

**CASE NO. A154612**

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

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JAY BROME

*Plaintiff and Appellant,*

v.

CALIFORNIA HIGHWAY PATROL

*Defendant and Respondent.*

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**APPELLANT'S REPLY BRIEF**

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

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## INTRODUCTION

Respondent California Highway Patrol (“CHP”) mischaracterizes the facts and misstates the law in an effort to conceal what this case is really about: Whether Appellant Jay Brome (“Officer Brome”) should be allowed to present to a jury his uncontested claims of severe and pervasive discrimination, harassment, and retaliation he suffered at the hands of his employer, the CHP, over the course of his decorated career because he is gay. Notwithstanding the CHP’s attacks on Officer Brome’s credibility throughout its brief, the CHP did *not* move for summary judgment on the merits of Officer Brome’s Fair Employment and Housing Act (“FEHA”) claims, and cannot now contest the substantial evidence in the record of the hostile work environment he was subjected to—including not only anti-gay slurs and other overtly discriminatory actions in the office, but also the life-threatening ongoing refusal of fellow officers to provide Officer Brome backup in the field, all of which CHP management refused to adequately address. The question on appeal is whether the record evidence, viewed in the light most favorable to Officer Brome, is sufficient to permit a jury to conclude that his FEHA claims are timely.

The CHP’s assertion that a workers’ compensation claim cannot equitably toll a FEHA claim as a matter of law is foreclosed by Supreme Court precedent. And its argument that Officer Brome is not entitled to equitable tolling on the facts ignores uncontested record evidence that the CHP knew without question that Officer Brome’s workers’ compensation claim was based on the same underlying facts and sought to remedy the same harm as his FEHA claims—the extreme psychological harm caused by twenty years of unrelenting harassment and discrimination that drove him to contemplate suicide and ultimately retire early.

Furthermore, the CHP’s argument that the continuing violation doctrine should not apply as a matter of law would require this Court to

ignore both the summary judgment standard and the extensive record evidence that supports Officer Brome's position. The CHP falsely claims that Officer Brome did not present evidence of discriminatory, harassing, and retaliatory conduct within the limitations period—despite uncontested evidence to the contrary. Perhaps most absurdly, the CHP argues that the continuing violation doctrine should not save Officer Brome's claims because he should have filed suit earlier rather than believing his supervisors that they wanted to address his concerns informally. This is wrong on the facts and law, and offends public policy.

The CHP's false narrative that Officer Brome "sle[pt] on his rights" by making "a conscious choice to serve out his career at the CHP rather than file a civil lawsuit" shows a deep disdain for a true public servant who attempted for decades to stay in a job he loved despite suffering severe and pervasive discrimination and harassment because he is gay. (Respondent's Brief ("RB"), pp. 10, 54.) Rather than simply suing, Officer Brome took the approach that our society hopes public servants will follow, by continuing to try to convince the CHP to take his complaints seriously and change his work environment so that he could carry out the CHP's motto of "Safety, Service, and Security" without putting his life, mental health, and dignity at risk. Officer Brome exhausted all reasonable attempts to convince the CHP to remedy its unlawful conduct prior to suit because he just "wanted to get back to work. I love my job." (2 AA0262:10-22.) But the CHP forced Officer Brome to end his career over a decade before the typical age of retirement—at significant financial cost—by perpetuating a hostile work environment so intolerable that it drove Officer Brome to become suicidal.

This Court should not permit the CHP to avoid having to defend its actions on the merits by strictly enforcing the statute of limitations and

ignoring the equitable doctrines established by the Supreme Court to protect the rights of plaintiffs like Officer Brome to their day in court.

### **CORRECTIONS TO RESPONDENT’S FACTUAL BACKGROUND**

Respondent’s Factual Background badly misstates the record evidence and improperly conceals disputed issues of material fact by characterizing the evidence in the light most favorable to the CHP, in patent violation of the summary judgment standard. For example, the CHP falsely states that “Appellant has not enumerated any discriminatory, harassing, or retaliatory conduct that he alleges took place during his last six weeks on the job.” (RB, p. 18.) In doing so, the CHP blatantly ignores undisputed record evidence of discriminatory, harassing, and retaliatory conduct that the jury could reasonably infer took place during Officer Brome’s last six weeks on the job—including fellow officers’ refusal to back him up in the field “on a daily basis,” which Officer Brome testified happened “every time [he] went to work,” and so frequently that “it would be impossible to list them all” (Appellant’s Opening Brief (“AOB”), p. 16); the use of homophobic slurs by fellow officers, which indisputably never stopped (AOB, p. 14); and the very public slight of breaking CHP’s longstanding tradition of displaying the Officer of the Year’s photograph in the briefing room when Officer Brome won the award, which was never rectified—despite his repeated complaints to supervisors—up through the day he left work on medical leave because of the relentless anti-gay harassment and discrimination he suffered on the job (AOB, p. 18).

Similarly, in discussing Captain Dickson’s response to Officer Brome’s workers’ compensation claim and accompanying text message, the CHP omits substantial record evidence that forecloses its argument that the claim was too vague to provide notice of his FEHA claims. (RB, p. 19.) The CHP ignores Captain Dickson’s testimony that he understood from the workers’ compensation claim and accompanying text that Officer Brome

was complaining that he had been harassed and subjected to a hostile work environment because he is gay (3 AA0582:12-AA0585:5; 3 AA0597:1-11), and omits the record evidence that Captain Dickson was aware of the basis for Officer Brome’s belief that he was being subjected to a hostile work environment through the complaints he raised directly to Captain Dickson and other supervisors (2 AA0311:10-AA0312:6; 3 AA0551:9-20; 2 AA0305:14-AA0306:22; 3 AA0586:20-24; 3 AA0595:10-15; 3 AA0568:23-AA0570:3; 3 AA0571:11-AA0572:2). While the CHP may ignore or dispute evidence it does not like when arguing to the jury, it is not free to do so on appeal from a summary judgment, when all evidence supporting Officer Brome as the non-moving party must be treated as true.

Moreover, Respondent’s articulation of the facts is replete with improper insinuation suggesting essentially every fact supporting Officer Brome is somehow not credible. It routinely introduces such evidence—almost all of which is sworn testimony—with statements like “Appellant alleges” and “Appellant claims,” which Respondent does not do when introducing evidence supporting the CHP. Officer Brome’s testimony is evidence (not allegation), and credibility issues are for the jury, not the trial court much less this Court, on summary judgment.

Additionally, the CHP misstates important undisputed record evidence in an effort to bolster its dismissive treatment of the pervasive harassment Officer Brome suffered. For example, Respondent asserts that after Officer Brome filed an internal complaint alleging discrimination and harassment in October 1998, he “received a memorandum informing him that he had been subjected to inappropriate acts but that he had *not* been retaliated against.” (RB, pp. 13-14 [emphasis added].) In fact, the evidence to which the CHP cites states the exact opposite, that “The investigation uncovered evidence that you have been subjected to incidents of inappropriate acts of insensitivity and retaliation.” (1 AA0217:23-218:1; 1

AA0247.) The CHP also ignores the un rebutted evidence that, while the CHP's memorandum claimed "appropriate action will be taken again[st] the responsible employees" and training on CHP's discrimination policies would be provided, the training "didn't happen" and Officer Brome was never told what (if any) purportedly "appropriate action" was taken against the officers found to have mistreated and retaliated against him. (1 AA0217:23-218:16.) The record shows that the CHP refused to tell Officer Brome any other information about the investigation's findings or provide him with any investigation report (*ibid.*), and that the harassment and discrimination continued unabated, even after he made another complaint. (1 A 0220:8-221:11; 1 AA0225:23-0226:12; 1 AA0229:1-18.)

Finally, the CHP conveniently omits from its Factual Background that, after the trial court dismissed Officer Brome's case and he filed his opening brief in this appeal, it has now apparently found additional pertinent discovery withheld from Officer Brome in response to his discovery requests in the trial court. Although it represented there that no such information existed, the CHP has now suddenly "located" a number of a number of transcripts and interviews of CHP officers conducted during investigations into the Officer Brome's complaints of discrimination, harassment, and retaliation. (See Declaration of Lisa Ells in Support of Motion for Judicial Notice, Ex. A [March 26, 2019 Letter].) Respondent's counsel—who also represented the CHP below—concedes that these highly relevant investigation interviews, which go directly to the failure of CHP's management to take appropriate action to address the discrimination and harassment Officer Brome faced because he is gay, should have been produced in response to Officer Brome's discovery requests and "would have potential evidentiary value if the matter is reversed and remanded," and felt ethically obligated by the Rules of Professional Conduct to inform him. (*Ibid.*) The CHP refuses to produce any interview tapes or transcripts

of interviews with the CHP officers without a court order pursuant to Evidence Code, § 1043 and *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, which cannot be obtained until this Court reverses the summary judgment. (*Ibid.*) Appellant expects this wrongfully withheld probative evidence will only further strengthen his existing case, should this Court reverse and remand the trial court's erroneous summary judgment so that he can prove his claims to a jury.

Unlike Respondent, Officer Brome's Statement of Facts properly states the record here in the light most favorable to the non-moving party, and supports each fact with citation to the record. Respondent does not contend that any facts stated therein are unsupported by the cited evidence. As such, this Court should disregard the CHP's legally improper Factual Background, and take notice of the fact that additional relevant and responsive discovery purportedly just found by the CHP will be available to support Officer Brome's claims on the merits should this Court reverse.

