (2 AA0282:20-0284:20; 2 AA0285:8-25.) Appellant contends that he reported all of these incidents to his shift sergeants and to the Solano captain. (2 AA0283:16-20.)

Appellant also believes that Officer Scott Lander was homophobic, and that Officer Lander did not back him up in 2009 and 2010 because of Appellant’s sexual orientation. (2 AA0291:1-8.) On one occasion, Appellant was impounding the vehicle of an agitated person and Officer Lander refused to show up and assist. Appellant reported this to his sergeant who, like all of Appellant’s other superiors, simply said he would look into it but never did. (2 AA0288:6-0290:7; 2 AA0290:18-0291:8.)

The last incident of no backup that Appellant describes in detail took place in April 2014. (1 AA0028, ¶ 91.) Appellant contends that he was nearly struck while responding to an accident and that a fellow officer refused to respond because he was having his motorcycle maintained in West Sacramento. (2 AA0295:22-0298:4.) Appellant reported this incident to a lieutenant, who responded that he would look into the situation. But, according to Appellant, the only response he received was a reprimand for going to the lieutenant and not to his sergeant. (2 AA0298:5-0299:17.) This was the last incident of not being backed up that Appellant recalled in his deposition.

**2. Appellant Is Voted Solano County “Officer of the Year” in 2013, But Is Upset His Photo Is Not Displayed.**

At the end of 2013, Appellant’s fellow officers voted him Solano County “Officer of the Year.” (1 AA0028, ¶ 90.) Appellant was honored accordingly at a division barbecue and a Rotary Club dinner, both attended by his superiors. (2 AA0295:4-21.) However, by September or October of 2014, Appellant became upset that his “Officer of the Year” photograph was not displayed in the briefing room as other winners’ photographs had been. (2 AA0028, ¶ 94.)

**3. In 2014, Appellant’s Last Full Year at Work, He Becomes Upset That the CHP Holds Blood Drives and That He Is Not Chosen as Court Officer.**

Appellant also became upset while working in Solano because the office held blood drives and, in June 2014, and the blood bank prevented Appellant from donating blood because of his sexual orientation. (1 AA0028, ¶ 92; 2 AA0354:8-15; 2 AA0373.) Appellant acknowledges that the blood banks make the rules about whether gay men can donate blood, but believes the CHP harassed him by continuing to hold the blood drives

when Appellant told his superiors that the blood drives upset him. (2 AA0301:10-0302:11.)

In August or September 2014, Appellant applied for, but was not awarded, a court officer position in Solano. (1 AA0028, ¶ 93; 2 AA0354:8-15; 2 AA0373.) Appellant believed he was the most qualified officer to apply for the position, and that the denial was based on his sexual orientation. (2 AA0302:12-19.)

**D. Appellant Presents No Specific and Substantial Evidence of Discriminatory, Retaliatory, or Harassing Conduct, Including Lack of Backup, During the Last Six Weeks He Works at CHP in Late 2014/Early 2015**

Appellant has not enumerated any discriminatory, harassing, or retaliatory conduct that he alleges took place during his last six weeks on the job. (1 AA0028-0029; 2 AA0355; 2 AA0372-0373.) This is noteworthy because even if the court provides Appellant with the benefit of equitable tolling, Appellant's FEHA limitations period spans the period of December 5, 2014 to September 15, 2016, and reaches only into his last six weeks of work. (3 AA0683.)

**E. Appellant Leaves Work Never to Return in January 2015, and Thus Suffers No Harassing Conduct After January 2015.**

On January 15, 2015, Appellant visited his doctor, and shared that he felt suicidal. (2 AA0307:11-15; 2 AA0308:15-20.) Appellant's doctor wrote Appellant a note taking him off work, and Appellant brought the note to the shift sergeant that evening, along with the CHP workers' compensation form, "Employer's Report of Occupational Injury or Illness." (2 AA0308:21-0309:14; 2 AA0329.) The stated nature of Appellant's injury was "work related stress." (2 AA0329.)

After reviewing Appellant's form and doctor's note, the sergeant on duty sent Appellant a text to ask clarifying questions about Appellant's

injury claim. (2 AA0329.) Appellant’s response was as follows: “I went to my doctor. Im [sic] off until further notice. That issued [sic] will be decided by trained professionals. Im [sic] aware of the eap. 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.” (*Id.*)

On January 16, 2015, Captain S.T. Dickson of the Solano Area Office sent Appellant a letter informing Appellant that this was the first time the Solano Area had been advised of Appellant’s stress issue. (2 AA0329.) Captain Dickson’s letter also requested that Appellant complete additional, required paperwork, and notified Appellant that, although Appellant requested the CHP not contact him, some degree of contact was needed to file his workers’ compensation claim. (2 AA0329-0331.) Finally, Captain Dickson’s letter notified Appellant that his vague claim of “harassment” could not be addressed without more detailed information or specific allegations. (2 AA0331.)

On January 21, 2015, Appellant signed an acknowledgement of the removal of his peace officer powers. (2 AA0334.) CHP policy mandates that any officer who claims psychological impairment surrender his or her peace officer powers, as well as firearms and other equipment. (2 AA0333.)

**F. The State’s Workers’ Compensation Carrier Initially Denies Appellant’s Claim Due to an Error, and the CHP Undertakes Efforts to Ensure Appellant Continues to Be Paid.**

As of September 17, 2015, Appellant remained on stress leave, but the state’s workers’ compensation carrier, State Compensation Insurance Fund (“SCIF”) had not yet approved Appellant’s claim. (2 AA0387, ¶ 3.) Appellant had been using his leave credits to continue being paid, and Appellant’s doctor had not released him to go back to work. (*Id.*)

Because Appellant’s leave credits were nearly exhausted after eight months of not working, Captain Strate of the Solano Area sent Appellant a letter dated September 17, 2015 to engage Appellant in a dialogue about his options going forward. (2 AA0390-0395.) The letter invited Appellant to indicate which options he was interested in. (2 AA0395.) Appellant indicated interest in (in order of preference): Temporary Disability/Industrial Disability Leave, Industrial Disability Retirement, Disability Retirement, and Service Retirement. (2 AA0397.) Temporary Disability Leave was not an option because SCIF had not yet approved Appellant’s workers’ compensation claim, and Industrial Disability Leave is only for non-uniformed personnel. (2 AA0387, ¶ 5.) Appellant’s next desirable choice was Industrial Disability Retirement. (2 AA 395.)

Accordingly, on October 7, 2015, Captain Strate sent Appellant a so-called “15-day letter” stating that the CHP intended to apply for Industrial Disability Retirement on Appellant’s behalf. (2 AA0357.) The CHP decided to send this letter because Government Code section 19253.5 authorizes the CHP to pay an employee the estimated retirement allowance upon the filing of the application. (2 AA0387, ¶ 6.) Neither the 15-day letter nor the Industrial Disability Retirement application precludes an employee from returning to work if his or her doctor approves a return. (2 AA0388, ¶ 8.) Although the 15-day letter advised Appellant that he could provide the CHP with additional information concerning his application for Industrial Disability Retirement, Appellant did not do so.<sup>1</sup> (2 AA0357; 2 AA0387, ¶ 9.)

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<sup>1</sup> The CHP never filed an application for Industrial Disability Retirement on Appellant’s behalf because, once the workers’ compensation claim was approved, there was no longer a concern about Appellant receiving pay. (2 AA0388, ¶ 10.)

**G. SCIF Approves Appellant’s Workers’ Compensation Claim**

Shortly after the 15-day letter went out, SCIF approved Appellant’s workers’ compensation claim. (2 AA0388, ¶ 10.) Approval of the claim meant Appellant was entitled to a full year’s pay, so Appellant’s leave credits were restored. (*Id.*)

Appellant applied for Service Retirement, pending Industrial Disability Retirement, in December 2015. (2 AA0388, ¶ 12.) Appellant’s Industrial Disability Retirement was approved, effective February 29, 2016. (2 AA0344:17-0345:2.)

**H. Appellant Files a DFEH Complaint On September 15, 2016, 20 Months After the Last Day He Worked at CHP.**

Appellant filed a DFEH complaint on September 15, 2016, which was one year and eight months after he stopped working at the CHP due to stress. This was also eleven months after Appellant’s workers’ compensation claim was approved. (2 AA0388, ¶ 10.) The DFEH provided Appellant an immediate right to sue letter. (2 AA 0355:5-20; 2 AA0377-0384.)

