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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

STEVE KARAGIOSIAN, Plaintiff and Respondent, v. BURBANK POLICE DEPARTMENT, CITY OF BURBANK, Defendant and Appellant.	B243622 (Los Angeles County Super. Ct. No. BC414602)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joanne B. O'Donnell, Judge. Affirmed.

Carol A. Humiston, Senior Assistant City Attorney; Mitchell Silberberg & Knupp, Julianne M. Scott and Lawrence A. Michaels; Ballard Rosenberg Golper & Savitt and Linda Miller Savitt for Defendant and Appellant.

Law Offices of Rheuban & Gresen, Robert Corey Hayden and Solomon Gresen; Benedon & Serlin, Gerald M. Serlin and Douglas G. Benedon for Plaintiff and Respondent.

The City of Burbank (City) appeals from the judgment entered in favor of Steve Karagiosian following a trial during which the jury found Karagiosian, an Armenian, had been subjected to harassment based on national origin as an officer in the Burbank Police Department (BPD) in violation of the California Fair Employment and Housing Act (FEHA)[1] and awarded him $150,000 in damages. City also appeals from the post-judgment order awarding Karagiosian $719,527.50 in attorney fees.[2]

City contends the judgment must be reversed on the following grounds. First, Karagiosian's FEHA claim is time-barred, because the "continuing violation doctrine" is inapplicable. Second, the trial court committed prejudicial error by refusing to instruct the jury pursuant to City's proposed Special Instruction Numbers 15 ("occasional, isolated, sporadic, or trivial" acts of harassment are insufficient to prove harassment) and 18 (the law does not require "zero tolerance" of harassment). Third, the court erred in excluding a three-hour recording of Karagiosian's interview in the course of a BPD investigation of harassment. Fourth, the court abused its discretion by refusing to declare a mistrial based on accusations of BPD "profiling" made by Karagiosian and his attorney. City also challenges the $719,527.50 award of attorney fees as "wildly inflated" and an abuse of discretion. We disagree with City's contentions, and affirm the judgment.

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[1] Government Code section 12900 et seq. All further section references are to the Government Code unless otherwise indicated.

[2] These appeals are consolidated for purposes of argument and disposition.

BACKGROUND

I. *Factual Summary*

A. *Events Prior to March 2008 Investigation*

In July 2004, Karagiosian joined the BPD. He was first assigned as a day-shift officer for six months with a Field Training Officer (FTO), who instructed him in BPD policies and procedures. He became a full-time officer after another six months as a probationary officer.

Karagiosian was the only BPD officer who spoke Armenian. He was called upon regularly by other officers to assist with translation. Also, he would obtain information from sources within the Armenian community and "assist[ed] in complex investigations involving the Armenian community." Additionally, his superiors regarded Karagiosian as a BPD "ambassador" for "helpless victims" who otherwise were unable to communicate with the BPD.

Beginning with his initial BPD training, Karagiosian experienced a course of incidents by fellow officers using offensive Armenian stereotypes and displaying anti-Armenian bias. Mitchell Ross, his first FTO, drove Karagiosian to a house with "some sort of tile or marble in front" about a mile and a half outside Burbank, told him to look at the house, and asked: "Why do you guys live like this?" Karagiosian was "overwhelmed" and did not reply, not knowing what to say.

From July 2004 to about January 2005, while on probation or during training, Karagiosian overheard certain officers make comments to other officers while passing in the hallway. These comments were made in a "strong Armenian" accent by Officers Ross, Klienfeld, and Dahlia. "They would mimic the [Armenian] culture and say, 'My friend, 100 percent. My friend, 1,000 percent. My friend, why you come after me like speeding bullet for seat belt ticket.'" These comments offended Karagiosian.

During training, Karagiosian was approached in the hallway by Officer Stohl who asked, "'Have you heard the four C's?'" When he replied no, Stohl added "they were now up to seven C's" and explained the "C's" were "any words that started with [the letter 'C'] that represented Armenians," such as "cigars, cigarettes, colon, cell phones, cars." Although offended, Karagiosian did not complain, because he was "brand new" and, as a probationary officer, he could have been fired for "no reason" and for "no cause."

Karagiosian also heard Officers Kendrick, Garay, and Cutler make offensive comments using the word "'mo's,'" meaning a "combination" word with the letters "mo," such as "Armo." They would make comments such as "'towel,' 'f-ing towel,' 'towel heads,' . . . in different variations."

During his probation, Karagiosian heard officers, mainly Officer Cutler, make offensive comments referring to an arrested Armenian suspect as a relative of Karagiosian, e.g., "'I arrested your mother'"; "'I arrested your father'"; "'I arrested your sister, grandfather, grandmother'." During one incident when an officer said "'I arrested your grandfather,'" Sergeant Ryburn responded, "'Yeah, and he stinks.'"[3] Additionally, when Karagiosian's son was born on September 4, 2004, Sergeant Frank asked if he had bought his son a Sean John outfit, referring to a line of designer clothing stereotypically worn by Armenians.

In October 2005, when a BPD team was being deployed to assist during Oktoberfest in Glendale, Officer Buteyn remarked in Karagiosian's presence: "'It's going to take only one Armenian to fuck that up.'"

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[3] Although acknowledging the intoxicated arrestee emitted a strong odor, Karagiosian testified he believed the Sergeant, a supervisor, should have reported and investigated the officer's disparaging remark.

About July 2005, at the end of or just after probation, Sergeant Kelley once called Karagiosian "Sarkus," his middle name. Karagiosian was especially offended, because this name-calling was by a supervisor.

During that same period, Karagiosian received by work email a video "making fun of Armenians." Offended, he reported the video to Lieutenant Omar Rodriguez. No internal affairs investigation was conducted.

From about summer of 2005 until "probably January or February of 2007," Karagiosian found in his mailbox "some sort of Armenian cultural artifact," e.g., "Armenian flags, small boxing gloves with the Armenian flags on them, C.D.'s with Armenian singers, letters in Armenian." He did not report these incidents for fear of retaliation.