### **STANDARD OF REVIEW**

While the CHP agrees that the standard of appellate review of a summary judgment is *de novo*, they confuse the issue by suggesting improperly that this Court should conduct its review with deference to the ruling below. (RB, p. 23.) While an appellant has the burden of showing error on appeal, this simply means that he or she must "point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed." (*Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 230.) This does not otherwise change the way *de novo* review is conducted. When reviewing a grant of summary judgment, this Court still "exercise[s] [its] independent judgment, and decide[s] whether undisputed facts have been established

that negate plaintiff's claims.” (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 253 (*Nazir*).

## **ARGUMENT**

### **I. OFFICER BROME’S WORKERS’ COMPENSATION CLAIM TOLLED THE STATUTE OF LIMITATIONS.**

Respondent misstates the law and the facts to argue that the trial court erred in assuming that Officer Brome’s workers’ compensation claim equitably tolled the statute of limitations for his FEHA claims from January 15 to October 27, 2015, while the compensation claim was pending. The CHP’s assertion that a workers’ compensation claim cannot “as a matter of law” toll the FEHA statute of limitations is wrong as a matter of law, fact, and policy. (RB, pp. 25-30.) Its second argument, that Officer Brome fails to meet the equitable tolling requirements, is equally unavailing given the indisputable evidence the CHP had actual knowledge that Officer Brome’s workers’ compensation claim was predicated on the exact same underlying facts and sought redress for the exact same harm as his FEHA claims—the psychological injury caused by twenty years of unremitting sexual orientation harassment over the course of Officer Brome’s decorated CHP career. As such, the CHP cannot credibly claim it lacked timely notice of or was prejudiced by tolling of Officer Brome’s FEHA claims, nor does it provide even a scintilla of support for its assertion that Officer Brome acted in bad faith. (RB, pp. 30-36.)

#### **A. There Is No Legal Basis For The CHP’s Contention That A Workers’ Compensation Claim Cannot Equitably Toll A FEHA Claim As A Matter Of Law.**

The Supreme Court has held both that the doctrine of equitable tolling applies to the FEHA limitations period (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 106-107 (*McDonald*)), and that a workers’ compensation claim may equitably toll

the limitations period for a civil action against the plaintiff's employer based on the same injury (*Elkins v. Derby* (1974) 12 Cal.3d 410, 414 (*Elkins*)). There is no legal basis for the CHP's assertion that, despite these binding precedents, a workers' compensation claim is incapable of equitably tolling the FEHA statute of limitations. (RB, pp. 25-30.)

Courts may only categorically refuse to apply equitable tolling to a statute of limitations if the legislature either expressly precludes the application of the doctrine in the statutory text, or if the statute's text or underlying legislative policy cannot be reconciled with allowing equitable tolling. (*McDonald, supra*, 45 Cal.4th at p. 105.) Except in those limited circumstances, the Supreme Court instructs courts to liberally apply equitable tolling upon "a showing of three elements: 'timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff.'" (*Id.* at p. 102.)

In *McDonald*, the Supreme Court analyzed the text of the FEHA and the legislative policies underlying the statute in depth (*id.* at pp. 106-110), and "conclude[d] there is neither an express limit on grounds for [equitable] tolling, nor ... a textual or legislative-intent-based rationale that would compel us to decline to extend the usual rule to FEHA claims" (*id.* at p. 106). While the alternative remedy pursued by the *McDonald* plaintiff was her employer's internal grievance procedures, rather than a workers' compensation claim (*id.* at pp. 104-105), the Supreme Court's holding was not limited to those narrow facts. In fact, in explaining that equitable tolling applies in situations where plaintiffs voluntarily pursue alternate remedies, the *McDonald* Court approvingly cited to its opinion in *Elkins*, which held that pursuit of a workers' compensation claim equitably tolled the statute of limitations for a later-filed tort action against the plaintiff's employer. (*Id.* at pp. 101-102 [citing *Elkins, supra*, 12 Cal.3d at p. 414].) The Court's analysis in *McDonald* did not turn on the fact that the alternate

remedy at issue was an internal grievance; instead, the Court analyzed the statutory text and legislative intent in enacting the FEHA to determine “whether anything in the FEHA itself stands as a bar to application of the usual rule that limitations periods are tolled while a party pursues an alternate remedy.” (*McDonald, supra*, 45 Cal.4th at p. 106.)

In *Elkins*, the Supreme Court held that an employee’s voluntary pursuit of a workers’ compensation claim for an on-the-job injury equitably tolled the limitations period for a common law tort claim against the employer based on the same injury. (*Elkins, supra*, 12 Cal.3d at pp. 414-418.) As the Supreme Court later recognized (*McDonald, supra*, 45 Cal.4th at p. 100), *Elkins* established the broad “principle that regardless of whether the exhaustion of one remedy is a prerequisite to the pursuit of another, if the defendant is not prejudiced thereby, the running of the limitations period is tolled ‘[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one.’ [Citations.]” (*Elkins, supra*, 12 Cal.3d at p. 414.) There is no basis for reading *Elkins* to exclude the possibility that a workers’ compensation claim could ever toll the limitations period for a FEHA claim, or to limit its holding to apply only to common law tort claims, as the CHP asserts here.<sup>1</sup>

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<sup>1</sup> For these reasons, the CHP’s arguments that this case lacks some of the policy rationales for equitable tolling discussed in the Supreme Court opinions in *Elkins* and *McDonald* are of no moment. (RB, pp. 27-30.) There is no authority for the proposition that equitable tolling only applies if doing so would encourage informal dispute resolution or increase judicial efficiency. Instead, both *Elkins* and *McDonald* direct courts to liberally apply equitable tolling, so long as there is timely notice and lack of prejudice to the defendant, and the plaintiff acts reasonably and in good faith. (*McDonald, supra*, 45 Cal.4th at pp. 99-102; *Elkins, supra*, 12 Cal.3d at p. 414.) Indeed, Officer Brome attempting to continue performing the job he loved while also seeking to end the harassment through mechanisms short of a lawsuit until he could no longer do so is fully consistent with these policy rationales. It is instead the CHP’s arguments—faulting Officer

**1. Officer Brome’s Workers’ Compensation Claim Equitably Tolled The Statute Of Limitations For His FEHA Claims Because They Are Two Different Legal Remedies For The Same Harm.**

The CHP attempts to skirt these binding precedents by citing a single out-of-district Court of Appeals opinion for the assertion that “the filing of a workers’ compensation claim does not ordinarily toll a statute of limitations for a different claim.” (RB, pp. 25-26 [citing *Aerojet General Corp. v. Superior Court* (1986) 177 Cal.App.3d 950 (*Aerojet*)].) The CHP does not even attempt to explain how this assertion could possibly be true, given that the Supreme Court expressly held that the filing of a workers’ compensation claim *does* toll the statute of limitations for a different claim. (*Elkins, supra*, 12 Cal.3d at pp. 414-418.)

In any event, *Aerojet* stands only for the unremarkable proposition that while “equity will toll the statute of limitations while a plaintiff, who possesses different legal remedies for the same harm, reasonably and in good faith pursues one, it will not toll the statute while a plaintiff, who has allegedly suffered several different wrongs, pursues only one remedy as to one of those wrong[s].” (*Aerojet, supra*, 177 Cal.App.3d at p. 956.) In reaching this conclusion, the Third Appellate District did exactly what the CHP asks this Court *not* to do: assess whether plaintiffs could show they were entitled to equitable tolling by analyzing whether the two claims at issue sought to remedy the same harm, such that the filing of the first claim would provide defendants notice of the second. (*Id.* at pp. 956-957.)

In *Aerojet*, the court held that the plaintiffs’ workers’ compensation claims seeking recovery for workplace injury did not equitably toll the

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Brome for continuing to work while complaining internally rather than suing earlier—that run contrary to the policy goals of encouraging informal resolutions and discouraging unnecessary judicial intervention.

statute of limitations for a civil action “when plaintiff seeks damages not for the injury itself but for fraudulent concealment of the injury’s cause.” (*Id.* at pp. 951-952.) The court distinguished *Elkins*, “where plaintiff sought to recover in the civil proceeding for the *same injury* and on the same circumstances that prompted his workers’ compensation claim,” from the *Aerojet* plaintiffs, who sought recovery “for a different wrong entirely, that being the harm they assertedly suffered as a result of defendants’ fraudulent concealment of the injury’s cause.” (*Id.* at pp. 954-55.)