**II. PROCEDURAL BACKGROUND**

Appellant filed his lawsuit on September 16, 2016 in Solano County Superior Court, stating causes of action for sexual orientation discrimination, sexual orientation harassment, failure to prevent harassment, retaliation, and intentional infliction of emotional distress based on allegations throughout his entire 20-year career.<sup>2</sup> (1 AA0010-0040.) Appellant originally named the CHP and eight individual officers as defendants, but later dismissed all eight individuals. (3 AA0711.)

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<sup>2</sup> Appellant has abandoned his cause of action for intentional infliction of emotional distress on appellate review.

The CHP filed a motion for summary judgment in December 2017 arguing the lawsuit was barred by FEHA's one-year statute of limitations for filing an administrative complaint with the DFEH. (3 AA0711-0712; 1 AA0047.) Appellant's suit was time-barred because he could not establish any adverse employment action or actionable harassment during the limitations period. (*Id.*) Further, Appellant could not avail himself of the continuing violation doctrine to avoid application of the statute of limitations for two reasons. First, the conduct underlying his complaint reached permanence many years before Appellant filed his September 2016 administrative complaint. Second, the minor conduct Appellant complained of during the limitations period was materially different than the allegedly discriminatory and harassing actions CHP took outside the limitations period. Finally, Appellant could not circumvent the statute of limitations by claiming a constructive discharge occurred on the date of his retirement, because the evidence did not support such a contention. (*Id.*)

The trial court granted the CHP's summary judgment motion. (3 AA0686-0692.) The court first noted that it was undisputed that Appellant stopped working at the CHP 20 months before filing his administrative claim. The court considered Appellant's argument that the filing of his workers' compensation claim equitably tolled the FEHA limitations period. The court did not specifically rule on the applicability of equitable tolling to this matter, because it found that, even if the workers' compensation proceeding equitably tolled the FEHA one-year statute of limitations to file an administrative charge, Appellant's claims were still untimely because the continuing violation doctrine did not apply. (3 AA0691.) Appellant failed to show that the unlawful actions alleged within the limitations period were sufficiently similar in kind to the unlawful actions alleged outside the limitations period. The trial court also rejected Appellant's claim of constructive termination because his working conditions were

neither sufficiently intolerable nor aggravated at the time of either his separation from work or his retirement.

### **STANDARD OF REVIEW**

The Court reviews the lower court's ruling granting summary judgment *de novo*. (*Casey v. Perini Corp.* (2012) 206 Cal.App.4<sup>th</sup> 1222, 1228.) On appeal, the reviewing court presumes the judgment is correct and the appellant bears the burden of demonstrating error. (*Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.App.4<sup>th</sup> 1367, 1376.) The appellate court may affirm summary judgment on any correct legal theory, as long as the parties had an adequate opportunity to address the theory in the trial court. (*Lujano v. County of Santa Barbara* (2010) 190 Cal.App.4<sup>th</sup> 801, 806.)

A defendant moving for summary judgment meets his burden of showing that a cause of action has no merit if he shows that one or more elements of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4<sup>th</sup> 826, 849.) If the defendant meets his burden of production, the burden shifts to plaintiff to present specific and substantial responsive evidence that there is a triable issue of material fact. (*King v. United Parcel Service* (2007) 152 Cal.App.4<sup>th</sup> 426, 433.) In a FEHA case such as this one, the plaintiff bears the ultimate burden of proving the timely filing of his DFEH complaint. (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4<sup>th</sup> 1390, 1402.)

### **STATEMENT OF ISSUES PRESENTED**

1. Whether the trial court erred in assuming that Appellant's workers' compensation case equitably tolled the FEHA one-year statutory limitations period for filing a DFEH charge where the remedies and harms under workers' compensation laws and the FEHA are entirely different.

2. Even assuming that a workers' compensation claim could toll the FEHA statute of limitations, did Appellant establish the necessary prerequisites for applying equitable tolling in this case?

3. Whether the trial court properly found that the continuing violation doctrine did not apply in this case because Appellant cannot show specific, admissible evidence that actionable discrimination, harassment, or retaliation occurred within the limitations period.

4. Whether the trial court properly found that the continuing violation doctrine did not apply in this case because, Appellant did not allege harassing, discriminatory, or retaliatory conduct within the limitations period that was sufficiently similar in kind to the conduct outside the limitations period.

5. Whether the continuing violation doctrine applies in this case, where the harassing, discriminatory, and retaliatory conduct Appellant alleged acquired a degree of permanence outside the applicable limitations period.

6. Whether the trial court properly found that Appellant, who voluntarily disability retired from his CHP employment, did not suffer a constructive discharge.

## **ARGUMENT**

### **I. THE FEHA'S ONE-YEAR STATUTE OF LIMITATIONS BARS APPELLANT'S CLAIMS**

Appellant seeks to recover for alleged discrimination, harassment, retaliation, and failure to prevent harassment based on his sexual orientation. (1 AA0010.) A precondition to any FEHA claim is that the plaintiff file a charge with the DFEH within one year of the allegedly unlawful act. (Gov. Code, § 12960(d).) Ordinarily, conduct occurring more than one year before the DFEH charge was filed "cannot serve as the basis for liability" under the FEHA. (*Cucuzza v. City of Santa Clara* (2002) 104

Cal.App.4th 1031, 1040.) In this case, Appellant did not file his DFEH charge until 20 months after his last day on the job. (2 AA0355:5-20; 2 AA0377-0384; 2 AA0252.) Appellant chose to retire approximately one year after his last day on the job. (2 AA0388.) Appellant' claims are time-barred as a matter of law because he was subjected to no illegal conduct during the year prior to filing his DFEH charge.

**II. APPELLANT'S WORKERS' COMPENSATION CLAIM DID NOT EQUITABLY TOLL THE FEHA STATUTE OF LIMITATIONS BECAUSE THE WORKERS' COMPENSATION AND FEHA CLAIMS INVOLVE DIFFERENT REMEDIES AND DIFFERENT HARMS**

Because Appellant failed to file his FEHA administrative charge with the DFEH until one year and eight months after he left work on stress leave, Appellant must argue that a combination of equitable tolling and the continuing violation doctrine save his time-barred lawsuit. He is wrong. Under the record in this case, neither principle assists Appellant.

Appellant first argues his filing of a workers' compensation claim equitably tolled the FEHA's one-year statute of limitations for filing a DFEH charge. (Appellant's Opening Brief ("AOB"), pp. 25-26.) In its summary judgment order, the trial court erred in assuming that Appellant's workers' compensation claim equitably tolled the one-year FEHA statute of limitations for filing a claim with the DFEH. (3 AA0691:2-4.) This is because the workers' compensation claim provides a separate remedy for an entirely separate harm than under the FEHA, and cannot, as a matter of law, toll the FEHA statute of limitations.

Under California law, the filing of a workers' compensation claim does not ordinarily toll a statute of limitations for a different claim. (*Aerojet General Corporation v. Superior Court* (1986) 177 Cal.App.3d 950 [holding workers' compensation claim for workplace injury did not equitably toll statute of limitations suit against employer for fraudulent

concealment of cause of injury].) Equitable tolling only applies to toll the statute of limitations for a plaintiff who has different remedies for the same harm and pursues one remedy in good faith, but tolling will not apply to a plaintiff who pursues a different remedy for a different harm. (*Id.* at 956.) Hence, courts have held that workers’ compensation claims for work injuries do not toll the statute of limitations for civil suits where the plaintiff alleges his employer concealed the cause of his injury or aggravated a medical condition, because the employer misconduct that *caused* the injury is a distinct harm from the injury itself. (*Ibid.*)

Here, the harms and remedies under workers’ compensation laws and the FEHA are clearly distinct. A well-established line of cases has held that workers’ compensation laws remedy workplace injuries caused by the normal risks of employment. (*Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 160.) Conversely, the FEHA remedies discriminatory employment practices outside the scope of the employment relationship. (*Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5<sup>th</sup> 75, 100-101.) As explained by one appellate court, “[n]either discrimination nor harassment is a normal incident of employment.” (*Nazir v. United Airlines* (2009) 178 Cal.App.4th 243, 288.) Therefore, courts have held that emotional distress damages allegedly caused by harassment and discrimination fall outside the exclusivity provisions of the workers’ compensation laws. (*Murray v. Oceanside Unified School District* (2000) 79 Cal.App.4th 1338, 1363 [FEHA sexual orientation harassment outside the scope of workers’ compensation because FEHA claim founded outside the normal course of employment environment]; *Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 352 [FEHA sexual harassment suit not barred by workers’ compensation exclusivity].)