"[F]or a long period of time" until January or February 2007, comments disparaging Armenians were made primarily by Officers Kendrick, Cutler, Garay, and Anderson "to the effect of the way Armenians dressed, the way Armenians talk, the cars that they drive, type of clothing they wear, the houses they live in, the, you know, palaces, the columns in front of their houses." In one instance, in 2005, Sergeant Frank asked Karagiosian to show up at "roll call one morning wearing a baby blue Sean John outfit." He declined unless Frank ordered him to so. Frank declined.

Mostly, the offending officers mimicked "the talk of Armenians," and sometimes repeated at the station words they picked up on the street. Garay and Cutler, mimicking Armenian accents, made comments "like 'Vontus,' which means hello in Armenian, and sometimes they talked about 'Vontus felony,'" which Karagiosian speculated might mean "an Armenian guy that gets arrested for a felony."

About 2006, Karagiosian refused to work with the offending officers. In February 2007, he became an FTO. About that time, he overheard Kendrick,

a former FTO, comment to someone in the locker room that Karagiosian had been hired and promoted only because he was Armenian. Karagiosian reported this comment to Sergeant Penaranda. The offensive comments "pretty much" ceased after Karagiosian confronted Kendrick during FTO training in February 2007.

In about March or April 2007, after a training session on citing drivers not the vehicle's registered owner, Sergeant Yadon said, "'This is how you cite Armenians . . . when their vehicles don't register to them.'"

In August 2007, Karagiosian became an officer in the Special Enforcement Detail (SED), which assisted detectives in investigations.[4] Later that month, Ross, then a detective, asked an Armenian man whose wife had just been murdered (though he had not yet been told) whether he had a dog. When the man said no, Ross remarked: "So you don't have a typical American family." Karagiosian was offended and refused to translate the remark. Ross directed him to leave and said he would get someone else to translate.

b. *March 2008 Investigation*

In early March 2008, Mike Parrinello, president of the Burbank Police Officers Association (BPOA), received an anonymous letter from a member complaining of racial remarks and a hostile work environment. The letter identified certain officers, including Karagiosian, who had information.

On March 11, 2008, BPD Chief of Police Timothy Stehr received the letter. In response, he issued a memorandum to all BPD members

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[4] In May 2009, Karagiosian left SED and returned to patrol.

emphasizing City's and BPD's "Zero Tolerance Policy" towards harassment, discrimination, and retaliation.[5]

Karagiosian was interviewed by Irma Rodriguez Moisa, an outside attorney selected to investigate the harassment complaint. In her report, Moisa referred to certain assigned ethnic or race type comments made by officers Kendrick, Cutler, Garay, Klienfeld, and Buteyn and by Sergeants Frank and Yadon.

On May 20, 2008, Moisa forwarded the report to Stehr. Deputy Chief William Taylor, who managed BPD's anti-discrimination training, recommended that all the officers Karagiosian identified needed to be investigated. Stehr decided to investigate only Kendrik.[6] He ordered everyone in BPD to visit the Museum of Tolerance and attend a four-hour cultural sensitivity training session. Those identified by Karagiosian did not receive additional training.

Taylor agreed with the recommendation of Nayiri Nahabedian, who provided sensitivity training for BPD, that additional training was needed to address BPD's discrimination and harassment problems. Chief Stehr disagreed.

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[5] The policy admonished that any BPD employee "who engages in even a single act of harassment . . . in any form that is directed against another person on the basis of that person's . . . national origin . . . is subject to discipline, up to and including termination." Further, the memorandum stated "[a]ll reports or complaints of such conduct will be investigated promptly, fairly and thoroughly and appropriate action taken to punish any offenders and prevent future actions of this kind."

[6] Officer Cutler also was to be investigated, but he was transferred elsewhere.

Although Moisa represented the interview was confidential, several months later, almost everyone in BPD was aware of what Karagiosian had related. Within a month of the interview, Klienfeld, Ross, and Garay, then detectives, resumed harassing Karagiosian in the hallways of the detective bureau, mimicking an Armenian accent and making stereotypical Armenian comments, one of the first being "'my friend, 100 percent.'" Karagiosian reported the incidents to Sergeant Duran, who took him to Lieutenant Dermenjian, Duran's supervisor.

Karagiosian informed Dermenjian of the pattern of harassment he had been subjected to since joining BPD, including specific incidents. A couple of days afterward, Dermenjian advised Karagiosian that after he had communicated Karagiosian's concerns to Stehr, the chief decided not to investigate because the complaints would "be unsustained."

C. *January 2009 Investigation*

Sergio Bent, an outside attorney hired by City at BPD's request, conducted three separate interview of Karagiosian, the first of which lasted almost three hours. Karagiosian's principal complaint concerned Kendrick.

On January 27, 2009, Bent submitted his report based on his investigation of the misconduct allegations against Kendrick. Bent found Karagiosian to be a credible witness whose responses were direct and forthcoming. In contrast, he found Kendrick not very credible and not completely truthful.

Bent found true these allegations: (1) Kendrick was familiar with City's policy against discrimination and harassment; (2) he used the terms "towels" and "towel-heads," to refer generally to Armenians and "stupid towel" in particular to refer to Karagiosian; (3) Karagiosian had complained

to Sergeant Peranda that Kendrick had made comments during an FTO class that Karagiosian considered racial in nature; (4) after the arrest of an Armenian male, Kendrick told Karagiosian he had arrested one of Karagiosian's "cousins"; (5) Kendrick stated the only reason Karagiosian made FTO and received a position with SED was because he was Armenian; (6) Kendrick asked Karagiosian if the title to his car reflected the car was salvaged, a reference to another Armenian stereotype; and (7) Kendrick said Armenians speak "'gibberish.'"

Based on this report, Captain Lynch suspended Kendrick without pay for a 12-hour and 20 minute work period, but Kendrick was allowed to return to an officer position.

D. *February 2009 Incidents*

In February 2009, Karagiosian was subjected to three additional incidents based on his Armenian national origin. The first involved a BPD white board on which these three stereotypical Armenian statements appeared: "My friend . . . 100%"; "I tell you everything . . . 100%"; and "Sir, please, I beg you no problem." When a co-worker displayed this board to him, Karagiosian was offended. He showed the whiteboard to Lieutenant Rodriguez, his supervisor. Taylor and Captain Varner also viewed the white board, and a forensic specialist photographed the whiteboard at Taylor's direction. Karagiosian believed the matter would be handled appropriately.