By contrast, Officer Brome, like the plaintiff in *Elkins*, seeks to remedy the same injury based on the same alleged wrong through his workers’ compensation and FEHA claims: the psychological harm he suffered at the CHP as a result of the hostile work environment arising from relentless, daily sexual orientation discrimination and harassment. Unlike the *Aerojet* plaintiffs—who “d[id] not seek to recover in a civil action for the original injury that prompted their workers’ compensation claim” (*id.* at p. 955), but rather for aggravating injuries suffered because they continued to work in a hazardous environment due to fraudulent concealment of the cause of the original injury (*id.* at pp. 952-953, 956)—Officer Brome seeks to recover for the exact same injury. The facts here are on all fours with *Elkins*, where the plaintiff also sought to recover for the same on-the-job injury through his workers’ compensation and tort claims. (*Elkins, supra*, 12 Cal.3d at p. 412).<sup>2</sup>

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<sup>2</sup> The only case the CHP cites where a court found that a workers’ compensation claim did not equitably toll the FEHA statute of limitations is an unpublished federal district court case. (*Andrews v. PRIDE Industries* (E.D. Cal. Jan. 12, 2017, No. 2:14-cv-02154-KJM-AC) 2017 WL 119803, at \*8 (*Andrews*)). The CHP asks this Court to find *Andrews* persuasive (RB, p. 27, fn. 3), but omits that the plaintiff’s lawyer there told the court that, after a computer error erased her opposition brief, she “scrambled to assemble a decent, working opposition before the filing deadline and haphazardly neglected to address a number of issues.” (*Andrews, supra*,

The CHP attempts to show that the harm that forms the basis for Officer Brome’s workers’ compensation claim is somehow “separate and distinct” from the harm underlying his FEHA claims by listing ways that the workers’ compensation system and the FEHA are different. (RB, p. 27.) These distinctions are red herrings.

The CHP stresses that the two statutory schemes have different purposes, and that FEHA claims for psychological harm caused by employment discrimination or harassment are not barred by workers’ compensation exclusivity. (RB, pp. 26-28.) Yet the cases relied upon by the CHP confirm that Officer Brome had several legal remedies to recover for the same psychological harm and reasonably pursued one, making equitable tolling of the statute of limitations for the second remedy appropriate. (See *Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 96-97 (*Light*) [employees may recover for emotional harm caused by workplace discrimination through both workers’ compensation and FEHA]; *Meninga v. Raley’s, Inc.* (1989) 216 Cal.App.3d 79, 89-90 [same].) The fact that employees are not barred from seeking recovery for the same harm through workers’ compensation law and the FEHA provides further support for equitable tolling. As the CHP concedes, a workers’ compensation claim “stands to lessen the harm that is the subject of a potential second action” (*McDonald, supra*, 45 Cal.4th at p. 100), by

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2017 WL 119803 at \*6.) In such circumstances, where “the court takes the opposition as it finds it,” the resulting ruling for the employer has little persuasive value. (*Id.* at \*7.)

*Andrews* is also readily distinguishable on the merits, as the plaintiff there did not tell defendant his workers’ compensation claim was for stress caused by a hostile work environment. (*Id.* at \*9.) The *Andrews* plaintiff’s FEHA claims were not for psychological harm from a hostile work environment, like Officer Brome’s, but for failure to provide reasonable accommodations and engage in the interactive process, and were thus based on a different injury than his compensation claim. (*Ibid.*)

providing for partial recovery for the harm that a FEHA claim also seeks to remedy, which can be credited against a judgment entered for the plaintiff in a FEHA action. (RB, p. 29 [citing Gov. Code, § 985, subd. (b)].) This is one of the quintessential situations where equitable tolling applies. (See *McDonald, supra*, 45 Cal.4th at p. 100.)

The CHP argues that the standards of liability are different under the two statutory schemes, contending that while the FEHA requires proof the employee's injury was caused by intentional discrimination, the workers' compensation system uses "no fault" liability. (RB, pp. 26-27.) But this is not true where, as here, employees seek compensation for psychological injury. Employees may only receive workers' compensation for psychological harm where "actual events of employment were predominant as to all causes combined of the psychiatric injury" (Labor Code, § 3208.3, subd. (b)(1)), and are statutorily barred from recovering compensation "if the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action" (*id.*, § 3208.3, subd. (h)). Courts thus do not permit "no fault" workers' compensation recovery for psychological or emotional injury, and instead look to whether the harm was caused by discrimination, harassment, or other unreasonable and bad faith conduct by the employer. (*City of Oakland v. Workers' Compensation Appeals Board* (2002) 99 Cal.App.4th 261, 266-267, 269 (*City of Oakland*); see also *Verga v. Workers' Compensation Appeals Board* (2008) 159 Cal.App.4th 174, 178 (*Verga*) [legislative intent "to require claimant to establish objective evidence of harassment, persecution, or other such basis for alleged psychiatric injury"].)

Regardless, the Supreme Court expressly rejected the relevance of workers' compensation's "no fault" liability standard to the applicability of equitable tolling in *Elkins*, holding that workers' compensation claims may toll the statute of limitations for personal injury claims even though the

workers' compensation claim does not require proof of fault. (*Elkins, supra*, 12 Cal.3d at pp. 417-418 [holding employer on notice for equitable tolling purposes “when prospective tort plaintiffs file compensation claims ... [even though] an employer notified of a compensation claim may fail to gather evidence of fault, and such evidence could prove critical in a subsequent tort action”].) As such, there is no legal basis for the CHP's argument that the different standards of liability under the FEHA and workers' compensation law prohibit equitable tolling.

Finally, the CHP emphasizes there are different remedies available under the FEHA and workers' compensation law, without making any attempt to establish why this should be legally relevant. (RB, pp. 26-27.) Indeed, it is not. As the CHP's own legal authority explains, “equity will toll the statute of limitations while a plaintiff, *who possesses different legal remedies for the same harm*, reasonably and in good faith pursues one ....” (*Aerojet, supra*, 177 Cal.App.3d at p. 956 [emphasis added].)

Despite the amount of space the CHP devotes to this point on appeal, there is no legal authority that a workers' compensation claim cannot toll the FEHA statute of limitations as a matter of law. The CHP's request that this Court ignore Supreme Court precedent and decline to apply the equitable tolling three-prong test here should be rejected.

**B. Officer Brome Satisfies The Requirements For Equitable Tolling In This Case.**

The CHP's argument that Officer Brome cannot satisfy the elements for equitable estoppel—timely notice, lack of prejudice, and good faith—is not supported by the law or facts. (RB, pp. 30-36.)

**1. The Workers' Compensation Claim For Psychological Harm Caused By Sexual Orientation Harassment Provided The CHP Timely Notice.**

The CHP does not dispute that it timely received Officer Brome's workers' compensation claim seeking recovery for work-related stress, which he expressly told the CHP was based on "harassment and hostile work environment at the chp." (2 AA0329.) The CHP disingenuously asks this Court to ignore uncontested evidence establishing that it actually knew and understood the nature of Officer Brome's claim, asserting the information received was too "vague" and "general" to provide timely notice "as a matter of law." (RB, pp. 31-32.) But the law does not permit an employer to defeat equitable tolling by feigning ignorance.

To establish the element of timely notice, a plaintiff need only 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.) The CHP misunderstands this element, asserting the compensation claim did not put it on notice because it "could have reasonably believed that Appellant was *not* pursuing a claim related to EEO policies or intentional employment injuries" since he did not pursue internal complaint procedures or meet with an EEO counselor, even though the CHP concedes that Officer Brome explained his worker's compensation claim was based on stress due to harassment and hostile work environment. (RB, p. 32.) Putting aside the questionable validity of this assertion, the issue is not whether the CHP could have reasonably believed Officer Brome would not later file FEHA claims, but whether the workers' compensation claim alerted the CHP to "begin investigating *the facts* which form the basis" for those claims. (*McDonald, supra*, 45 Cal.4th at p. 102, fn. 2 [emphasis

added].) There can be no dispute that Officer Brome’s compensation claim accomplished this.

First, the CHP relies heavily on the legally incorrect statement that “the CHP was only given notice that Appellant was claiming ‘no fault’ liability for work-related stress when he filed his workers’ compensation claim.” (RB, p. 31.) But, as discussed in Part I.A.1., *supra*, under workers’ compensation law, employees cannot recover for psychological injury such as work-related stress unless the “actual events of employment were predominant as to all causes combined of the psychiatric injury” and the injury was not “substantially caused by a lawful, nondiscriminatory, good faith personnel action.” (Labor Code, § 3208.3, subd. (b)(1) & (h); see *City of Oakland, supra*, 99 Cal.App.4th at p. 269 [rejecting “no fault” workers’ compensation for psychiatric injury].) When an employee files a workers’ compensation claim for psychological injury, as Officer Brome did here, the employer is on notice of the need to investigate whether the harm was actually caused by “events of employment” and assess whether the employee experienced discrimination and harassment in the workplace. (*Verga, supra*, 159 Cal.App.4th at p. 178 [holding employee not entitled to workers’ compensation for psychological injury because supervisor and co-workers did not actually subject her to harassment].) As such, the CHP was on notice of the need to investigate the facts underlying Officer Brome’s FEHA claims when he filed his workers’ compensation claim seeking to recover for the same injury, regardless of whether the CHP believed that Officer Brome would later file a civil action under the FEHA.