Moreover, the standards of liability and available remedies under workers’ compensation laws and the FEHA are different.

Under the Workers' Compensation Act, liability is "no fault" and the remedies are limited. (*Chevron USA, Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1198.) Workers' compensation laws are intended to benefit both the employee and employer: the employer's interest is served by having fixed and ascertainable liability, and the employee's interest is served by avoiding the burden of proving liability in exchange for limited payment. (*Ibid.*) In contrast, FEHA liability requires the employee to prove "intentional discrimination" and potential damages are unlimited. (*Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 360-61.) Because Appellant's workers' compensation claim for his mental stress (in which he sought "no fault," limited compensation) is separate and distinct from his FEHA suit (in which he seeks potentially unlimited damages and attorneys' fees for alleged intentional acts that violate the FEHA), the filing of his workers' compensation claim did not serve to toll the FEHA statute of limitations. (*See Andrews v. PRIDE Industries* (E.D.Cal.2017) 2017 WL 119803<sup>3</sup>.)

**A. Case Law and Policy Rationales Justifying the Application of Equitable Tolling Do Not Apply to Appellant's Workers' Compensation and FEHA Actions Because They Involve Different Claims.**

The cases that Appellant cites in his brief do not support his position because those cases involved the *same claims* pursued in different proceedings, and public policy justified the application of equitable tolling in those cases. For example, in *Elkins v. Derby* (1974) 12 Cal.3d 410, the plaintiff's workers' compensation claim concerned a workplace arm injury, and his later personal injury suit against his employer sought compensation

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<sup>3</sup> Unpublished federal opinions are properly cited as persuasive authority. (*See Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP* (2010) 183 Cal.App.4th 238, 251 fn.6.)

for the same arm injury. The reason plaintiff's personal injury suit was not barred by the workers' compensation exclusivity rule was that the employee was found not to be eligible for worker's compensation benefits because he was not the defendant's employee. (*Elkins, supra*, 12 Cal.3d at 413.) The California Supreme Court in *Elkins* determined that the one-year statute of limitations for personal injury claims was tolled while the plaintiff pursued his remedies for the same injury in his workers' compensation case because the employer was not prejudiced, as it received adequate notice of the personal injury claim when the workers' compensation case was filed. (*Id.* at 417.) The Court also reasoned that requiring a personal injury plaintiff to pursue both a workers' compensation case and a civil action for the same injury would be duplicative and inefficient because the remedies are mutually exclusive, and a favorable ruling in one case would bar an action in the other. (*Id.* at 420.)

Similarly, the California Supreme Court's decision in *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, involved the application of equitable tolling to the same claims – FEHA claims – in different proceedings. The Court held that a plaintiff's pursuit of FEHA claims in an employer's internal administrative procedure tolled the plaintiff's FEHA statute of limitations for filing a civil action. The Court reasoned that equitable tolling in that situation serves the public policy of reducing unnecessary and premature litigation because an employee's FEHA claims could be resolved informally during the employer's internal process. (*Id.* at 108.) The Court noted that tolling would encourage employees to seek resolution of FEHA claims early through an informal process, and thereby reduce the number of FEHA civil suits, which “increases the likelihood that those ‘potentially meritorious claims’ will in fact be resolved on the merits.” (*Ibid.*)

The policy rationale in *Elkins* and *McDonald* does not apply here because Appellant’s workers’ compensation case and FEHA lawsuit do not involve the same harms and remedies. First, unlike *Elkins*, Appellant’s FEHA harassment and discrimination injuries are not potentially barred by the exclusivity provisions of workers’ compensation laws, so that a favorable finding in his workers’ compensation case would not preclude the filing of a FEHA suit. (*Meninga v. Raley’s, Inc.* (1989) 216 Cal.App.3d 79, 90-91.) The two statutory schemes serve entirely separate purposes. The FEHA provides employees with protection against discrimination, harassment, and retaliation based on various protected categories. (*McDonald, supra*, 45 Cal.4<sup>th</sup> at 106.) The stated purpose of the FEHA is to “provide effective remedies that will eliminate ... discriminatory practices.” (Gov. Code, § 12920.) By contrast, the purpose of the workers’ compensation scheme is to “insure to the injured employee and those dependent upon him adequate means of subsistence while he is unable to work....” (*Moyer v. Workmen’s Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 233.) The “no fault” liability under the workers’ compensation system is simply based on the issue of whether an injury arose out of employment. (*Wright v. State of California* (2015) 233 Cal.App.4<sup>th</sup> 1218, 1229.) In contrast, FEHA liability is determined based on whether the employer acted with intent to discriminate or harass on basis of gender, race, sexual orientation, or another protected basis. (*See Wills v. Superior Court* (2011) 195 Cal.App.4<sup>th</sup> 143, 159-160.) Accordingly, there is no risk of conflicting outcomes if an employee litigates both a workers’ compensation claim and a FEHA employment discrimination claim simultaneously. In fact, the outcome of workers’ compensation proceedings has no bearing on the FEHA litigation, other than as a possible credit for the workers’ compensation award after the verdict is rendered in the civil action. (*See* Gov. Code, § 985(b).) Hence, there is no policy rationale for applying

equitable tolling, as a favorable outcome in the workers' compensation claim will neither bar, nor substantially affect, the FEHA action.

Second, unlike *McDonald*, resolution of Appellant's claimed work injuries in his workers' compensation case would not likely have resolved his FEHA claims. Because a worker's compensation claim involves a different type of work injury from a FEHA claim, the workers' compensation process does not qualify as a type of "informal remedy" for resolving FEHA workplace grievances. (*McDonald, supra*, 45 Cal.4<sup>th</sup> at 100.) Rather, as discussed above, an employee seeking compensation in the workers' compensation arena seeks financial payments when he is unable to work, while an employee seeking additional compensation under FEHA seeks to remedy a different injury caused by discriminatory employment practices. (*Moyer, supra*, 10 Cal.3d at 233.) Again, the policy rationale of informally resolving FEHA claims and thereby reducing the number of FEHA lawsuits would not be served by permitting equitable tolling in this type of case.

**B. Even If a Workers' Compensation Claim Could Serve to Toll the FEHA Limitations Period, Appellant Has Not Satisfied the Requirements for Equitable Tolling.**

Assuming, *arguendo*, that a workers' compensation claim could potentially toll the FEHA statute of limitations, Appellant has failed to show that his case meets the legal requirements for application of equitable tolling. Courts apply a three-prong test to determine whether equitable tolling applies to a given case. These elements are timely notice to the defendant, lack of prejudice to the defendant, and reasonable and good faith conduct on the part of the plaintiff. (*Addison v. State of California* (1978) 21 Cal.3d 313, 319.) Appellant cannot satisfy any of these elements.

**1. Appellant’s Workers’ Compensation Claim Did Not Provide the CHP with Timely Notice of the FEHA Claims.**

The first requirement of the equitable tolling doctrine is that the filing of the first claim provides timely notice of the second claim to the defendant. (*Hopkins v. Kedzierski* (2014) 225 Cal.App.4<sup>th</sup> 736, 750.) This means that the filing of the first claim alerts the defendant of the need to begin investigating the facts that form the basis of the second claim. (*Id.*) In this case, the CHP was only given notice that Appellant was claiming “no fault” liability for work-related stress when he filed his workers’ compensation claim. (2 AA0329-0331.) Nothing about the workers’ compensation claim the CHP received gave it notice that it would need to defend its motivations or whether Appellant was subjected to severe or pervasive harassment because of his sexual orientation. (2 AA0329-0331; 2 AA0333.) The CHP was not given notice that it also faced potential liability for damages under the FEHA for alleged discrimination, harassment, and retaliation. The only injury Appellant identified in his workers’ compensation filing was “work related stress.” (2 AA0329.) “Work-related stress” can mean any number of things, particularly for a law enforcement officer. When Sergeant Timmons texted Appellant to inquire about his well-being and request details regarding his vaguely stated claim, Appellant’s response was simply to notify the sergeant that he had “been in counseling [his] entire career due to the harassment and hostile work environment at the CHP” and that he preferred no contact from anyone at his CHP office. (2 AA0329.) This general statement referencing “harassment” over a 20-year career as a peace officer was insufficient, as a matter of law, to provide notice to the CHP that Appellant would file a civil action for FEHA discrimination, harassment, retaliation, and intentional infliction of emotional distress. (1 AA0010-0040; 2 AA0331.) (*See, e.g.,*

*Aerojet, supra*, 177 Cal.App.3d at p. 956 [workers’ compensation claim for work-related injury did not provide notice to employer of different civil action for fraudulent concealment of facts that caused the injury].)