Karagiosian, however, was not interviewed about the whiteboard. Although Taylor thought the whiteboard statements violated BPD's anti-harassment policy and necessitated an investigation, Stehr disagreed and refused to order one and responded those responsible would get a "comment card." Karagiosian learned that the detectives responsible "claimed" that the

statements were quotes from a suspect, and that they had told Chief Stehr that the white board was part of their investigation.

On February 25, 2009, the date of the second incident, Karagiosian, then a SED officer, asked Ross, then a detective, in the latter's office what he meant when he referred to an Armenian female who had been shot as "'N.H.I.'" Ross responded: "'No Humans Involved.'" Karagiosian felt the victim would not get a fair investigation.

On February 26, 2009, the third incident occurred. During an interview, Detective Howell told an Armenian suspect something like: "I know you're scared right now. You can't even tell me the truth. Especially in Burbank, there are White people, and they don't like it when you come to their house and kill them in the middle of the night, so you'd better think real hard before you go downstairs and rot for 25 years." Karagiosian, who was offended, reported Howell's "White people" comments to Sergeant Gunn and also to Dermenjian. Karagiosian was not interviewed by BPD until March or April 2010, and after Stehr was replaced by Chief Lachasse.

II. *Procedural Summary*

Karagiosian filed a complaint with the Department of Fair Employment and Housing (DFEH), and received a right-to-sue letter, on May 28, 2009. The same day, he filed his FEHA action for damages. Karagiosian, along with four fellow BPD officers whose unrelated claims were later severed and are not involved in this appeal, filed this action alleging, as here relevant, causes of action under FEHA for harassment based on Armenian national origin (second cause of action) and City's failure to prevent such

harassment (fifth cause of action).[7] The jury returned a verdict for Karagiosian on his national origin harassment claim, and for City on the claim that it failed to prevent such harassment.

In its special verdict, the jury made these express findings in favor of Karagoisan on his harassment claim: (1) on or after May 27, 2008, Karagiosian was "subjected to unwanted harassing conduct because he is Armenian"; (2) he also was "subjected to unwanted harassing conduct because he is Armenian before May 27, 2008, which conduct was all of the following: (a) similar in kind to the conduct occurring on or after May 27, 2008; (b) occurred with reasonable frequency; and (c) had not become permanent"; (3) such harassing conduct was "committed by a non-supervisor, and: (a) [BPD], its supervisors, or its agents knew or should have known [of] such conduct; and (b) [BPD], its supervisors or its agents failed to take immediate and appropriate corrective action"; (4) the harassing conduct was "severe or pervasive"; (5) "a reasonable person in . . . Karagiosian's circumstances [would] have considered the work environment to be hostile or abusive"; (6) Karagiosian "consider[ed] the work environment to be hostile or abusive"; and (7) "the harassing conduct [was] a substantial factor in causing harm to . . . Karagiosian."

In returning a verdict for City on the remaining cause of action, the jury found that City did not fail "to take reasonable steps to prevent harassment from occurring."

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[7] The court granted City's motion for summary adjudication as to Karagiosian's first, third, and sixth causes of action (FEHA claims for, discrimination and retaliation, and a claim under the Peace Officer's Bill of Rights Act (§§ 3300, et seq.) The motion was denied as to the seventh cause of action for injunctive relief. However, because the judgment does not include such relief we do not discuss that claim.

On the issue of damages, the jury expressly found: (1) Karagiosian's damages were $225,000; (2) he "could have avoided some or all of his damages if he had used [BPD]'s harassment complaint procedures"; and (3) $75,000 is the amount of damages he could have avoided if he had used such procedures. Based on these findings, the court entered judgment in favor of Karagiosian for $150,000. Later, the court awarded Karagiosian $719,527.50 in attorney fees and $20,085.13 in costs.

DISCUSSION

I. *FEHA Claim Timely Under Continuing Violations Doctrine*

City contends Karagiosian's FEHA claim is barred by the applicable statute of limitations. We disagree. Substantial evidence supports the jury's finding that his FEHA claim was timely under the continuing violation doctrine.

A. *Standard of Review*

"A challenge in an appellate court to the sufficiency of the evidence is reviewed under the substantial evidence rule. [Citations.] '"Where findings of fact are challenged on a civil appeal, we are bound by the 'elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court." [Citation.]' [Citations.]

"Moreover, we defer to the trier of fact on issues of credibility. [Citation.] '[N]either conflicts in the evidence nor "'testimony which is subject to justifiable suspicion . . . justif[ies] the reversal of a judgment, for it is the exclusive province of the [trier of fact] to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.'" [Citations.] Testimony may be rejected only when it is inherently improbable or incredible, i.e., "'unbelievable *per se*,'" physically impossible or "'wholly unacceptable to reasonable minds.'" [Citations.]' [Citation.]" (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968.)

B. *Continuing Violation Doctrine*

As here relevant, to bring a civil action for damages under FEHA, a plaintiff must file an administrative claim with DFEH within one year from the date of the occurrence of the alleged unlawful practice. (§ 12960, subd. (d); see also, *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492.) Here, Karagiosian filed his DFEH complaint on May 28, 2009.[8] At trial, City raised a statute of limitations defense, because much of the alleged harassing conduct on which Karagiosian relied occurred before May 27, 2008, more than one year before he filed his DFEH complaint.

In response, Karagisoian relied on the "continuing violation" doctrine. Under that doctrine, an employer is liable "for unlawful employer conduct occurring outside the statute of limitations [i.e., more than one year before

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[8] A plaintiff also must file his civil action within one year from the date of the notice to sue. (§ 12965, subd. (b).) That limitation period is not in issue here, since Karagiosian filed his suit on May 28, 2009, the same day he received his right to sue letter (also the same day he filed his DFEH complaint).

the filing of the DFEH complaint] if it is sufficiently connected to unlawful conduct within the limitations period [i.e., within one year of filing the DFEH complaint]." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 802 (*Richards*).) "'Cases alleging a hostile work environment due to racial or sexual harassment are often found to come within the continuing violations framework.'" (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 270.) The rule is no less applicable to a case, such as presented here, involving harassment based on national origin.