Second, the CHP’s claim that Officer Brome’s specific statement that his workers’ compensation claim arose from the CHP’s harassment and hostile work environment was too “vague” to provide notice is foreclosed by the factual record. Officer Brome’s supervisor Captain Dickson testified that he understood from the workers’ compensation claim and

accompanying text message that Officer Brome was complaining he had been sexually harassed and subjected to a hostile work environment at the CHP because he is gay. (AB, p. 28 [citing 3 AA0635; 3 AA0582:12-AA0585:5; 3 AA0597:1-11].) Respondent's Brief ignores this important evidence, belying the CHP's meritless assertion that it could not possibly have understood the basis for the compensation claim. The CHP unsuccessfully attempts to downplay the substantial uncontested evidence showing that even before Officer Brome filed his workers' compensation claim, CHP supervisors knew that Officer Brome believed he was being subjected to a hostile work environment because of his sexual orientation, as he had repeatedly complained about not being backed up by fellow officers because he is gay, and that his Officer of the Year photograph was not displayed as past winners' had been. (See AB, pp. 28-29.)<sup>3</sup>

If there was any question as to whether Officer Brome's workers' compensation claim sufficiently alerted the CHP to the need to investigate the facts underlying his FEHA claims—all of which are based on the same factual allegations (see 1 AA0030-AA0036 ¶¶ 101-141)—it was answered by Captain Dickson's emails shortly after receiving Officer Brome's workers' compensation claim. Captain Dickson told his fellow CHP

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<sup>3</sup> Respondent misunderstands the relevance of this evidence, claiming that Officer Brome is improperly arguing that his informal complaints—as opposed to his workers' compensation claim—put the CHP on notice. (RB, pp. 34-35.) But Officer Brome has never made this argument. What the CHP knew and understood when the workers' compensation claim was filed is relevant to show the falsity of its assertion that it had no idea what Officer Brome meant when he expressly told Sergeant Timmons that his workers' compensation claim was for stress caused by the harassment and hostile work environment. (See AOB, pp. 28-31.) The CHP's feigned ignorance is not remotely credible. The undisputed record evidence is that the CHP, in fact, understood the claim to arise out of Officer Brome's experience of being subjected to a hostile work environment by the CHP because of his sexual orientation.

supervisors, “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 expressly linking his claim to the CHP’s harassment and hostile work environment as a “brewing situation” (3 AA0597:12-AA0598:12).<sup>4</sup> Taken together, the uncontested record evidence amply demonstrates that Officer Brome’s workers’ compensation claim provided timely notice to the CHP.

## **2. Equitable Tolling Would Not Prejudice The CHP.**

Respondent repeats many of these same erroneous arguments in a failed effort to establish that equitable tolling would prejudice the CHP. (RB, pp. 32-35.) In doing so, the CHP recycles its meritless assertion that the FEHA and workers’ compensation claims are “entirely different,” which fails for the reasons stated in Part I.A., *supra*. (RB, pp. 32-33.)

The CHP concedes that a plaintiff establishes the lack of prejudice element simply by showing “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,” focusing on “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.” (RB, pp. 32-33 [quoting *Collier v. City of Pasadena* (1983) 142 Cal.App.3d 917, 925].) The two claims need not require proof of the same elements: The Supreme Court held in *Elkins* that the employer would not be prejudiced by equitably tolling the statute of limitations for a tort claim

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<sup>4</sup> This Court should not credit Captain Dickson’s self-serving explanation for why he referred to the workers’ compensation claim as a “brewing situation.” (RB, p. 35.) Putting aside the impropriety of the CHP asking the Court to draw inferences and resolve ambiguities in its favor, even without this email, the preponderance of the evidence strongly supports the finding that the CHP was on notice of the need to investigate the facts of Officer Brome’s FEHA claims through his workers’ compensation claim.

during the pendency of a workers' compensation claim, even though the workers' compensation claim did not require proof of the employer's fault in causing the physical injury. (*Elkins, supra*, 12 Cal.3d at pp. 417-418.) The Court reasoned that, although "an employer notified of a compensation claim may fail to gather evidence of fault, and such evidence could prove critical in a subsequent tort action," the "likelihood ... is minimal" that an employer notified of a workers' compensation claim will suffer prejudice, as the employer has the opportunity to gather evidence bearing on fault, even if it chooses not to do so. (*Id.* at p. 418.)

Thus, even if Officer Brome's workers' compensation claim allowed for "no fault" recovery, there would be no prejudice under *Elkins* because notice of his workers' compensation claim gave the CHP the opportunity to fairly defend against his later-filed FEHA claims. Moreover, as discussed in Part I.A.1., *supra*, because Officer Brome could only recover workers' compensation if his work-related psychological injury was caused by "actual events of employment" and was not "substantially caused by lawful, nondiscriminatory, good faith personnel action" on the CHP's part (Labor Code, § 3208.3, subd. (b)(1) & (h)), the CHP's investigation of Officer Brome's workers' compensation claim necessarily put it in a position to fairly defend against his FEHA claims seeking to recover for the same injury based on the same facts (*McDonald, supra*, 45 Cal.4th at p. 102, fn. 2). To respond to Officer Brome's workers' compensation claim, CHP was required by law to investigate whether his psychological harm was actually caused by "events of employment," and whether he actually was subjected to discrimination and harassment in the workplace. (See *Verga, supra*, 159 Cal.App.4th at p. 178.) That inquiry unquestionably provided the CHP every opportunity to identify the sources of evidence needed to defend against his FEHA claims based on the same allegations

and the same injury. Under the doctrine of equitable tolling, this is all that is required to demonstrate lack of prejudice.

The CHP confuses the issue by focusing on other ways it claims to have been prejudiced, wholly unrelated to the legal test for equitable tolling—for example, arguing that it was “prejudiced” because Officer Brome requested to not be contacted by his harassers while out on medical leave, because peace officer stress claims are not discussed outside the officer’s chain of command, and because Officer Brome exercised his legal right not to use the CHP’s internal grievance procedures prior to filing a lawsuit. (RB, p. 33.) The CHP does not explain why these typical limitations on the ability of one party to gather information from another in our adversarial legal system should be treated as “prejudicial,” and cites no legal authority saying that these considerations are relevant to the prejudice inquiry under equitable tolling.

Absurdly, the CHP argues for prejudice because it could not “be expected to know that Appellant, who had been complaining and not suing for years, would this time file a lawsuit ....” (RB, p. 34.) The record evidence demonstrates that the CHP was alerted to the need to investigate the facts underlying Officer Brome’s FEHA claims when he filed his workers’ compensation claim for psychological injury resulting from harassment and hostile work environment, and that investigation of his compensation claim would necessarily permit the CHP to fairly defend against the FEHA claims. Indeed, Officer Dickson’s emails make clear the CHP was well aware of its potential exposure, despite its claims of ignorance. The idea that the CHP should be excused for declining to properly investigate Officer Brome’s claims despite receiving the notice and opportunity to do so, simply because he had complained about discrimination and harassment in the past but had not yet felt forced to sue, would eviscerate the doctrine of equitable tolling and encourage employers

to put their heads in the sand. This Court should not accept the CHP's invitation to punish Officer Brome for trying to informally resolve the hostile work environment in order to continue his law enforcement career, and to reward the CHP for ignoring his complaint simply because he had not previously sued.

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

The CHP cites no evidence supporting their contention that Officer Brome acted in bad faith in filing his DFEH charge less than eleven months after his workers' compensation claim was granted, well within the statute of limitations. (RB, pp. 35-36.) It does not even address the undisputed record evidence that explains Officer Brome's delay—that suicidal thoughts and posttraumatic stress disorder caused by the CHP's hostile work environment made it difficult for him to have any contacts with the CHP or even to drive past the office where he had worked, let alone prepare and file a DFEH charge, particularly since he was provided with essentially no counselling for much of his medical leave due to the CHP's faulty medical records. (AOB, p. 32; see also 2 AA0345:6-21.)

The CHP blithely asserts that Officer Brome must have been acting in bad faith by filing his DFEH charge with well over a month left on the tolled statute of limitations, even though it points to no evidence supporting an inference of bad faith conduct, and even though no court has held that similar timing bars equitable tolling. (AOB, pp. 31-33.) In fact, in *Elkins*, the Supreme Court held that the plaintiff acted in good faith and reasonably even though he had only one month left on the tolled statute of limitations at the time he filed his tort action—*less time than remained on the statute of limitations for Officer Brome's FEHA claims*. (*Elkins, supra*, 12 Cal.3d at p. 413, fn. 1 [“[T]here remained the period until mid-February 1971, for plaintiff to file his tort action or approximately one month beyond the date

on which he actually filed.”].) The trial court did not err in assuming that Officer Brome acted reasonably and in good faith, and the CHP has presented neither law nor evidence to the contrary.

**II. THE TRIAL COURT ERRED IN CONCLUDING THAT THE CONTINUING VIOLATION DOCTRINE DOES NOT PRESERVE OFFICER BROME’S FEHA CLAIMS AS A MATTER OF LAW.**

Respondent next asks this Court to repeat the trial court’s error in failing to properly apply the summary judgment standard by considering all the evidence in the light most favorable to Officer Brome when deciding if there is a triable issue of fact as to whether the continuing violation doctrine preserves his FEHA claims. (RB, pp. 36-42.) The continuing violation 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*)), whenever the plaintiff establishes 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 v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714, 721 (*Dominguez*).)

The trial court granted summary judgment to the CHP based solely on its erroneous conclusion that Officer Brome could not establish the sufficiently similar prong of the continuing violation doctrine. (3 AA0683.) On appeal, the CHP argues for affirmance on two grounds—that Officer Brome has not presented “admissible, specific evidence” creating a triable issue of fact that he was subjected to any unlawful conduct by the CHP during the limitations period (RB, pp. 37-46), and that there is no factual

dispute as to whether the FEHA claims had acquired permanence before the limitations period ended (RB, pp. 46-49).<sup>5</sup> Both arguments fail.