The CHP’s receipt of Appellant’s doctor’s note that related to his workers’ compensation claim for “stress” similarly did not provide any notice to CHP that it should be prepared to defend against a discrimination lawsuit. The doctor’s note did not state whether Appellant’s injury was work-related. (2 AA0329-0330.) The doctor’s note was so vague, the Solano Area Commander specifically requested that Appellant pursue the CHP’s internal complaint procedures and/or meet with its designated EEO counselors so that the CHP could be informed about the facts underlying Appellant’s claimed injury. (2 AA0331.) But Appellant took neither of these steps. Therefore, the CHP could have reasonably believed that Appellant was *not* pursuing a claim related to EEO policies or intentional employment injuries. All the CHP had was a workers’ compensation form claiming “work-related stress” and Appellant’s vague assertion of “harassment” and a “hostile work environment.” (2 AA0329.) Such a statement included in a workers’ compensation claim was insufficient to put CHP on notice that it faced potential liability for FEHA and tort claims outside of that arena.

**2. The CHP Was Prejudiced by Appellant’s Delay in Filing His DFEH Claim Because the Two Claims Are Entirely Different.**

The second required element for equitable tolling to apply is that “the facts of the two claims be 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.” (*Collier v. City of Pasadena* (1983) 142 Cal.App.3d 917, 925.) This inquiry focuses on prejudice to defendants, and 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.” (*Id.*) As discussed extensively above, a workers’ compensation stress claim and a FEHA discrimination, harassment, and retaliation case involve entirely different harms, so that Appellant cannot satisfy this prong as a matter of law.

The CHP’s “investigation” of Appellant’s stress claim did not, and could not have, put the CHP in a fair position to investigate and identify the evidence related to Appellant’s delayed DFEH charge and lawsuit. First, when Appellant commenced his stress leave, the CHP was only informed that Appellant was suffering “work-related stress” and, later, Appellant generally told his sergeant that he suffered harassment and hostile work environment at the CHP over the course of his “entire career.” (2 AA0329.) Because Appellant specifically requested that no one from the Solano CHP contact him, the Solano area office could not reach out to Appellant in order to “investigate” the cause of his stress claim. (2 AA0329.) The CHP complied with this request, limiting contact to essential medical or business communications. (2 AA0330). This meant the CHP could not, during the entire course of the workers’ compensation proceeding, obtain additional information from Appellant. Appellant’s own actions in asking the CHP not to contact him prejudiced the CHP.

The CHP was particularly prejudiced by Appellant’s refusal to communicate with the CHP because peace officer stress claims are highly sensitive and kept confidential. Solano Captain Sam Dickson stressed in a letter to Appellant that department personnel would not discuss the circumstances surrounding Appellant’s stress claim with those outside of Appellant’s chain of command in Solano. (2 AA0333-0334.) Given these confidentiality constraints, and Appellant’s failure to use the CHP’s internal grievance procedure to inform the CHP of his EEO claims, the CHP was unable to fully investigate the stress claim to uncover facts and evidence

relevant to Appellant's later-filed DFEH charge and lawsuit. (2 AA0331.) The CHP had no way of "identify[ing] the sources of evidence which might be needed to defend against the second claim." (*Collier, supra*, 142 Cal.App.3d at 925.) When Appellant belatedly filed his DFEH claim 20 months after leaving work it raised allegations of discriminatory events dating from 1996, and that mainly took place before Appellant worked in Solano. (1 AA0010-0040.) Under no stretch of the imagination, did Appellant's workers' compensation stress claim provide the CHP with notice that he would be filing a FEHA lawsuit involving allegations of discrimination, harassment and retaliation over a twenty-year period in different CHP area offices.

Appellant now argues that the CHP had "plenty of notice" of the need to identify sources of evidence needed to defend against Appellant's FEHA lawsuit even before Appellant filed his workers' compensation claim. (AOB, p. 30.) However, absent the power of clairvoyance not yet gifted to humanity, how could the CHP be expected to know that Appellant, who had been complaining and not suing for years, would this time file a lawsuit? And Appellant's argument is not relevant to the issue of whether Appellant's workers' compensation claim tolled the FEHA statute of limitations. The only relevant issue is whether the workers' compensation claim provided CHP sufficient notice of the later FEHA action, not whether CHP should have known prior to the filing of any claim that Appellant intended to pursue a FEHA lawsuit. (*Collier, supra*, 142 Cal.App.3d at 925.) Allowing a plaintiff to "toll" his filing of a DFEH administrative charge based on an argument that the employer *should have known* the plaintiff would file a DFEH charge would effectively eviscerate the FEHA one-year statute of limitations. An employee could always rely on vague and ambiguous communications to an employer to justify delaying filing a DFEH charge indefinitely, and then later claim that those communications

should have given “notice” that the DFEH charge was forthcoming. This absurd scenario is particularly applicable here, where Appellant is relying on conversations that he had with CHP managers between 2012 and 2014 to show “notice,” several years before he finally filed his DFEH charge. (AOB, p. 31; 3 AA0590.)

Finally, Captain Dickson’s emails sent after he received notice of Appellant’s workers’ compensation claim do not constitute admissions that the CHP was aware that Appellant intended to file a later DFEH charge and civil lawsuit. (AOB, p. 31.) Captain Dickson’s use of the term “brewing situation” could simply have referred to the unusual situation created by Appellant’s unexpected decision to go on an extended medical leave on the basis of work-related stress. Captain Dickson explained that he used the term “brewing situation” because he was puzzled that a “competent and conscientious officer” was not following proper procedures in reporting an injury claim, as well as Appellant’s vague allegation of harassment. (3 AA0597-0598.) Captain Dickson went on to explain that he was uncertain whether Appellant was raising an EEO or ordinary misconduct allegation, which was the reason Captain Dickson sent Appellant a letter notifying him of the option to file an internal EEO complaint. (3 AA0599; 2 AA0331.) Thus, Appellant’s vague communications about harassment and his filing a workers’ compensation claim did not give CHP adequate notice of the need to investigate and obtain evidence to defend against a FEHA lawsuit. Equitable tolling should not apply in this case.

**3. Appellant Cannot Avail Himself of Equitable Tolling Because He Did Not Act in Good Faith.**

The third prong of the equitable tolling test examines whether the proponent of tolling acted in good faith. (*Addison, supra*, 21 Cal.3d at 319.) While this part of the test is “less clearly defined,” courts have mainly looked at whether the plaintiff acted promptly or delayed filing a claim

after the tolling event ended. (*Collier, supra*, 142 Cal.App.3d at 926 [plaintiff filed second action while statute of limitations was still tolled]; *Addison, supra*, 21 Cal.3d at 319 [plaintiff filed within one week of conclusion of first action].)

Appellant's delay in filing his DFEH charge was significant. Appellant's workers' compensation claim was approved in October 2015. (2 AA0388, ¶ 10.) Appellant's effective retirement date was February 29, 2016. (2 AA0359-0360; 2 AA0349:22-0350:17.) Yet, he did not file his DFEH charge until 11 months after his workers' compensation claim was approved and almost seven months after his retirement date. (2 AA0381.) Based on Appellant's lengthy delay in filing his DFEH charge after he retired, the CHP could reasonably have assumed that Appellant would not file any further actions against CHP. Appellant's failure to promptly pursue his FEHA claims once his workers' compensation case concluded demonstrates Appellant's lack of good faith and prejudice to the CHP. Equitable tolling is not justified in this case.

### **III. THE CONTINUING VIOLATION DOCTRINE DOES NOT APPLY**

The trial court properly determined that the continuing doctrine did not apply. This is because the undisputed material facts established none of the essential elements for applying the doctrine are present. The CHP's alleged unlawful actions 1) were not sufficiently similar in kind inside and outside the limitations period; 2) did not occur with reasonable frequency; and 3) acquired permanence outside the limitations period. (*See Jumaane, supra*, 241 Cal.App.4<sup>th</sup> at 1402 [describing elements of the doctrine].)