The continuing violation doctrine has three prongs. The employer's pattern of unlawful actions: "(1) [must be] sufficiently similar in kind—recognizing . . . that similar kinds of unlawful employer conduct, such as acts of harassment . . . , may take a number of different forms [citation]; (2) [must] have occurred with reasonable frequency; (3) and [must not have] acquired a degree of permanence. [Citation.]" (*Richards, supra*, 26 Cal.4th at p. 823.) The concept of "permanence" means "that an employer's statements and actions made clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile." (*Ibid*.) Assuming these three requirements are met, as long as at least one act in the pattern of unlawful conduct occurred within the limitation period—that is, within one year of the DFEH complaint—the employer may be liable for the entire course of conduct, including acts occurring before the limitation period.

In short, "when an employer engages in a continuing course of unlawful conduct under the FEHA by . . . engaging in . . . harassment, and this course of conduct does not constitute a constructive discharge, the statute of limitations begins to run, not necessarily when the employee first believes that his or her rights may have been violated, but rather, *either* when the

course of conduct is brought to an end, as by the employer's cessation of such conduct or by the employee's resignation, *or* when the employee is on notice that further efforts to end the unlawful conduct will be in vain." (*Richards, supra*, 26 Cal.4th at p. 823; accord, *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1059.)

C. *Harassment Within the Limitations Period*

City first contends that substantial evidence does not support the continuing violation doctrine, because no words or conduct constituting "harassment" occurred within the limitation period, that is, after May 27, 2008. We disagree.

1. *Harassment Defined*

Within the meaning of FEHA, "harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. Harassment is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job." (*Reno v. Baird* (1998) 18 Cal.4th 640, 645-646.) An ongoing course of harassing conduct creates a hostile or abusive work environment in violation of FEHA when such conduct is severe enough or sufficiently pervasive to alter the conditions of employment adversely to the plaintiff. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283-284 (*Lyle*).) Such conduct may consist of physical contact, audio comments, or visual images which "communicates an offensive message to the harassed employee." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706.)

The plaintiff "'must prove that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-being of a reasonable employee . . . .'" (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 130–131.) The actionable harassment, which "'cannot be occasional, isolated, sporadic, or trivial,'" must consist of "'a concerted pattern of harassment of a repeated, routine or a generalized nature.'" (*Id*. at p. 131.) The severity or pervasiveness of the harassing conduct "must be assessed from the 'perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff.'" (*Nazir v. United Airlines, Inc., supra,* 178 Cal.App.4th at pp. 263–264.)

2. *February 2009 Incidents*

Karagiosian identified three incidents of alleged harassment that occurred in February 2009. The first involved statements written on a white board in the Detective Bureau. Around the time of the investigation of the so-called Jacaranda Murder in Burbank, Karagiosian observed a white board in the Detective Bureau. Written on it were stereotypical Armenian statements: "My friend . . . 100%"; "I tell you everything . . . 100%"; and "Sir, please, I beg you no problem." Although Karagiosian later learned that other officers claimed these statements were purportedly quotes from a suspect, the statements were very similar to the comments that Karagiosian had reported in 2005, and that had occurred again in 2008. Although Assistant Chief Taylor thought the whiteboard statements violated BPD's anti-harassment policy and necessitated an investigation, Chief Stehr disagreed and responded those responsible would get a "comment card."

In the second incident, Karagiosian was with Ross in Ross's office when Ross referred to an incident in which a female Armenian had been shot as "N.H.I." Karagiosian asked what he meant. Ross responded: "'No Humans Involved.'"

In the third incident, which occurred the next day, Karagiosian was interpreting during an interrogation of an Armenian suspect in the same killing. Detective Howell said to the suspect something like: "I know you're scared right now. You can't even tell me the truth. Especially in Burbank, there are White people, and they don't like it when you come to their house and kill them in the middle of the night, so you'd better think real hard before you go downstairs and rot for 25 years."

3. *Lyle, supra,* 38 Cal.4th 264

City argues that under *Lyle, supra,* 38 Cal.4th 264, none of the February 2009 conduct qualifies as harassment under FEHA, because each "involved nothing more than an officer making a comment, relating in some way to a criminal suspect who happened to be Armenian." *Lyle* compels no such conclusion.

In *Lyle,* the plaintiff, who was a comedy writer's assistant on the television show *Friends,* sued three of the male comedy writers on the show and others, alleging that "the writers' use of sexually coarse and vulgar language and conduct, including the recounting of their own sexual experiences, constituted harassment based on sex" under FEHA. (*Lyle, supra*, 38 Cal.4th at p. 272.) In its summary of its holding affirming a grant of summary judgment, the Supreme Court stated in part: "[T]he record discloses that most of the sexually coarse and vulgar language at issue did not involve and was not aimed at plaintiff or other women in the workplace.

Based on the totality of the undisputed circumstances, particularly the fact the *Friends* production was a creative workplace focused on generating scripts for an adult-oriented comedy show featuring sexual themes, we find no reasonable trier of fact could conclude such language constituted harassment directed at plaintiff because of her sex within the meaning of the FEHA. Furthermore, to the extent triable issues of fact exist as to whether certain offensive comments were made about women other than plaintiff because of their sex, we find no reasonable trier of fact could conclude these particular comments were severe enough or sufficiently pervasive to create a work environment that was hostile or abusive to plaintiff in violation of the FEHA." (*Ibid.*)

From this holding, City extrapolates three principles: (1) to qualify as harassment based on national origin (Armenian), the conduct must be harassment "because of" national origin; (2) also, the conduct must be "directed or aimed at" the plaintiff; and (3) like the creative process in *Friends*, use of vulgar language is a "natural element" of police work when referring to suspects and crimes, and thus "[s]uch conduct within a Police Department does not qualify as 'harassment' of fellow police officers, even if the suspect in a particular instance happens to be of the same ethnicity as the fellow police officer."

City misunderstands *Lyle's* reasoning. In part, City appears to argue that under *Lyle,* unless an offensive comment based on national origin is literally "directed or aimed at" the offended employee or a co-employee—meaning that it is a comment which, by its literal content, is made to such a person or about such a person—it cannot qualify as harassment "directed or aimed at" the employee. However, as *Lyle* recognizes, "'To state that an employee must be the direct victim of the sexually harassing conduct is

somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee.' [Citation.] Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. [Citations.] A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment.' [Citation.] [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. [Citation.] The reason for this is obvious: if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect . . . her perception of the hostility of the work environment.' [Citation.]" (*Lyle, supra*, 38 Cal.4th at pp. 284-285.)