Respondent inappropriately asks this Court to apply a more exacting standard of proof than the authorities require, and ignores the flexibility mandated by the Supreme Court in applying the continuing violation doctrine to “ease application” for employees. (*Birschtein v. New United Motor Mfg., Inc.* (2001) 92 Cal.App.4th 994, 1005 (*Birschtein*) [explaining that the Supreme Court “instructed” that “the requirements of similarity and permanence are not to be taken literally”].) Respondent’s arguments also depend on this Court inappropriately making credibility determinations, drawing inferences adverse to Officer Brome, and resolving ambiguities in the CHP’s favor, none of which are permitted here.

**A. There Is A Triable Issue Of Fact Whether The CHP’s Unlawful Conduct Within The Limitations Period Is Sufficiently Similar To Earlier Pervasive Sexual Orientation Discrimination, Harassment And Retaliation.**

Officer Brome’s opening brief describes in detail—with citation to specific admissible record evidence—how the trial court committed reversible error by failing to consider all the evidence in a light favorable to him. Even ignoring the “newly discovered” responsive evidence the CHP admits it withheld from Officer Brome until after he lost on summary judgment, and which Officer Brome has still never received, the existing record evidence permits the reasonable inference that he was subjected to discriminatory, harassing and retaliatory conduct because he is gay within the limitations period—from December 5, 2014 on—that is sufficiently similar to the CHP’s unlawful conduct outside the limitations period. This

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<sup>5</sup> Although the CHP asserts that Officer Brome has not met any of the elements for continuing violation (RB, p. 36), it does not contest that he established the second element, reasonable frequency. (RB, pp. 36-49.) That element is met in any event. (AOB, pp. 48-49.)

includes the routine, daily refusal of officers to back Officer Brome up in dangerous situations because of his sexual orientation, being subjected to derogatory anti-gay slurs, the CHP's public slight in abandoning—and refusing to rectify—the longstanding tradition of publicly displaying the Officer of the Year's photograph after he won the award, and CHP's management's ongoing failure to do anything to address the hostile work environment. (See AOB, pp. 37-43.)

**1. The CHP Warps The Law In An Unsuccessful Effort To Minimize Officer Brome's Uncontested Evidence Of Substantially Similar Conduct.**

The CHP falsely implies that Officer Brome relies on inadmissible evidence by emphasizing that a plaintiff must present “admissible” evidence to create a triable issue of fact, but does not point to a single piece of evidence relied upon by Officer Brome that it claims is inadmissible. (RB, p. 37.)

The CHP also repeatedly states that plaintiffs must show “specific facts” to defeat summary judgment, and asserts that Officer Brome relies only on “speculation, conjecture, and conclusions” because it claims his deposition testimony is “merely regurgitating” the allegations in his complaint. (See RB, pp. 37-38, 40-41.) But the CHP's authority for this point merely explains that to defeat summary judgment, the plaintiff must rely on “specific facts,” as opposed to the allegations in the pleadings. (Code Civ. Proc., § 437c, subd. (p)(2).) It is manifestly incorrect to claim, as the CHP does, that Officer Brome relies only on the complaint's allegations when he has presented sworn deposition testimony substantiating them. (RB, p. 40.) To the extent the CHP suggests Officer Brome's testimony should not be credited because it is *consistent* with the allegations in his complaint, that is both nonsensical and improper on summary judgment review. (See *Dominguez, supra*, 168 Cal.App.4th at p.

723 [rejecting attempts to minimize plaintiff’s testimony, which the court “must accept as true,” to support application of continuing violation doctrine].)

Furthermore, the CHP misstates the plaintiff’s burden of production to defeat summary judgment based on a statute of limitations defense, insisting that the plaintiff must “present specific and substantial responsive evidence that there is a triable issue of fact.” (RB, p. 38.) The only authority cited for this purported requirement are out-of-district opinions discussing how to establish that an employer’s legitimate nondiscriminatory reason for an adverse employment action is pretext. (RB, p. 38 [citing *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433]; RB, p. 41 [citing *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1038 (*Cucuzza*)].) That is not the posture here, where the CHP never sought to rebut Officer Brome’s prima facie case on the merits. By repeatedly using language describing a plaintiff’s heightened burden to establish pretext once the defendant rebuts his or her prima facie case, the CHP distorts what is necessary to establish a triable issue on the sufficiently similar prong, which merely requires that the employee present evidence that the employer’s conduct “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.)

The CHP also improperly asks the Court to assess each piece of evidence in isolation, rather than evaluating if all evidence taken together is sufficient to create a triable issue as to whether there was unlawful conduct within the limitations period sufficiently similar to the earlier misconduct. (See RB, pp. 37-42.) But “[w]hen a plaintiff alleges a series of actions that comprise a course of conduct, we need not examine each individually. Instead, we consider the totality of the circumstances to determine whether the plaintiff has suffered an adverse employment action.” (*Light, supra*, 14

Cal.App.5th at p. 92; see also *Birschtein*, *supra*, 92 Cal.App.4th at pp. 1006-08 [triable issue that harasser’s staring comprises continuing course of sufficiently similar conduct, even though “defendant is able to make ... [the] staring, considered as discrete events, appear trivial”].) The Supreme Court explained that requiring that “each act separately constitute an adverse employment action would subvert the purpose and intent of the statute,” and that it is enough that the employer’s actions “collectively” qualify as unlawful conduct. (*Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1055-56 (*Yanowitz*)).

**2. There Is No Merit To The Argument That Officer Brome Failed To Present Sufficient Evidence Of Harassing, Discriminatory And Retaliatory Conduct Within The Limitations Period.**

The CHP relies on the above misstatements of law to suggest that this Court can ignore or disbelieve record evidence that, when taken together, permits the reasonable inference that Officer Brome was subjected to discriminatory, harassing and retaliatory conduct on or after December 5, 2014 that is sufficiently similar to the uncontested unlawful conduct that occurred outside the limitations period.

Respondent disputes that there is a triable issue of fact whether officers continued to refuse to back up Officer Brome in the field within the limitations period and that, despite repeatedly reporting his concerns to his supervisors, CHP management failed to take adequate action to prevent the harassment.<sup>6</sup> (RB, pp. 38-40.) The CHP does not dispute that the record

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<sup>6</sup> Respondent misunderstands the relevance of Officer Brome’s testimony about CHP’s management’s failure to do anything to ensure his fellow officers stopped endangering his life. Officer Brome does not contend that the subjective effect of the CHP’s unlawful conduct on his psychological well-being is sufficient to establish a hostile work environment. (RB, pp. 38-39.) The testimony about what CHP management actually did and did not do in response to this objectively dangerous situation is relevant to

shows that fellow officers would not back up Officer Brome in extremely dangerous situations, that Officer Brome repeatedly made complaints about this to his supervisors, and that the evidence supports the reasonable inference that this pattern of refusals was motivated by officers' hostility to Officer Brome's sexual orientation and retaliation for his prior complaints about harassment and discrimination. (AOB, pp. 37-40.) The CHP also concedes that Officer Brome's undisputed testimony is that he "did not receive backup on a daily basis" and that "every time [he] went to work within his 12-hour day" his fellow officers risked Officer Brome's safety by refusing to provide him with routine backup. (AOB, p. 39 [citing 2 AA0300:1-11; 3 AA0550:13-AA0551:8].)<sup>7</sup>

The CHP's attempt to rebut this uncontested evidence fails. First, the CHP claims without any citation whatsoever that "CHP officers patrol alone" (RB, p. 38), when Officer Brome's sworn testimony is to the contrary (2 AA0284:15-25). Next, the CHP falsely states that "[n]o evidence was presented that the alleged lack of backup was unique to Appellant." (RB, p. 38.) Not only is the CHP's effort to cast doubt on

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show the course of conduct, which began with supervisors' inadequate responses to his first complaints about retaliation (the subject matter of the "newly discovered" evidence that the CHP says was found only after Officer Brome lost on summary judgment), and which continued into the limitations period, right up until he went on medical leave as a direct result of the CHP's failure to prevent the harassment. (AOB, pp. 39-40.)

<sup>7</sup> Although Respondent states "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" (RB, p. 38, fn. 4), it is clear from Lines 6-11 of 2 AA0300 that Officer Brome is addressing how frequently fellow officers refused to back him up, testifying that it happened "every single shift ... I was working" (2 AA0300:3-5). Even without considering this portion of the evidence, Officer Brome's testimony that he "did not receive backup on a daily basis" and that this happened "every time [he] went to work" is more than sufficient to establish the lack of backup continued into the limitations period. (2 AA0300:6-11; 3 AA0550:13-AA0551:8.)

Officer Brome’s credibility by dismissing his sworn testimony as allegation insulting and improper, it is false. The undisputed evidence—Officer Brome’s testimony—is that he was “the only one who did not receive backup on a daily basis.” (3 AA0551:3-8.) The totality of the record evidence, which the CHP does not seriously contest, is sufficient to establish for summary judgment purposes that Officer Brome’s fellow officers chose to put his basic physical safety at risk on a daily basis by refusing to provide him with backup because of their animus towards his sexual orientation, that this harassing and discriminatory misconduct continued into the limitations period, and that CHP management did not take adequate action to address Officer Brome’s concerns, much less secure his physical safety.