Because equitable tolling does not apply, the applicable limitations period is one year prior to the date Appellant filed his DFEH complaint: September 15, 2015 to September 15, 2016. However, even if the court provides Appellant with the benefit of equitable tolling, Appellant's FEHA limitations period spans only the period of December 5, 2014 to September

15, 2016. (3 AA0683.) As the trial court correctly concluded, Appellant’s claims are still time-barred under this longer period for two reasons. First, Appellant has no anchoring event in the limitations period, let alone similar conduct on the part of CHP inside and outside the limitations period. Second, the CHP’s conduct reached permanence in 2012, at the latest, triggering the one-year time period in which Appellant could file a DFEH complaint.

**A. Appellant Has Not Presented Specific Admissible Evidence of Harassing, Discriminatory or Retaliatory Conduct in the Limitations Period.**

Assuming, as the trial court did, that Appellant’s limitations period began on December 5, 2014, Appellant worked as a CHP officer for only six weeks of the limitations period before taking medical leave on January 15, 2015, and never returning to work. (3 AA0683:2-4; 2 AA0252:9-11.) Therefore, to avail himself of the continuing violation doctrine, Appellant was obligated to present admissible, specific evidence creating a triable issue of material fact that he was subjected to harassing, discriminatory, or retaliatory conduct within that six-week period. (*Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4<sup>th</sup> 714, 720-721.) Appellant failed to provide the required specific, non-speculative evidence of CHP wrongdoing within the period. Therefore, this Court should affirm summary judgment even before reaching the second and third prongs of the doctrine.

Appellant argues that the record contains evidence of unlawful conduct on the part of CHP that is “sufficiently similar to the earlier pervasive harassment.” (AOB, p. 37.) Appellant claims there are four categories of actions that constitute sufficient evidence of this unlawful conduct during the limitations period. (AOB, pp. 37-43.) But this “evidence” consists only of speculation, conjecture, and conclusions

insufficient to defeat summary judgment. (*Mackey v. Board of Trustees of California State University* (2019) 31 Cal.App.5<sup>th</sup> 640, 657.) The record lacks the specific and substantial responsive evidence required to raise a triable issue of fact against an employer in summary judgment proceedings. (*King, supra*, 152 Cal.App.4<sup>th</sup> at 433 [a plaintiff seeking to avoid summary judgment on a factual issue must present “specific and substantial responsive evidence that the employer’s evidence was in fact insufficient”].)

First, Appellant alleges that the evidence creates a “reasonable inference” that Appellant’s fellow officers failed to back him up in the field between December 5, 2014 and January 15, 2015. (AOB, p. 37.) In support of this claim, Appellant cites to deposition testimony in which Appellant stated that he “could go a whole day and not see another unit unless [he] was responding to their scenes.” (2 AA0300:6-11.)<sup>4</sup> Appellant then cites to deposition testimony in which he testified that he spoke with Captain Dickson about Officer White not providing him backup. (2 AA0311:10-0312:6.) The next cited excerpt is one in which Appellant alleged that he “did not receive backup on a daily basis.” (3 AA0550:13-0551:20.) The cited testimony fails to identify a specific event occurring during a specific time period. As importantly, this evidence does not show any conduct linked to Appellant’s sexual orientation. CHP officers patrol alone. No evidence was presented that the alleged lack of backup was unique to Appellant. The final excerpt cited in the paragraph refers only to the psychological effect on Appellant when he did not receive backup. (3 AA0561:17-24; *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4<sup>th</sup> 264, 289 [subjective effects on plaintiff not enough where the record

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<sup>4</sup> Lines 1-5 of 2 AA0300 have no relevance because the preceding page is not part of the record and there is no context for this excerpt.

does not establish an objectively hostile work environment[.]) Those excerpts do not show that Appellant experienced a lack of backup between December 5, 2014 and January 15, 2015, much less that any purported failure of backup relates to his sexual orientation. (*See Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4<sup>th</sup> 1509, 1524.)

Appellant then launches into a narrative regarding allegedly dangerous incidents in which Appellant claims fellow officers did not assist him. (AOB, p. 38.) The problem is that it is clear from the record that the bulk of those incidents occurred back in 2009 and 2010, with one isolated incident in April 2014, still outside the limitations period.<sup>5</sup> (2 AA0279:25 - 0292:15; 1 AA0027-0028; 2 AA0372-0373.) There is simply no specific and substantial responsive evidence in the record that CHP officers failed to back up Appellant after December 5, 2014. And, again, there is a complete lack of evidence that any CHP officer's inaction was based on Appellant's sexual orientation.

Appellant also claims, without citation to case law, that Appellant's own self-serving testimony that he went on leave because he was suicidal due to CHP management's refusal to take appropriate action is sufficient to create a triable issue of fact as to whether CHP management engaged in unlawful conduct during the limitations period. (AOB, p. 40.) This claim is unhelpful to him for two reasons. First, absent a constructive termination, an employee who voluntarily resigns cannot show he has suffered an adverse employment action. (*See Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5<sup>th</sup> 1150, 1163.) Second, the deposition testimony to which Appellant cites references his

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<sup>5</sup> Appellant's brief contains a lengthy footnote on page 38 discussing an April 2014 incident, which is irrelevant to the analysis of whether Appellant can show any unlawful acts in the limitations period of December 5, 2014 to September 15, 2016.

complaints to superiors, but he fails to identify any dates as to when those communications occurred. (2 AA0311:10-0312:6; 3 AA0551:3-20; 3 AA0588:7-23; 3 AA0595:10-15; 3 AA0561:17-24; 2 AA0302:22-0303:8.)

Appellant’s general, undated complaints about earlier work conditions do not constitute discrimination or harassment on the part of CHP within the limitations period. (*See Jumaane, supra*, 241 Cal.App.4<sup>th</sup> at 1407.) Appellant is merely regurgitating the ultimate facts alleged in his complaint in an attempt to create an illusion of a triable issue of fact without actually coming up with any specific evidence of discrimination within the limitations period. (See Complaint; 1 AA0028 (“Officer Brome’s serious safety concerns were never addressed”); 1 AA0031 (“CHP management ... were aware of acts of harassment, discrimination, and retaliation, but allowed them to persist without taking all reasonable steps to halt and prevent any further acts”).) This violates the fundamental rule of summary judgment, which prohibits a plaintiff from merely relying “upon the allegations or denials of its pleadings to show that a triable issue of material fact exists....” (Code Civ. Proc., § 437c(p)(2) [plaintiff cannot rely on complaint allegations and must show “specific facts”]; *see also Aguilar, supra*, 25 Cal.4<sup>th</sup> at 849; *Roman v. BRE Properties, Inc.* (2015) 237 Cal. App. 4th 1040, 1054 [“It is fundamental that to defeat summary judgment a plaintiff must show “specific facts” and cannot rely on allegations of the complaint”].)

Second, Appellant claims the evidence supports a “reasonable inference” that officers in Solano engaged in homophobic “locker room talk” between December 5, 2014 and January 15, 2015. (AOB, p. 40.) Again, this is merely a recital of allegations in the complaint that do not reference specific conduct or dates. (1 AA0027, ¶ 86 “... homophobic ‘locker room talk’ permeated the ranks of the officers in Solano County.”) The record is devoid of any reference to a specific offensive comment in

the limitations period and therefore should be completely disregarded. (2 AA0271:13-0274:13.) Additionally, Appellant admitted that the talk generally did not take place around him and was not directed at him. (AA0272:1-7; *see Lyle, supra*, 38 Cal.4<sup>th</sup> at 289.)