In *Lyle,* the court distinguished the plaintiff's case from *Ocheltree v. Scollon Productions*, *Inc.* (4th Cir. 2003) 335 F.3d 325,328-329, in which, as described by *Lyle,* "the plaintiff's male coworkers [in a costume production shop] engaged in a daily stream of sexually explicit discussions and conduct: they spoke in crude terms of their sexual exploits with their wives and girlfriends; they used a female-form mannequin to demonstrate sexual techniques; one sang a vulgar song to the plaintiff; and another showed the plaintiff a magazine with graphic photographs of men with pierced genitalia to get her reaction. [Citation.] In that case, the appellate court affirmed an award of compensatory damages to the plaintiff because '[a] reasonable jury

could find that much of the sex-laden and sexist talk and conduct in the production shop was aimed at [the plaintiff] because of sex—specifically, that the men behaved as they did to make her uncomfortable and self-conscious as the only woman in the workplace.' [Citation.] [¶] Unlike the situation presented in *Ocheltree*, the record here reflects a workplace where comedy writers were paid to create scripts highlighting adult-themed sexual humor and jokes, and where members of both sexes contributed and were exposed to the creative process spawning such humor and jokes. In this context, the defendant writers' nondirected sexual antics and sexual talk did not contribute to an environment in which women and men were treated disparately. Moreover, there was nothing to suggest defendants engaged in this particular behavior to make plaintiff uncomfortable or self-conscious, or to intimidate, ridicule, or insult her, as was the case in *Ocheltree*." (*Lyle, supra*, 38 Cal.4th at p. 288.)

Properly understood, under the reasoning of *Lyle,* when the plaintiff is subjected to offensive comments in the workplace based on national origin that are directed or aimed at a third party, the question whether those comments can constitute harassment turns on whether the evidence supports a finding that the comments were made to offend the plaintiff (who is of that national origin) and were part of a pattern sufficiently pervasive or severe to alter the conditions of employment. While the nature of the workplace is certainly a relevant consideration, *Lyle's* reasoning does not make any particular workplace immune from a finding of harassment, including any police department where offensive comments about suspects or crimes based on national origin might be common.

In the present case, as we explain, substantial evidence supports a finding that the February 2009 incidents constituted harassment, in that

Karagiosian personally witnessed the offensive conduct, and such conduct was intended to offend him or make him uncomfortable as an Armenian.

4. *Substantial Evidence of Harassment in February 2009*

According to City, the incident in which statements were written on a white board in the Detective Bureau did not rise to the level of harassment because it involved "nothing more than a detective quoting what a suspect had said." However, City relies on a misstatement of Karagiosian's testimony. City asserts that "Karagiosian learned that these were quotes from a suspect." To the contrary, Karagiosian testified only that he "learn[ed] . . . the officers [who wrote the statements] *claimed* that these were quotes from a suspect." (Italics added.) Of course, the jury was free to draw its own conclusion whether the officers' claim was true. Other evidence suggested it was not.

The comments were extremely similar to comments made by Officers Ross, Klienfeld, and Dahlia in the hallway at the police station from July 2004 to approximately January 2005. Those officers would mimic Armenian speech patterns and say, "My friend, 100 percent. My friend, 1000 percent. My friend, why you come after me like speeding bullet for seat belt ticket.'" The statements on the board were likewise very similar to statements made by Klienfeld, Ross, and Garay in the hallways in 2008 ("my friend, 100 percent"). Further, it was common knowledge in BPD that in March 2008, Karagiosian had told Irma Moisa, who was investigating alleged harassment with in BPD, about such comments. Also, although Chief Stehr disagreed, Assistant Chief Taylor thought the whiteboard statements violated BPD's anti-harassment policy and necessitated an investigation. From this evidence, the jury could reasonably conclude that the statements on the

board were not quotes made by a suspect or related to any investigation, but rather were statements using offensive Armenian stereotypes, intended to be seen by and offend Karagiosian.

Similarly, substantial evidence supports a finding that Ross's use of the acronym "N.H.I." qualified as harassment based on Karagiosian's national origin. Ross was one of the main perpetrators of prior incidents of harassment, repeatedly making offensive, stereotypical Armenian comments from July 2004 to approximately January 2005, and beginning again in March 2008. The jury could reasonably infer that, in using the acronym "N.H.I.", meaning "no human involved," in Karagiosian's presence in February 2009, Ross fully understood that the meaning of the term would offend Karagiosian (Ross was referring to an Armenian murder victim as N.I.H.), and that Ross intended to offend Karagiosian or make him uncomfortable.

Finally, in the last of the February 2009 incidents, Karagiosian was interpreting during an interrogation of an Armenian suspect in the same killing. Detective Howell said something like: "I know you're scared right now. You can't even tell me the truth. Especially in Burbank, there are White people, and they don't like it when you come to their house and kill them in the middle of the night, so you'd better think real hard before you go downstairs and rot for 25 years." The comment implied that as an Armenian, the suspect had reason to fear the reaction of white people to the crime, based on the suspect's status as an Armenian. Given the history of offensive comments to which Karagiosian was subjected beginning in July 2004, which evidenced an environment of hostility to Armenians, the jury could reasonably infer that Detective Howell knew that Karagiosian, who was

interpreting, would be uncomfortable hearing the comment, and that Howell at least in part intended that result.

Finally, to the extent City contends that the February 2009 incidents cannot constitute harassment under the continuing violation doctrine because they were not sufficiently severe or pervasive in themselves to alter the conditions of the workplace, City is mistaken. As we have explained, for purposes of the continuing violation doctrine, the relevant point is that acts of the harassment occur within the limitation period that are sufficiently connected to acts occurring outside the limitations period. It is not necessary that the particular acts within the limitation period be adequate in themselves to alter the conditions of employment. That issue requires consideration of the entire pattern of harassment, both within and outside of the limitations period. Considered in light of the harassing conduct that preceded the February 2009 incidents, substantial evidence supports a finding that the February 2009 incidents, in context, were sufficiently severe or pervasive to alter the conditions of employment and create an abusive or hostile work environment.