The CHP nevertheless asks this Court to ignore the record evidence on the ground that Officer Brome’s testimony about failures to back him up in the field during the limitations period is insufficiently specific (RB, pp. 37-38), and does not specify the exact dates when he complained (RB, pp. 39-40). The only authority the CHP cites for this proposition is an out-of-district opinion (RB, p. 40), where the court emphasized the plaintiff merely stated in his brief that “harassing conduct continued” into the limitations period, without providing “any citations to the record to enable us to find out for ourselves” what conduct he was referring to and when it occurred. (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1407 (*Jumaane*).

Yet this Court and other Courts of Appeal have held that testimony like Officer Brome’s stating unlawful conduct was occurring regularly within the limitations period—even without describing specific incidents or dates when complaints were made to the employer—is sufficient to create a triable issue of fact on the “sufficiently similar” prong. (*Dominguez, supra*, 168 Cal.App.4th at p. 724 [testimony that harasser was “constantly”

blocking access to work station and that she complained to supervisors periodically is sufficient]; *Birschtein, supra*, 92 Cal.App.4th at pp. 998-999, 1006 [testimony that harasser stared at plaintiff several times a shift and that she complained to a supervisor at some point in April is sufficient].) Like the plaintiffs in *Dominguez* and *Birschtein*, and unlike the plaintiff in *Jumaane*, Officer Brome’s testimony that fellow officers were not backing him up on a daily basis, so frequently that it would be impossible to list every incident, and that his supervisors never adequately responded to his complaints, was enough to create a triable issue whether this continued during the limitations period. (See AB, pp. 37-39.)

The CHP also contends that the evidence of failures to back up Officer Brome should be ignored because “this evidence does not show any conduct linked to Appellant’s sexual orientation.” (RB, p. 38.) But courts look to the course of conduct as a whole in evaluating whether there is sufficient evidence to support a reasonable inference of discriminatory animus. (See *Nazir, supra*, 178 Cal.App.4th at p. 283 [“Proof of discriminatory intent often depends on inferences rather than direct evidence. [Citation.] And because it does, ‘very little evidence of such intent is necessary to defeat summary judgment.’”].) The Supreme Court and Courts of Appeals have thus found conduct within the limitations period that does not necessarily appear to be unlawful discrimination, harassment, or retaliation on its face may still be part of a continuing violation when it is connected to earlier conduct for which there *is* evidence of a discriminatory, harassing, or retaliatory motive. (*Yanowitz, supra*, 36 Cal.4th at p. 1055 [“[T]here is no requirement that an employer’s retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging injuries.”]; *Dominguez, supra*, 168 Cal.App.4th at p. 724 [disruptive actions within limitations period sufficiently connected to derogatory comments about sexual orientation outside limitations period]; *Birschtein, supra*, 92

Cal.App.4th at p. 1006 [persistent staring within limitations period sufficiently connected to overtly sexually harassing comments outside limitations period].) Similarly, the undisputed record evidence that refusals to back up Officer Brome outside the limitations period were motivated by animus towards his sexual orientation allows for the reasonable inference that the more recent failures to do so were based on the same unlawful motivations. (See AB, pp. 38-39.)

The CHP relies on the same improper arguments to assert that Officer Brome’s sworn testimony of persistent homophobic comments should be “completely disregarded” because he did not identify “a specific offensive comment in the limitations period” and because his fellow CHP officers only sometimes spewed anti-gay slurs in his presence or directly at him, rather than behind his back. (RB, pp. 40-41.) But the undisputed evidence is that Officer Brome continued to be subjected to anti-gay comments for the duration of his employment at Solano. (AOB, p. 40.) Moreover, insulting and derogatory statements are probative evidence of a hostile work environment even if directed at others or describing gay people generally. (See *Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 349, *abrogated on other grounds by Richards, supra*, 26 Cal.4th at p. 823 (*Accardi*) [“‘derogatory and insulting terms relating to women generally and addressed to female employees personally may serve as evidence of a hostile environment’ (citation)’]). In any event, this argument goes to the sufficiency of Officer Brome’s claim on the merits—not whether such uncontested hateful misconduct is sufficiently similar to prior harassing behavior for continuing violation purposes. The undisputed fact that homophobic office talk continued into the limitations period, particularly when considered as part of the “totality of the circumstances” with the other discriminatory and harassing conduct identified by Officer Brome (*Light, supra*, 14 Cal.App.5th at p. 92), permits the conclusion that a

hostile work environment driven by animus towards Officer Brome's sexual orientation continued during the limitations period.<sup>8</sup>

The CHP again inappropriately argues that because Officer Brome's uncontested testimony on this point is consistent with the allegations in his complaint, it is somehow less credible. (RB, p. 40.) There is no law to support this nonsensical argument, nor is this Court permitted to make credibility determinations when faced with admissible evidence supporting Officer Brome, the non-moving party, particularly when that evidence stands uncontested. As such the CHP's argument should be rejected.<sup>9</sup>

Last, the CHP simply ignores the undisputed evidence that the Solano Area Office had a policy of displaying the photograph of the current Officer of the Year recipient for the following year, but that when Officer Brome received the award, nobody ever replaced the photograph of the previous year's winner with Officer Brome's photograph, even after he complained to supervisors about this obvious and public slight. (AOB, pp. 40-42.) The CHP does not—and cannot—dispute that the record evidence establishes that despite Officer Brome's complaints of unequal and

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<sup>8</sup> Respondent's reliance on *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 281, is misplaced, as Officer Brome does not contend that the ongoing homophobic comments are the sum total of the harassing conditions within the limitations period.

<sup>9</sup> Officer Brome also testified that, in 2014, he was not selected for a court officer position because he is gay, even though he was the most senior applicant. (AOB, p. 42.) The CHP contends that statements in the complaint and Government Claim that this may have happened before the limitations period demonstrate there is no factual dispute, despite no evidence he was denied the position before December 5, 2014. (RB, p. 42.) But when the "record is confused" as to when a relevant event occurred, an appellate court reviewing a summary judgment based on the statute of limitations may reasonably infer it occurred within the limitations period where there is some evidence supporting that position. (See *Dominguez, supra*, 168 Cal.App.4th at p. 725 fn. 9.)

discriminatory treatment, the previous winner's photograph was displayed "up until the day [Officer Brome] left Solano" on January 15, 2015, well within the limitations period. (AOB, p. 41 [citing 2 AA0306:1-9].)

The CHP's attempt to downplay this evidence fails. It first argues that there is no direct evidence that this particular conduct was motivated by discriminatory or retaliatory animus (RB, p. 41), but "[p]roof of discriminatory intent often depends on inferences rather than direct evidence." (*Nazir, supra*, 178 Cal.App.4th at p. 283.) Here, a reasonable jury could infer that the CHP's failure to correct the ongoing refusal to display Officer Brome's Officer of the Year photograph in the briefing room—in contravention of longstanding office tradition—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. (See *Dominguez, supra*, 168 Cal.App.4th at p. 723 [“Discriminatory behavior comes in all shapes and sizes, and what might be an innocuous occurrence in some circumstances may, in the context of a pattern of discriminatory harassment, take on an altogether different character....” (Citation.)”].)

The CHP also misunderstands the relevance of Officer Brome's testimony that the failure to display his photograph was similar in kind to earlier incidents where officers defaced his workspace and commendations because of hostility to his sexuality and in retaliation for his complaints about discrimination and harassment. (AOB, pp. 41-42.) This testimony is not cited as evidence of the subjective psychological harm Officer Brome suffered from this publicly belittling snub, but to show that the failure to display his Officer of the Year photograph is sufficiently similar in kind to unlawful discriminatory and harassing conduct that occurred outside the limitations period, which, particularly when coupled with the CHP's failure

to take corrective action in response to both this and prior complaints, constitutes a continuing course of conduct.

Finally, the CHP's argument that this denigrating insult could not have been motivated by discriminatory animus because Officer Brome was selected as Officer of the Year in the first place is wrong, and has been squarely rejected. (*Light, supra*, 14 Cal.App.5th at p. 93 [rejecting argument that employee's promotions and pay raises meant she could not have been subjected to adverse employment action].)

When this Court ignores the CHP's attempts at legal misdirection and applies the appropriate standard of review, as it must, the evidence in the record is more than sufficient to create a material factual dispute as to whether acts of sexual orientation discrimination, harassment, and retaliation continued on or after December 5, 2014, and that such unlawful conduct was sufficiently similar to the earlier misconduct that Officer Brome suffered during his employment with the CHP.