Third, Appellant points to the alleged failure of the Solano CHP management to display Appellant's "Officer of the Year" photograph in the briefing room. (AOB, p. 40.) It is somewhat incongruous to suggest that this is discriminatory or harassing conduct. Had CHP been motivated by animus against Appellant due to his sexual orientation it would have presumably would have selected someone else as Officer of the Year. In any event, this claim fails to support a continuing violation because the record indicates Appellant complained about the failure to display the photo in September or October 2014, outside the one-year limitations period. (2 AA0373.) Additionally, Appellant presents no evidence that CHP's failure to display the photograph was motivated by discriminatory or retaliatory animus. Appellant also argues the failure to respond to his complaints about the photograph triggered, in his mind, disturbing events earlier in his career. (AOB, p. 41.) But the incident's effect on Appellant is not relevant. The relevant issue is whether Appellant presented specific evidence raising a triable issue of material fact that the CHP engaged in unlawful discrimination against him during the limitations period. (*Cucuzza, supra*, 104 Cal.App.4<sup>th</sup> at 1041 [employee must set forth specific facts demonstrating employer's reasons for its action are "unworthy of credence"]; *see also Jumaane, supra*, 241 Cal.App.4<sup>th</sup> at 1407 [plaintiff's insistence that harassing events "continued into 2001" without specific evidence, was insufficient to show continuing violation].) Appellant failed to present evidence that the failure to display his photograph was sexual orientation discrimination that occurred within the limitations period.

Finally, Appellant claims a jury could reasonably conclude that the Solano CHP's failure to offer him the court officer position occurred on or after December 5, 2014. (AOB, p. 42.) However, the available evidence in the record undermines his position. Appellant's own Complaint places this event in August or September 2014. (1 AA0028, ¶ 93.) Appellant's Government Claim, which he authenticated at his deposition, also indicates this denial of the court officer position occurred in August or September 2014. (2 AA0354:5-15, 0362, 0373.) Appellant cannot now claim that the denial of the court officer position qualifies as an anchoring event in the limitations period for purposes of the continuing violation doctrine.

The continuing violation doctrine does not apply because Appellant failed to establish that any harassing, discriminatory, or retaliatory action within the limitations period. Accordingly, even providing Appellant with the benefit of equitable tolling, he cannot show that unlawful CHP actions occurred between December 5, 2014 and September 15, 2016.

**B. The CHP's Actions While Appellant Was on Medical Leave Are Not Sufficiently Similar to the Actions Outside the Limitations Period.**

As described above, Appellant failed to establish any unlawful conduct between December 5, 2014 and January 15, 2015 when he left work. So Appellant falls back to arguing that actionable conduct occurred during the time he was on stress leave after January 15, 2015. (AOB, p. 43.) Appellant seeks to establish a continuing violation by connecting the CHP's actions after January 15, 2015 – when he was on medical leave – to incidents that occurred while Appellant worked in the Solano, Contra Costa and San Francisco CHP offices. (AOB, pp. 43-45.) Appellant's argument fails because CHP's post-stress-leave conduct was indisputably not harassing, discriminatory, or retaliatory, and was also not sufficiently similar to the pre-2015 conduct on which Appellant bases his FEHA claim.

First, Appellant points to Captain Dickson’s January 16, 2015 letter sent to Appellant the day after Appellant commenced his stress leave. (2 AA0329-0331.) A review of the letter shows that Captain Dickson only sought clarification regarding incomplete paperwork, and addressed Appellant’s request not to have contact with anyone from Solano CHP. (*Id.*) Appellant posits that the letter is harassing because Captain Dickson wrote that “this is the first time Area has been advised of your stress issue.” (2 AA0329.) However, just because this statement was upsetting to Appellant does not qualify the statement as actionable harassment. (*See Hughes v. Pair* (2009) 46 Cal.4<sup>th</sup> 1035, 1044 [objective standard for harassment].) The letter was not harassing or discriminatory in any way. It was nothing more than a communication regarding paperwork supporting a stress claim. Captain Dickson was not motivated by discriminatory or retaliatory animus; he testified in deposition that he, in fact, viewed Appellant’s stress leave as an unexpected event because Appellant had been working patrol for the last several months without incident. (3 AA0600:1-12.) Appellant’s claim that Captain Dickson’s letter was a “harassing event” sufficiently similar to the harassment Appellant allegedly sustained prior to December 4, 2014 is nothing more than a self-serving assertion uncorroborated by the evidence. (*Villiarimo v. Aloha Island Air, Inc.* (9<sup>th</sup> Cir. 2002) 281 F.3d 1054, 1061.)<sup>6</sup> In fact, the record refutes this; Captain Dickson’s letter was a unique communication that was unlike prior alleged CHP misconduct.

Second, Appellant disingenuously claims that there is a triable issue of fact as to whether the CHP improperly interfered with the state’s

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<sup>6</sup> A plaintiff’s subjective beliefs as to an employer’s motives do not create a genuine issue of material fact for summary judgment purposes. (*King, supra*, 152 Cal.App.4<sup>th</sup> at 433.)

workers' compensation carrier, SCIF's, handling of Appellant's claim. (AOB, pp. 44-45.) In fact, Appellant testified clearly in deposition that SCIF had made an error in initially denying his claim, and that he "didn't know" whether CHP had anything to do with that error. (2 AA0338:21-0339:8; see *Bozzi v. Nordstrom* (2010) 186 Cal.App.4th 755, 761 [evidence in support of summary judgment must be admissible].) Appellant cannot now suggest a conspiracy theory on appeal without any supporting evidence showing the CHP was involved in SCIF's error, and that the CHP acted in violation of the FEHA.

Third, Appellant contends that communications received from the CHP during Appellant's medical leave were harassing simply because those communications caused him stress. (AOB, p. 44.) Again, Appellant's subjective perception of the CHP's conduct is irrelevant as to whether the CHP's actions constitute actionable misconduct. A review of the letters, which are in the record, demonstrates they are nothing more than standard business communications necessary to ensure Appellant continued to be paid. (2 AA0357; 3 AA0611; see *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 870 [actions of a type necessary to carry out duties of business are not harassment as a matter of law].) In the May 19, 2015 letter, Captain Dickson merely informed Appellant that his leave credits would only cover his salary until June and suggested that Appellant request catastrophic leave. (3 AA0611.) The October 7, 2015 letter, as detailed in the CHP's Separate Statement of Undisputed Material Facts ("SSUMF") and not disputed by Appellant, only describes the CHP's procedure for ensuring that an employee continues to be paid. (2 AA0357; 2 AA0433-0434.) The CHP presented admissible evidence showing the legitimate business reasons for its October 7, 2015 letter and corresponding actions. (1 AA0088; 2 AA0386-0388.) Appellant's speculation and conjecture regarding the CHP's motives in sending those letters is not

sufficient admissible evidence to create a triable issue. (*King, supra*, 152 Cal.App.4<sup>th</sup> at 433.)

The CHP's administrative actions described above were not only motivated by valid business reasons, but were also dissimilar to the CHP's actions that Appellant complained about prior to his medical leave, so that they cannot be considered a continuing course of conduct. (*Birschtein v. New United Motor Mfg., Inc.* (2001) 92 Cal.App.4<sup>th</sup> 994, 1006.) The cases in which courts have found similar conduct within the limitations period are distinguishable from this case because those cases usually concerned the same bad actor committing repeated acts of egregious misconduct directed against the plaintiff both outside and within the limitations period. (*See, e.g., Birschtein, supra*, at p. 1003 [bad actor who made sexually harassing comments to plaintiff outside the limitations period and then repeatedly stared at plaintiff within the limitations period committed similar conduct to justify application of continuing violation doctrine]; *Dominguez, supra*, 168 Cal.App.4<sup>th</sup> at pp. 717, 723-24 [co-worker's crude and offensive remarks due to sexual orientation outside the limitations period similar to co-worker's conduct of jamming the wheels of plaintiff's pallet jack, blocking plaintiff's access to her work station, and lying to plaintiff about whether there was mail for her to process that occurred within the limitations period].)

In contrast, here, the CHP's conduct within the limitations period was limited to facially neutral, administrative actions related to Appellant's workers' compensation claim, leave credits, and disability retirement. This is far different from the alleged misconduct that occurred outside the limitations period, consisting of allegedly harassing remarks, a failure to assist at Appellant's crime scenes, defacing Appellant's accomplishments and property, and adverse personnel decisions such as the failure to appoint Appellant as court officer. Accordingly, Appellant failed to show that the

CHP's actions after January 15, 2015 are sufficiently similar to earlier alleged CHP misconduct. (*Trovato v. Beckman Coulter, Inc.* (2011) 192 Cal.App.4<sup>th</sup> 319, 326-327.)