Thus, we conclude that substantial evidence shows that the February 2009 incidents constituted harassment sufficient to satisfy the continuing violation doctrine regarding the pattern that began in July 2004, assuming the other requirements of the doctrine are met.

D. *Similarity in Kind*[9]

City argues that the February 2009 incidents were not similar in kind to the earlier harassment on which Karagiosian relied. Of course, as we have noted, the comments on the white board were extremely similar to comments made by Officers Ross, Klienfeld, and Dahlia in the hallway at the police station from July 2004 to approximately January 2005, and those made by Klienfeld, Ross, and Garay in the hallways in 2008. Further, there was a consistent theme in all of the conduct and statements on which Karagiosian relied: use of Armenian stereotypes to denigrate Armenians in general and Karagiosian in particular.

Thus, while Karagiosian was in training after joining BPD in July 2004, Officer Stohl explained to him the "seven C's," referring to words describing stereotypical Armenian possessions such as "cigars, cigarettes, colon, cell phones, cars." Also during training, referring to a house with

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[9] At trial, the evidence was undisputed that an officer holding the rank of sergeant in BPD is a supervisor. In his testimony, Karagiosian identified certain incidents of harassment by sergeants: (1) when an officer told Karagiosian that he had arrested Karagiosian's "grandfather," Sergeant Ryburn said, "Yeah, and he stinks" (2) Sergeant Frank (in separate incidents) asked Karagiosian if he had bought his son a Sean John outfit, asked Karagiosian to come to roll call in a baby blue Sean Jean outfit, and referred to him as "Sarkus"; and (3) Sergeant Yadon said, "This is how you cite Armenians . . . when their vehicles don't register to them." However, in its special verdict, the jury answered "No" to the following question: "Was any of the harassing conduct which you found to exist in response to questions 1 [referring to the finding of harassment on or after May 27, 2008] or 2 [referring to the finding of harassment before May 21, 2008] committed by a supervisor?" Given the "no" finding in response to this question, it appears the jury concluded that either these incidents did not occur, or that, if they did occur, they did rise to the level of harassment based on Karagiosian being Armenian. Thus, in discussing the evidence of harassment, we do not mention these incidents, as it appears the jury disregarded them.

marble decoration, Officer Ross asked Karagiosian, "Why do you guys live like this?"

From July 2004 to approximately January 2005, Officers Ross, Klienfeld, and Dahlia made the offensive comments in the hallway that we have already described. Around that time, Officers Kendrick, Garay, and Cutler would use the letter combination, "mo," from the derogatory term "Armo," to make words, and would make comments such as "'towel,' 'f-ing towel,' 'towel heads,' . . . in different variations." Officer Cutler would refer to arrested Armenian suspects as relatives of Karagiosian (e.g., "'I arrested your grandfather'").

In that same time frame, Karagiosian received in his work email a video "making fun of Armenians." He reported the incident to Lieutenant Rodriguez, but no investigation was conducted. In October 2005, deployed to assist during Oktoberfest in Glendale, Karagiosian heard Officer Buteyn remark, "'It's going to take only one Armenian to fuck that up.'"

Into January or February 2007, Officers Kendrick, Cutler, Garay, and Anderson made repeated comments disparaging Armenians and their lifestyle (dress, cars, homes, etc.). In an Armenian accent, they would also use Armenian diction and or Armenian words they heard on the street (e.g., Garay and Cutler would use the word "Vontus," which is hello in Armenian, and would refer to a "Vontus felony").

Besides this recurrent pattern of offensive comments by fellow officers, from about summer of 2005 until around January or February 2007, someone would leave Armenian cultural items in Karagiosian's mailbox, such as Armenian flags and small boxing gloves displaying the Armenian flags.

Around February 2007, Karagiosian overheard Kendrick tell another officer in the locker room that Karagiosian had been hired and promoted only

because he was Armenian. In March or April 2007, after a training session on citing drivers not the vehicle's registered owner, Sergeant Yadon said, "'This is how you cite Armenians . . . when their vehicles don't register to them.'"

In August 2007, Ross, then a detective, was interviewing the husband of a woman who had murdered (though he had not yet been told) and Karagiosian was translating. Ross asked the man about how many children he had, and then whether he had a dog. When the man said no, Ross remarked: "So you don't have a typical American family." Karagiosian refused to translate the remark. Ross said he could leave and he would find someone else to translate.

In short, the evidence leaves no doubt that the February 2009 incidents were similar in kind to the harassing acts that preceded them.

E. *Reasonable Frequency*

City argues, in substance, that as a matter of law, the February 2009 incidents were isolated occurrences, not part of a reasonably frequent pattern, because there was a year-long hiatus in harassment after February 2007. We disagree.

Although Karagiosian testified that the harassment "pretty much" ceased in February 2007 after he confronted Kendrick about his comment that Karagiosian had been hired and promoted only because he was Armenian, the evidence showed that the harassment occurred into August 2007. As we have noted above, in August 2007, Ross told Karagiosian he could leave for refusing to translate Ross's comment to an Armenian murder victim's husband (the absence of a dog meaning "you don't have a typical American family").

In any event, although it is true that the harassment ceased for a period of time, Karagiosian testified he tried to get assigned somewhere he would not have to work with the harassing officers. In February 2007, he became an FTO. After the August 2007 incident, he was transferred to SED (he did not return to patrol until May 2009).

However, from March 2008 to May 20, 2008, when her report was issued, Irma Moisa conducted her investigation of harassment within BPD. Shortly after his interview in March 2008, the contents of Karagiosian's interview became known by other BPD officers, and the verbal harassment by Klienfeld, Ross, and Garay resumed. In determining whether the resumption of harassment in March 2008 can be considered connected to the harassment that ceased in August 2007, such that the February 2009 incidents are part of that resumed harassment, the question of reasonable frequency, as with the concept of the continuing violation doctrine as a whole, "'boils down to whether sufficient evidence supports a determination that the "alleged discriminatory acts are related closely enough to constitute a continuing violation."'" (*Green v. Los Angeles County Superintendent of Schools* (9th Cir. 1989) 883 F.2d 1472, 1480-1481.) Here, the 2008 acts were extremely similar to acts of harassment that had consistently occurred beginning in July 2004. Some of the same officers were involved in the 2008 harassment—Klienfeld, Ross, and Garay. Further, the 2008 harassment grew out of the earlier harassment, in that the 2008 harassment occurred only after the details of Karagiosian's interview with Moisa became known (in which he complained of the earlier harassment). The timing of the 2008 harassment suggested that the offending officers were using the same type of offensive language Karagiosian had complained of to harass him, and as a protest of, or negative reaction to, the investigation.