**3. There Is A Triable Issue Of Fact As To Whether The CHP's Actions While Officer Brome Was On Medical Leave Are Sufficiently Connected To The Earlier Unlawful Conduct.**

The CHP mischaracterizes Appellant's argument that there is sufficient evidence for a reasonable jury to conclude that the CHP's actions after Officer Brome began his medical leave of absence are part of a continuing course of unlawful conduct. First, the CHP incorrectly states that Officer Brome posits that Captain Dickson's January 16, 2015 letter is harassing simply because it was upsetting to him. (RB, p. 43.) But in fact, Officer Brome argues that the letter could be reasonably interpreted as harassing because the undisputed record evidence is that Captain Dickson's statement in the letter that "this is the first time Area has been advised of your stress issue" is patently untrue, as Officer Brome had repeatedly raised his concerns about sexual orientation harassment with Captain Dickson

directly. (AOB, p. 43.) Nor is Captain Dickson's self-serving and uncorroborated testimony that he was not motivated by discriminatory or retaliatory animus in sending the letter relevant (RB, pp. 43-44), as this Court may not accept Captain Dickson's testimony as true in reviewing a grant of summary judgment, especially in light of the reasonable alternate inference based on the text of the letter itself.<sup>10</sup>

Officer Brome's argument that the record permits the inference that the CHP may have purposefully interfered with his workers' compensation claim cannot be dismissed as a mere "conspiracy theory." (RB, p. 44). The CHP does not attempt to refute the evidence that would permit a reasonable jury to reach this conclusion (see AOB, pp. 44-45), other than by citing to Officer Brome's testimony that he does not know for certain whether the CHP interfered with his workers' compensation claim. (RB, p. 44.) But the practical fact is, one of the parties to the workers' compensation claim was responsible for providing the ten-year-old doctor's note to the State Compensation Insurance Fund, causing his workers' compensation claim to initially be denied, and it was not Officer Brome. As the record evidence demonstrates that the CHP had the motive and opportunity to interfere with Officer Brome's workers' compensation claim, a reasonable juror could certainly infer that the CHP provided the faulty doctor note, and there is no record evidence showing this was an honest mistake.

The CHP also asserts that its conduct while Officer Brome was on medical leave is different in kind from the earlier unlawful conduct. But

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<sup>10</sup> The CHP also improperly states that "the record refutes" the reasonable inference that Captain Dickson's letter is sufficiently connected to CHP management's history of failing to address Officer Brome's complaints to be part of a continuing course of conduct, baldly stating that the letter "was a unique communication that was unlike prior alleged CHP misconduct" without any supporting evidence, or even any argument. (RB, p. 43.)

the exact conduct within the limitations period need not have occurred earlier, so long as the evidence permits the reasonable inference that the misconduct within the limitations period was related to what was done outside the limitations period. (*Dominguez, supra*, 168 Cal.App.4th at p. 724; see *Accardi, supra*, 17 Cal.App.4th at pp. 350-51 [allegation that employer “filed false and misleading medical reports” interfering with leave sufficiently connected to on-the-job harassment of police officer].)

**B. There Is No Merit To The CHP’s Contention That The Discrimination, Harassment, And Retaliation Officer Brome Suffered Acquired Permanence Prior To The Expiration Of The Limitations Period.**

Apparently recognizing that the trial court’s “sufficiently similar” finding is not defensible, the CHP next attempts to justify summary judgment by contending that Officer Brome’s FEHA claims acquired permanence before expiration of the limitations period as a matter of law. This is wrong.

An employer’s unlawful conduct only acquires a degree of permanence once “an employer’s statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to ... end harassment would be futile.” (*Richards, supra*, 26 Cal.4th at p. 823.) This only occurs when the employer demonstrates “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.*) Here, the CHP’s words and actions gave Officer Brome reason to believe further efforts to informally resolve the discrimination and harassment would not be futile.

There is no dispute that Captain Dickson wrote Officer Brome a letter on January 16, 2015, within the limitations period, expressing concern and asserting that the CHP is “committed to provide a safe and healthy work environment that is free of discrimination and harassment ...

and want to work with you to that end.” (AOB, p. 46.) Captain Dickson personally represented that he “genuinely hope[s] you allow us the opportunity to work together to resolve your work-related issues.” (*Id.* at pp. 46-47.) The CHP makes no mention at all of this evidence (RB, pp. 46-49), perhaps because the only way it could conceivably address it is to say that a reasonable person in Officer Brome’s position should have known that the CHP was lying to him and that his only option was to file suit.

Instead, the CHP selectively cites to portions of the record it contends support the conclusion that Officer Brome’s claims achieved permanence earlier, while ignoring contrary evidence. The CHP relies heavily on the fact Officer Brome filed a DFEH complaint in 2003 while working at the Contra Costa Office (RB, pp. 46-47)—which a reasonable jury could easily conclude arose out of Officer Brome’s complaints that one specific supervisor in one specific office, Captain Maas, was sexually harassing him, as opposed to the broader hostile work environment claims spanning three CHP offices that form the basis for his FEHA claims (2 AA0315; 2 AA0317; 2 AA0254:14-AA0255:9). It then emphasizes one portion of a November 17, 2003 email where Officer Brome writes that “[i]t is very clear that the internal EEO process does not work. Therefore, I will be filing a DFEH complaint” (RB, p. 46), while conveniently ignoring that Officer Brome clarified less than a week later in a November 22, 2003 letter to the same supervisor that he did not believe it was futile to informally seek to end the harassment, noting that “I just want to work in an environment that is businesslike and free from sexual harassment. I just want to come to work and do my job.” (2 AA0317.) Despite the unsupported assertion that Officer Brome knew “that his relationship with the CHP had deteriorated to the point where he could no longer repair it” (RB, p. 46), Officer Brome’s uncontested testimony is that he did not sue after filing the DFEH complaint in 2003 because his “hope at the time was

that [the situation] would change and that the Department would actually take the complaint seriously and change the environment that I was working in.” (1 AA0178:2-16.)

The CHP also cites to informal complaints by Officer Brome after he transferred to Solano regarding the harassment and discrimination he suffered, arguing that the fact that the unlawful conduct continued for at least four years after his transfer from the Contra Costa Office meant that his FEHA claims achieved permanence by 2012 as a matter of law. (RB, pp. 47-48.) The CHP’s position appears to be that, because Officer Brome continued to make informal efforts to address the hostile work environment so that he could continue his career in law enforcement, rather than simply filing suit, his claims should be barred, even though the undisputed evidence is that the CHP continued to represent to Officer Brome that it was interested in resolving his concerns. (See 2 AA0298:10-23; 3 AA0556:3-AA0559:12; 3 AA0595:10-AA0596:4.) The CHP’s own words and conduct gave Officer Brome hope that it was possible to end the harassment informally, and he believed them. The law does not permit a finding of permanence in these circumstances.

The CHP relies entirely on three out-of-district opinions as legal authority, but each is an outlier, and none is analogous to this case.

First, as previously explained, the Second Appellate District’s opinion in *Jumaane* is not analogous (AOB, pp. 47-48), as the plaintiff expressly testified that, long before he filed his FEHA claims, “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, has never testified that he believed informal efforts would be futile. Indeed, Officer Brome tried for two decades to find a way to do his dream job serving the public with the CHP without being subjected to harassment and life-endangering discrimination because he is

gay. As he testified: “I wanted to go back to work. I love my job.” (2 AA0262:10-22.)

The CHP next cites a federal district court opinion, *Weeks v. Union Pacific Railroad Co.* (E.D. Cal. 2015) 137 F.Supp.3d 1204, 1225-26, which held the plaintiff did not establish permanence because there was four-year gap where no challenged conduct occurred, explaining that “the status quo remaining unchanged for a period of about four years shows a significant degree of permanence.” (*Id.* at p. 1226.) The CHP misleadingly quotes this to claim a “status quo” of ongoing discrimination and harassment similarly supports a finding of permanence (RB, pp. 47-48), when the *Weeks* court was pointing to a status quo where no allegedly unlawful conduct occurred. (See *Richards, supra*, 26 Cal.4th at p. 823 [permanence may be achieved upon employer’s cessation of challenged conduct].) Here, by contrast, the CHP’s misconduct never ceased, and pervaded every day of Officer Brome’s decorated career.

Finally, the CHP cites the Sixth Appellate District’s opinion in *Cucuzza v. City of Santa Clara*, holding the plaintiff’s FEHA claim for sex discrimination, alleging she had been denied job duties because of her sex, either reached permanence when her grievance seeking the return of the job duties was denied, or alternatively, when defendant reclassified her job to omit those duties. (*Cucuzza, supra*, 104 Cal.App.4th at pp. 1042-43.) Yet *Cucuzza* is inapposite, as it has nothing to do with ongoing discrimination and harassment. As the Supreme Court emphasized, “courts applying the continuing violation doctrine have tended toward a broader view of that doctrine when the cause of action involves ongoing harassment,” and are “inclined to find a continuing violation ... either concluding the employer’s actions had little ‘permanence’ or else giving little weight to the permanence factor.” (*Richards, supra*, 26 Cal.4th at p. 817.)

Employees should not be penalized for making a reasonable and sincere effort to pursue the career of their choice free of discrimination and harassment, or for ultimately filing suit to effectuate their rights should the employer fail to cure the illegal conditions. Officer Brome continued to make informal complaints about the pervasive harassment he was suffering to his supervisors throughout his employment with the CHP while trying to continue to protect and serve his community, up until the point where he was forced into early retirement after the horrendous conditions at the CHP drove him to seriously contemplate suicide. His CHP supervisor then sent Officer Brome a letter on January 16, 2015, days after he reached his breaking point and went out on stress leave, that promised Officer Brome the CHP wanted to work with him informally to resolve his concerns. This undisputed evidence more than supports the reasonable inference that the discrimination, harassment, and retaliation had not already acquired a degree of permanence outside the limitations period. To hold otherwise would require a determination that no reasonable person should have believed the CHP's promises to take steps to provide a work environment free of discrimination and harassment, and that the only reasonable response was to disbelieve the CHP and file suit.