**C. Continuing Violation Does Not Apply Here Because Appellant's FEHA Claims Reached Permanence Long Before the Applicable Limitations Period Commenced.**

Appellant's continuing violation argument also fails because his claims reached permanence no later than 2012, well before the applicable FEHA limitations period. An employee's FEHA claim accrues as soon as the employer's misconduct has reached a sufficient level of permanence. (*Cucuzza, supra*, 104 Cal.App.4<sup>th</sup> at 1042.) This rule prevents an employee from indefinitely delaying the filing of a FEHA lawsuit. (*Id.*) Hostile work environment claims reach "permanence" when "an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to ... end harassment will be futile." (*Ibid.*) Here, Appellant's claims reached permanence long before he took medical leave in January of 2015.

The evidence plainly shows that Appellant knew years before the one-year limitations period that his relationship with the CHP had deteriorated to the point where he could no longer repair it. In 2003, Appellant filed a DFEH charge based on alleged discrimination. (1 AA0025, ¶ 72; 2 AA0256:10-0257:20.) At that time, Appellant explained to his then-Chief that "[i]t is very clear that the internal [CHP] EEO process does not work. Therefore, I will be filing a DFEH complaint." (2 AA0253:7-13; 2 AA0315.) Appellant's doctor also placed him on stress leave in 2004 because of the alleged harassment he suffered at work. (2 AA0261:11-15; 2 AA0319.) Even in September 2004, Appellant was complaining that he "ha[d] received no assistance from the CHP or the management of the Contra Costa Area Office. In fact, the actions of the CHP have caused me

more stress.” (2 AA0319.) This is the exact same complaint Appellant made during his later stress leave in 2015. (3 AA0607, “[u]nfortunately, having to deal with the CHP and SCIF is only making my stress worse.”) Appellant specifically stated in 2003 that the internal complaint process at the CHP did not work, and that he was therefore pursuing outside legal action. (2 AA0253:7-13; 2 AA0315.) Appellant thus admitted as early as 2003 that “future efforts to make changes would be futile.” (*Jumaane, supra*, 241 Cal.App.4<sup>th</sup> at 1404.)

Any doubt that Appellant may have had regarding the futility of repairing his relationship with the CHP should have been dispelled when he transferred to his third CHP location in 2008 and found that the harassment, discrimination, and retaliation continued. Appellant testified that he moved to Solano with the hope that management there would follow policy, but claims he encountered “homophobic locker room talk” once he arrived there. (2 AA0270:20-24; 2 AA0271:13-0272:7; 0273:1-0274:13.) Appellant was also the subject of gossip and rumors based on his sexuality. (2 AA0275:6-0276:4; 2 AA0276:21-0277:9.) Appellant also alleges that, soon after coming to Solano in 2008, he was denied backup, similar to what he had experienced in San Francisco and Contra Costa. (2 AA0279:25-0281:22; 1 AA0017, ¶ 34.) At this point, a reasonable person would have realized that any further efforts to end harassment would be futile. (*Weeks v. Union Pacific Railroad Co.* (2015) 137 F.Supp.3d 1204, 1225.)

Appellant’s own admissions show that he believed his FEHA claims against CHP had acquired permanence years before he filed his second DFEH charge in 2016. In November 2012, he emailed two of his sergeants to document that, for the preceding four and one-half years, one of his fellow officers had refused to respond to Appellant’s scenes, and that the problem had not been corrected. (2 AA0327.) Where the status quo remains “unchanged for a period of about four years,” this lengthy time

period “shows a significant degree of permanence.” (*Weeks, supra*, 137 F.Supp.3d at 1226.) In fact, Appellant continued to experience a lack of backup, along with “homophobic locker room talk.” (2 AA0270:20-24; 2 AA0271:13-0272:7; 0273:1-0274:13; 2 AA0279:25-0281:22; 1 AA0017, ¶¶ 34; 2 AA0327.) These events allegedly occurred four years after he arrived to work in Solano, and incontrovertibly shows that Appellant’s FEHA claims had become permanent by 2012, at the latest. Appellant should have known by then, if not before, that further efforts to improve his employment conditions would be futile.

California courts have consistently refused to revive claims such as Appellant’s, which reached permanence outside the limitations period. For example, in *Cucuzza, supra*, the plaintiff attempted to establish a five-year continuing violation based on alleged gender discrimination between 1993 and 1998. The appellate court held that the continuing violation doctrine could not save the plaintiff’s untimely FEHA action because the misconduct underlying plaintiff’s claim had reached permanence in 1994, several years before the limitations period. At that time, the plaintiff had filed a grievance based on the removal of job duties. The employer did not return her job duties to her, but rather offered her a transfer out of her current job. Plaintiff admitted the transfer was her only choice at that time, and the court held that plaintiff knew the situation had reached permanence by then. (*Cucuzza, supra*, 104 Cal.App.4<sup>th</sup> at 1042-1043.) Alternatively, the court found the situation reached permanence two years later, when the employer “reclassified” plaintiff’s job to include only clerical and administrative duties. (*Id.* at 1036, 1043.) Either way, the court held, conduct outside the limitations period could not be deemed part of a continuing violation. (*Id.* at 1043.) Similarly, in this case Appellant’s relationship with the CHP deteriorated years before the limitations period, and Appellant’s attempts to remedy his situation through transfers were

unsuccessful. Accordingly, Appellant may not rely on the continuing violation doctrine, and his FEHA action is time-barred.

**IV. THE TRIAL COURT CORRECTLY RULED THAT, AS A MATTER OF LAW, APPELLANT DID NOT SUFFER A CONSTRUCTIVE DISCHARGE**

Appellant's last attempt to rescue his time-barred claims is by claiming constructive discharge as of the date of his industrial disability retirement, February 29, 2016. (2 AA0359-0360; 2 AA0349:22-0350:17.) But an employee cannot simply "quit and sue," claiming constructive discharge. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4<sup>th</sup> 1238, 1247.) Rather, the employee must demonstrate that working conditions were so intolerable that any reasonable employee would have resigned rather than endure such conditions. (*Id.*) The employee must also show that the employer intended to create, or purposefully maintained, the intolerable working conditions such that the resignation was, essentially, employer-coerced. (*Id.* at 1248-1249.) A constructive discharge is determined under an objective standard, "and the proper focus is on the working conditions themselves." (*Simers v. Los Angeles Times Commc'ns, LLC*, (2018) 18 Cal. App. 5th 1248, 1270.) The trial court correctly found that Appellant did not put forth sufficient evidence to create a triable issue of material fact regarding constructive discharge, which, as Appellant admits in his brief, requires him to meet a high standard of proof. (AOB, p. 52.) The court should affirm this finding.

**A. Appellant Was Not Subjected to Objectively Extraordinary and Egregious Conditions at the Time He Took Medical Leave.**

The first prong of the constructive discharge test requires Appellant to show that, based on all the circumstances, the working conditions at the CHP were so unusually adverse that a reasonable person in the plaintiff's position would have felt compelled to resign. (*Turner, supra*, 7 Cal.4<sup>th</sup> 12

1246-47.) Courts typically use words such as “extraordinary,” “egregious,” “intolerable,” and “aggravated” to describe the requisite conditions. (*Id.*) In determining what a reasonable person would have done, courts can examine the length of time the plaintiff remained on the job following the commencement of the allegedly intolerable conditions. (*Id.* at 1254.)

Appellant claims he was constructively discharged based on three actions. First, he claims that his fellow officers refused to back him up in dangerous situations. (AOB, p. 52.) Second, he relies on locker room homophobic language not directed at him. (*Id.*) Third, he claims the CHP failed to display his Officer of the Year photograph. (*Id.*) A reasonable employee would not have felt compelled to leave his 20-year employment because of these events. (*Turner, supra*, 7 Cal.4<sup>th</sup> 12 1247.)

Appellant claims the “routine refusals of fellow officers to back up [Appellant] in dangerous situations” constitutes an objectively intolerable condition. (AOB, p. 52.) Although Appellant testified in deposition about various specific instances of a lack of backup between November 1998 and April 2014 (1 AA 17-28; 2 AA0263:9-0264:17; 2 AA0268:11-0269:9; 2 AA0279:25-0281:22; 2 AA0284:25; 2 AA0285:8-25), Appellant’s evidence is generally vague, speculative, and self-serving. For example, Appellant claimed he investigated three fatal traffic collisions alone while working in Contra Costa County between 2001 and 2008, and he had never heard of another officer having to do so. (1 AA0238:22-0239:14.) But he does not allege that there was any negative consequence to him because he investigated a traffic accident on his own.