Given the close relationship of content and perpetrators and the long history of harassment, the jury could reasonably infer that although in August 2007 there was a cessation of harassment until March 2008, that cessation was merely temporary, and the resumption of harassment in 2008 was simply a continuation of the earlier pattern of harassment after a temporary lull, with the pattern culminating in the February 2009 incidents. In short, substantial evidence supports a finding that that the resumption of harassment in March 2008 was part of a reasonably frequent pattern that began in 2004 and ended in February 2009.

F. *City's Knowledge of Pre-2008 Violations*

The jury found in part that Karagiosian had been subjected to harassment before May 27, 2008 committed by a "non-supervisor," and that "(a) [BPD], its supervisors, or its agents knew or should have known [of] such conduct; and (b) [BPD], its supervisors or its agents failed to take immediate and appropriate corrective action." City contends the evidence is insufficient to show City knew or should have known of the any harassment before March 2008, when the anonymous letter complaining of harassment was referred to Chief Stehr. We disagree.

"'When the harasser is a nonsupervisory employee, employer liability turns on a showing of negligence (that is, the employer knew or should have known of the harassment and failed to take appropriate corrective action).' [Citation.]" (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 952.) Around July 2005, Karagiosian received by work email a video "making fun of Armenians." He reported the video to Lieutenant Rodriguez and forwarded it to him and others in the Department. On one occasion, Sergeant Ryburn was present when an officer, referring to an Armenian arrestee, told

Karagiosian, "I arrested your grandfather."[10] In addition, in February 2007, after Kendrick's remark that Karagiosian had been hired and promoted only because he was Armenian, Karagiosian reported the remark to Sergeant Penaranda. Officers holding the rank of sergeant and lieutenant are supervisors in BPD, responsible for reporting and investigating misconduct. From this evidence that before March 2008 supervisors had been informed of these incidents, the jury could reasonably conclude that as early as July 2005 (when Karagiosian contacted Lieutenant Rodriguez about the offensive video and sent him a copy), City (through BPD supervisors) was aware of, or at the very least should have been aware of, the pattern of offensive language and conduct directed at Armenians in general and Karagiosian in particular. Thus, City's challenge to the jury's findings applying the continuing violation doctrine fails.

II. *Special Instructions Refusal*

City contends the trial court committed prejudicial error by refusing to give its Proposed Special Instructions Numbers 5 and 18 (Numbers 5 and 18, respectively). We disagree.

Upon request, a party is entitled "to correct, nonargumentative instructions on every theory of the case advanced by [that party] which is supported by substantial evidence." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) Nonetheless, "[i]t is not error, of course, [for the trial court] to refuse to give an instruction requested by a party when the legal

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[10] The jury's apparent finding that Sergeant Ryburn did not engage in harassment in the incident (see fn. 9, *ante*) does not constitute a finding that the officer's comment was not made, or that Ryburn was not present and heard the comment. Therefore, we consider that evidence, and the inference that Ryburn was aware of the remark.

point is covered adequately by the instructions that are given." (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1189, fn. 11.)

City's Number 5 would have instructed on "severe or pervasive" harassment, as follows: "In determining what constitutes 'severe or pervasive' harassment, the acts of harassment cannot be occasional, isolated, sporadic, or trivial. Rather, Mr. Karagiosian must prove a concerted pattern of harassment of a repeated, routine or generalized nature." The proposed instruction was based on *Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 465-467 (*Etter*), which found no error in including similar language in the instruction defining severe or pervasive conduct.[11]

We find no error in refusing to give Number 5, because the principles of Number 5 were adequately covered by CACI instructions given by the court. CACI No. 2521A instructed the jury that the burden rested with Karagiosian to prove the harassing conduct was "severe or pervasive." CACI No. 2524, requested by both parties, instructed the jury on the definition of "severe or persuasive," as follows: "'Severe or persuasive' means conduct that alters the conditions of employment and creates a hostile or abusive work environment. [¶] In determining whether the conduct was severe or pervasive, you should

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[11] In *Etter,* the jury was instructed: "'In order to find in favor of Plaintiff on his claim of race harassment, you must find that Plaintiff has proved by a preponderance of the evidence that the racial conduct complained of was sufficiently severe or pervasive to alter the conditions of employment. *In order to find that racial harassment is "sufficiently severe or pervasive[,]" the acts of racial harassment cannot be occasional, isolated, sporadic, or trivial.* The circumstances which you may consider include the following: [¶] 1. The frequency of the racial conduct; [¶] 2. The severity of the racial conduct; [¶] 3. Whether the racial conduct was physically threatening or humiliating, or a mere offensive utterance; and [¶] 4. Whether the racial conduct unreasonably interfered with Plaintiff's work performance.'" (*Etter, supra*, 67 Cal.App.4th at pp. 465-466, italics added.)

consider all the circumstances. You may consider any or all of the following: [¶] (a) The nature of the conduct; [¶] (b) How often and over what period of time, the conduct occurred; [¶] (c) The circumstances under which the conduct occurred; [¶] (d) Whether the conduct was physically threatening or humiliating; [and] [¶] (e) The extent to which the conduct unreasonably interfered with an employee's work performance." These instructions are correct statements of law. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609-610.)

"A party is not entitled to have the jury instructed in any particular language so long as the instructions given correctly state the law." (*Hom v. Clark* (1963) 221 Cal.App.2d 633, 643.) *Etter* found no error in including language similar to Number 5 in the definition of severe or pervasive harassment. It reasoned that the language "was consistent with the legal standard" on which the jury had been correctly instructed—that the jury must find "'severe or pervasive' harassment," and should consider the "factors . . . for evaluating [the employer's] conduct, including the frequency of the conduct and whether the racial conduct was physically threatening or humiliating or merely an offensive utterance." (*Etter, supra*, 67 Cal.App.4th at pp. 466, 467.) However, *Etter* did not hold that it was error to exclude such language, or that the standard language of the CACI instructions is incomplete.