### **III. OFFICER BROME RAISED A TRIABLE ISSUE OF FACT AS TO HIS CONSTRUCTIVE DISCHARGE CLAIM.**

This Court should also reverse the trial court's erroneous conclusion that Officer Brome could not establish as a matter of law that he was constructively discharged by the CHP's knowing refusal to address the intolerable working conditions that forced him into early retirement. Plaintiffs establish constructive discharge 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.” (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 (*Turner*).)

**A. The CHP Does Not Dispute That If There Is A Triable Issue Of Fact As To Whether Officer Brome Was Constructively Discharged, His FEHA Claims Accrue On The Date His Disability Retirement Commences.**

The CHP does not dispute that, in the event this Court agrees that there is a triable issue whether Officer Brome was constructively discharged when he took medical leave on January 15, 2015, his FEHA claims would not accrue until he began his industrial disability retirement on February 29, 2016, less than seven months before he filed his DFEH complaint on September 15, 2016, and well within the statute of limitations. (RB, pp. 49-53.) Respondent's Brief also does not dispute Appellant's analysis showing 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 occur. (*Ibid.*; see AOB, pp. 49-51 [discussing *Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293 (*Colores*)].) The CHP thus implicitly concedes that the trial court erred by focusing primarily on whether the working conditions met the constructive discharge standard “at the time of Plaintiff's retirement” (3 AA0683-AA0684), when the relevant inquiry should have been focused on the time that Officer Brome went out medical leave after becoming suicidal due to the hostile work environment at the CHP. (AOB, p. 51.)

**B. There Is A Triable Issue Of Fact As To Whether Officer Brome's Working Conditions Were Sufficiently Intolerable To Constitute A Constructive Discharge.**

Respondent's Brief, like the trial court's opinion, erroneously draws inferences and resolves 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. As discussed in detail in Part II.A., *supra*, the CHP consistently ignores record evidence that does not support its characterization of the facts, and impermissibly asks this Court to resolve ambiguities and view the evidence in the light favorable to its position. Here, the record evidence establishes that the conditions of Officer Brome’s employment—including daily refusals by fellow officers to back him up in dangerous situations in the field, the use of homophobic language, the continuing refusal to publicly display his Officer of the Year photograph, and the CHP’s ongoing failure to address Officer Brome’s complaints about the hostile work environment—were so objectively intolerable that Officer Brome became suicidal and was compelled to go out on medical leave and retire early. (See AOB, p. 52.)

The CHP emphasizes that Officer Brome testified that fellow officers first refused to back him up in 1998, asserting that a reasonable officer “would not have endured such alleged<sup>11</sup> conditions for 16 years before suddenly resigning.” (RB, p. 51.) To argue that it was unreasonable as a matter of law for Officer Brome to endure the routine failures of fellow officers to back him up for an extended period, the CHP asks this Court to ignore the record evidence that the cumulative effect of the years of harassment built up until they became so intolerable that he became actively suicidal. (See, e.g., 2 AA0308:4-13.) The CHP also points to testimony that the situation initially improved once he moved to the day shift several months into his stint in Solano, asserting it is “inconsistent” for Officer Brome to claim “that conditions subsequently deteriorated” (RB, p. 51), but this ignores the evidence that by the time Officer Brome left the

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<sup>11</sup> Once again, the CHP improperly describes Officer Brome’s undisputed testimony as an allegation, even though two CHP supervisors confirmed that the circumstances where officers refused to back Officer Brome up were dangerous. (3 AA0572:10-AA0575:19; 3 AA0593:4-20.)

CHP, his fellow officers were refusing to back him up on a daily basis, on every shift. Viewing the evidence in the light favorable to Officer Brome, as this Court must, there is nothing inconsistent about a situation that temporarily improved only to deteriorate again to the point where the working conditions became objectively intolerable.

While the CHP states that this case is “a far cry” from *Colores v. Board of Trustees*, it is not clear why the working conditions that plaintiff described—having her supervisory responsibilities reduced, being assigned four different supervisors in five months, and being given unnecessary and excessive assignments (*Colores, supra*, at p. 1310)—are more outrageous and egregious than the conditions Officer Brome experienced. The record here supports the reasonable inference that in the last weeks and months at Solano, conditions had worsened—with officers refusing to back up Officer Brome on a daily basis, and with CHP management continuing to ignore his concerns—both about this life-threatening ongoing situation and his other complaints about discrimination and harassment, including the intentional decision to break the tradition of publicly honoring Officers of the Year by refusing to display Officer Brome’s photograph, despite his complaints (see AOB, pp 40-42)<sup>12</sup>—and ultimately became so intolerable that Officer Brome was compelled to go out on medical leave and to retire early because his posttraumatic stress disorder caused by the CHP’s hostile work environment made it impossible for him to return.

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<sup>12</sup> In yet another example of the CHP’s attempts to downplay the record in contravention of the summary judgment standard, it describes this as “a single incident in which the CHP did not display his photograph sometime in 2014 ....” (RB, p. 52.) The fact is, this demeaning slight was never remedied, and the photo of the prior year’s winner still hung on the wall when Officer Brome was forced to take medical leave.

**C. There Is A Triable Issue Of Fact As To Whether The CHP Knowingly Permitted The Working Conditions That Compelled Officer Brome To Take Medical Leave.**

The CHP also incorrectly states that Officer Brome made no showing that his resignation was “coerced.” The CHP focuses on whether Officer Brome established that the CHP intentionally created the intolerable working conditions to try to force him to quit (RB, pp. 52-53), but he may also establish constructive discharge by showing that the CHP “knowingly permitted” intolerable working conditions. (*Turner, supra*, 7 Cal.4th at p. 1251.) As such, the fact that the *Colores* plaintiff presented evidence that her supervisor intentionally created conditions to try to force her to quit is of no moment. The only piece of evidence the CHP cites is the self-serving testimony of Captain Dickson that he took some action in response to Officer Brome’s complaints. (RB, p. 53.) It would be improper to accept this uncorroborated testimony as true at the summary judgment phase, particularly in the face of undisputed testimony by Officer Brome that his fellow officers continued to refuse to back him up on a daily basis, and that he was reprimanded for reporting one such incident in 2014 just months before his leave. (AB, pp. 16-17.)

The record evidence, viewed in a light favorable to Officer Brome, supports the reasonable inference that the CHP knowingly permitted the intolerable working conditions—Officer Brome repeatedly complained about the conditions discussed in Part II.A., *supra*, and the CHP took no action to address them. As such, the trial court erred in finding that there was no constructive discharge as a matter of law.

**IV. POLICY CONSIDERATIONS WEIGH IN FAVOR OF ALLOWING OFFICER BROME THE OPPORTUNITY TO PRESENT HIS CASE TO A JURY ON THE MERITS.**

In a last ditch attempt to argue for affirmance of the erroneous summary judgment, the CHP asserts that because statutes of limitations

serve important policy purposes, Officer Brome’s claims should be barred regardless of whether the Supreme Court’s equitable tolling and continuing violation doctrines would otherwise apply to save his claims. (RB, p. 54.) First, policy considerations can never outweigh the law and facts, both of which require reversal here. But even if they could, the Supreme Court expressly weighed the policy considerations favoring strict enforcement of statutes of limitations against other important policy considerations in creating these equitable doctrines. The Supreme Court determined that the important goals of “prevent[ing] 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” (*McDonald, supra*, 45 Cal.4th at p. 99), and of ensuring that the FEHA’s statute of limitations “be liberally construed ‘to safeguard the employee’s right to hold employment without experiencing discrimination’” (*Richards, supra*, 26 Cal.4th at p. 821), trump strict enforcement of statutes of limitations, and directed courts to allow claims to go forward so long as the elements of equitable tolling and the continuing violation doctrine are met.

The CHP subjected Officer Brome to decades of harassment, discrimination and retaliation because he is gay, to the point where he had no choice but to take medical leave because he had become actively suicidal. The psychological and emotional harm Officer Brome suffered at the hands of the CHP forced him to retire early from a job he loved. He has still not recovered to this day.

This Court should not allow the CHP to avoid responsibility for defending their actions on the merits before a jury, simply based on the CHP’s unwarranted claim that policy considerations require strict application of the statute of limitations at all costs. In establishing the equitable tolling and continuing violation doctrines, the Supreme Court

considered and rejected the CHP's extreme position in order to protect the rights of worthy plaintiffs like Officer Brome to their day in court.

### CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's summary judgment in favor of the CHP. Justice and equity require that Officer Brome be allowed the opportunity to present his case to a jury.

DATED: July 29, 2019

Respectfully submitted,

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**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 the attached brief is proportionally spaced, is set in Times New Roman 13-point type, and contains 13,985 words according to the Microsoft Word 2016 software used to prepare the brief.

DATED: July 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 July 29, 2019, I served true copies of the following document(s) described as:

**APPELLANT'S REPLY BRIEF**

on the Superior Court as follows:

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

**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 July 29, 2019, at San Francisco, California.

  
\_\_\_\_\_  
Karen Stilber