More importantly, Appellant contends that this “life-threatening pattern” of a lack of backup began in November 1998, and the latest incident occurred in April 2014. (1 AA0017; 1 AA0028, ¶ 91.) Appellant’s medical leave started nine months later in January 2015. (1 AA0029, ¶ 95.) In examining whether this evidence can support a

constructive discharge claim, the court must examine whether a reasonable person would have endured such conditions for a long period of time. (*Turner, supra*, 7 Cal.4<sup>th</sup> at 1254.) Appellant contends he endured this “life-threatening” condition beginning in 1998, but it did not become intolerable until many years later, in 2015. A reasonable employee would not have endured such alleged conditions for 16 years before suddenly resigning.

Additionally, the evidence in the record suggests that, during his time working in Solano, Appellant transferred from swing shift to day shift in order to rectify the problem of not receiving backup. (2 AA0277:10-0278:10; 3 AA0571:11-22.) Appellant testified that the situation improved once he moved to day shift, several months into his stint in Solano. (2 AA0277:10-0278:10.) It is inconsistent for Appellant to claim, on the one hand, that things improved once he moved to day shift, and on the other hand, that conditions subsequently deteriorated to the point of a forced resignation.

Appellant also claims the use of derogatory and homophobic language contributed to his constructive discharge. But there is no evidence in the record to suggest that any homophobic comments were directed at Appellant during the time he worked in Solano, from 2008 to 2015. Appellant testified that his fellow officers “didn’t want to say things around [him].” Appellant was able to describe in Solano involved *overhearing* words such as “gay” or “faggot,” but nothing directed at Appellant. (2 AA0271:13-0272:7; 2 AA0273:1-0274:13; *see Lyle, supra*, 38 Cal.4<sup>th</sup> at 289 [plaintiff was obligated to set forth specific facts since derogatory comments were not about her]; *McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4<sup>th</sup> 283, 293 [crude and offensive remarks not directed at plaintiff were insufficient to alter the conditions of her employment].)

Similarly, Appellant’s claim about the single incident in which the CHP did not display his photograph sometime in 2014 does not support a constructive discharge claim. Being honored as the Office of the Year even sans display of a photograph simply did not “render his job so intolerable that a reasonable person in his position would have felt compelled to resign.” (*Turner, supra*, 7 Cal.4<sup>th</sup> at 1253.)

This case is a far cry from *Colores v. Board of Trustees* (2003) 105 Cal.App.4<sup>th</sup> 1293, relied upon by Appellant. In that case, the plaintiff produced evidence that employees were instructed to falsify a memorandum to make it appear that she had made a mistake on a contract, and that another supervisor demanded that plaintiff process unlawful orders. (*Id.* at 1309.) Plaintiff also presented evidence that she faced hostility and retaliation for reporting illegal activity. (*Id.* at 1308.) Plaintiff showed that her supervisory responsibilities were reduced, that she was assigned four different supervisors within five months, and that she was given unnecessary and excessive assignments after her doctor had placed her on half-time status. (*Id.* at 1310.) The *Colores* plaintiff produced evidence of outrageous, egregious and widespread misconduct in the workplace at the time she left her employment that created a triable issue of material fact as to constructive discharge. (*Id.*)

Appellant in this case has failed to produce evidence of outrageous and egregious behavior to support his constructive discharge theory.

**B. Appellant Has Made No Showing That His Resignation Was Coerced, As Required by Case Law.**

In analyzing a claim of constructive discharge, “[t]he proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee.” (*Turner, supra*, 7 Cal.4<sup>th</sup> at 1246.) This is the second prong of the constructive discharge analysis: a resignation must properly be characterized as an employer-attempted “end run” around

a termination. (*Colores, supra*, 105 Cal.App.4<sup>th</sup> at 1305.) Appellant must show that a “reasonable employer” would realize that a reasonable person in Appellant’s position would be compelled to resign. (*Id.*)

Appellant presented no evidence that the CHP attempted to coerce his resignation, or that the CHP should have reasonably realized that a reasonable officer in his position would feel compelled to resign. To the contrary, the Solano captain testified under oath that, in response to Appellant’s complaints of a lack of backup, he spoke with Appellant’s sergeants, instructed them to discuss the situation with Appellant’s fellow officers, and later followed up with the sergeants. (3 AA0588:7-0589:20.) Furthermore, Appellant must show that the CHP knew Appellant considered the working conditions intolerable and either deliberately created the conditions, or failed to remedy the conditions in order to force Appellant to resign. (*Turner, supra*, 7 Cal.4<sup>th</sup> at 1249-1250.) Appellant has failed to make such a showing.

In *Colores, supra*, the court emphasized that the plaintiff was able to show constructive discharge because there was evidence that defendant’s vice-president of administration and finance was determined to push plaintiff to quit her job. (*Colores, supra*, 105 Cal.App.4<sup>th</sup> at 1310.) The court held that the evidence raised a reasonable inference that, when the manager failed to convince others to terminate plaintiff, he designed a plan to falsely show that plaintiff’s performance was poor in order to effectuate her termination. (*Id.*) In contrast, Appellant, here, presented no evidence that any CHP manager was trying to force him to quit. Instead, his constructive discharge claim focuses only on his subjective perceptions of his working conditions, which is not relevant because constructive discharge is analyzed from an objective perspective. (*Turner, supra*, 7 Cal.4<sup>th</sup> at 1248.) Appellant has not created a triable issue of material fact as to constructive termination, and that claim must be disregarded.

**V. POLICY CONSIDERATIONS WEIGH IN FAVOR OF APPLYING THE STATUTE OF LIMITATIONS TO BAR APPELLANT’S LAWSUIT**

Statutes of limitations serve important policy purposes. One is to protect defendants from having to defend stale claims. Another is to encourage plaintiffs to pursue their claims diligently. (*Fox v. Ethicon Endo-Surgery* (2005) 35 Cal.4<sup>th</sup> 797, 806.) This case involves an officer who served an entire career and left the work site for good once he reached retirement age. Appellant complained at various points throughout his career, but never filed a lawsuit. Seven months after CalPERS granted his disability retirement, Appellant decided to sue the CHP, claiming he was harassed and discriminated against throughout his entire career. If Appellant is permitted to proceed with his 20 years’ worth of allegations, it is difficult to see how any employer can avail itself of the statute of limitations when a long-time employee brings such a claim.

**CONCLUSION**

This is a clear case for applying the statute of limitations. Appellant unreasonably delayed filing his DFEH charge after he went on medical leave and after many years of admittedly believing that he was being subjected to unlawful conduct by his CHP colleagues. Equitable tolling should not be applied in this case because Appellant’s workers’ compensation claim and his FEHA action involve different remedies and harms, and tolling the FEHA statute of limitations would not serve the policy rationale underlying the equitable tolling doctrine. Appellant cannot avail himself of the continuing violation doctrine because he is unable to cite to any actionable conduct within the limitations period, and also waited until years after his claims reached permanence to file his lawsuit. The evidence is indisputable that Appellant made a conscious choice to serve out his career at the CHP rather than file a civil lawsuit. The FEHA statute

of limitations bars Appellant's claim, and summary judgment in favor of the CHP should be affirmed.

Dated: April 26, 2019

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify that the attached **RESPONDENT’S OPENING BRIEF** uses a 13 point Times New Roman font and contains 13,200 words.

Dated: April 26, 2019

XAVIER BECERRA  
Attorney General of California

*/s/ JENNIFER G. STOECKLEIN*

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California Highway Patrol*

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**DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL**

Case Name: **Jay Brome v. CHP, et al. (Appeal)**  
Case No.: **A154612**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On April 26, 2019, I electronically served the attached **RESPONDENT'S OPENING BRIEF** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on April 26, 2019, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Honorable Michael Mattice  
Solano County Superior Court  
Hall of Justice  
Department 23, Room 306  
600 Union Avenue  
Fairfield, CA 94533

Benjamin Bien-Kahn  
Rosen Bien Galvan & Grundfeld LLP  
101 Mission Street, Sixth Floor  
San Francisco, CA 94105-1738

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 26, 2019, at Sacramento, California.

\_\_\_\_\_  
Erika Thompson  
Declarant

\_\_\_\_\_  
*/s/ Erika Thompson*  
Signature