Indeed, CACI 2521A and 2524 implicitly include the concepts stated in Number 5 and *Etter,* i.e., that occasional, isolated, sporadic, or trivial incidents are not enough to prove severe or pervasive harassment. Under the CACI instructions, Karagiosian had the burden to prove the harassing conduct was severe or pervasive, meaning that it altered the conditions of his employment and created a hostile or abusive work environment. The jury

was directed to consider all relevant circumstances—"(a) The nature of the conduct; [¶] (b) How often and over what period of time, the conduct occurred; [¶] (c) The circumstances under which the conduct occurred; [¶] (d) Whether the conduct was physically threatening or humiliating; [and] [¶] (e) The extent to which the conduct unreasonably interfered with an employee's work performance."

These instructions necessarily and implicitly included the notion that mere occasional, isolated, sporadic, or trivial incidents were inadequate—the harassment had to rise to the level of altering the conditions of employment and creating a hostile or abusive work environment, considering, among other things, the nature of the conduct and its frequency. In light of that language, there is no reasonable likelihood that the jury would conclude that occasional, isolated, sporadic, or trivial incidents of harassment would alone suffice. (*Cristler v. Express Messenger Systems Inc.* (2009) 171 Cal.App.4th 72, 82.) Rather, the jury would reasonably understand that Karagiosian had to prove a pattern of conduct sufficiently egregious that it altered the condition of his employment and created a hostile or abusive environment. Thus, the court's refusal to give Number 5 was not error.

Similarly, City's Number 18 was unnecessary. In *Etter,* in rejecting the plaintiff's challenge to the instruction defining severe or pervasive harassment, the court commented that "[c]ontrary to plaintiff's assertion, however, the law does not exhibit 'zero tolerance' for offensive words and conduct. Rather, the law requires the plaintiff to meet a threshold standard of severity or pervasiveness." (*Etter, supra*, 67 Cal.App.4th at p. 467.) In Number 18, City sought to elevate this comment into a concept to be included in a jury instruction. The proposed instruction stated: "An employer is permitted to have an anti-harassment policy that is more stringent than the

law, including a 'zero tolerance' policy. Violation of an employer's 'zero tolerance' anti-harassment policy does not automatically establish a harassment claim under the law. The law does not require 'zero tolerance.' Rather, Mr. Karagiosian must prove that the alleged conduct was 'severe or pervasive.'"

We find the proposed instruction superfluous. Under the CACI instructions given, no reasonable juror could have thought that a violation of BPD's zero tolerance policy was equivalent to severe or pervasive harassment sufficient to prove liability. Rather, as the trial court concluded, the significance of the zero tolerance policy, if any, was a matter for argument in the context of all the evidence.[12] We find no error in the court's refusal to give Number 18.

III. *Exclusion of Recorded Interview*

City contends the trial court erred in excluding four compact discs (C.D.s) of Bent's audio-taped interview with Karagiosian.[13] We conclude exclusion of the C.D.s of the interview fell well within the court's discretion under Evidence Code section 352.

"In ruling upon the admissibility of a [tape], a trial court must determine whether: (1) the videotape is a reasonable representation of that which it is alleged to portray; and (2) the use of the videotape would assist

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[12] Even in the absence of Number 18, City was able to argue in closing that "[t]he law does not [require zero tolerance]. That's not what the judge told you. That is a misleading statement. The law requires severe or pervasive harassment that meets all of those requirements that I read to you before. The law does not have a zero tolerance policy."

[13] The four C.D.s were marked as Exhibit 513 for identification only.

the jurors in their determination of the facts of the case or serve to mislead them." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1114 [videotape].)

"'The trial court has broad discretion both in determining the relevance of evidence and in assessing whether its prejudicial effect outweighs its probative value.' [Citation.]" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 950.) Evidence may be excluded "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "It is for the trial court, in its discretion, to determine whether the probative value of relevant evidence is outweighed by a substantial danger of undue prejudice. The appellate court may not interfere with the trial court's determination . . . unless [that] determination was beyond the bounds of reason and resulted in a manifest miscarriage of justice." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 596.)

Karagiosian made a motion in limine to exclude the three-hour audio-taped interview by Bent. In opposition, City urged Karagiosian's statements in the recorded interview were admissible on the issues of "what comments were made, and whether Karagiosian took offense," which "are central to his claim that he was subjected to a hostile work environment based on his Armenian ethnicity."

At the hearing, City's attorney argued "[t]he jurors need to hear what his complaint was" and "what he told [City]." He advised "[w]e may choose to play the entire three-hour thing."

The trial court ruled that City could not present the entire interview, but rather could use relevant portions in its cross-examination of Karagiosian at trial. The court reasoned that the taped interview might be "minimally

probative" in that "a few sections" appear to be admissions but "it would be inappropriate to take them out of context. However, the context just makes matters worse because the interview as a whole is completely unintelligible. It doesn't help understand those comments [by "Karagiosian that could be regarded as admissions that he was not the victim of harassment"] better,'" although "those segments and perhaps others . . . may be used for impeachment, if necessary." Further, the court found "what probative value they have is outweighed by the time it would take to present it and by the undue prejudice to" Karagiosian. The court explained: "The jury is not being asked to decide whether Mr. Karagiosian is a good or admirable person, and the court believes the primary purpose of introducing the tape is to show he is not, so they [*sic*] will not be coming in any form."

City urges exclusion of the audio-taped interview was erroneous, because the jury was deprived of the opportunity to assess Karagiosian's "verbal demeanor." Further, hearing the taped interview was essential to counter Karagiosian's testimony that he did not report certain harassing incidents from his fear for the safety of himself and his family. Moreover, such prejudice was compounded by Karagiosian's counsel challenging Bent's credibility during closing argument.

We are not persuaded. City was not precluded from using relevant portions of the taped interview in its examination of Karagiosian (though City ultimately did not play portions of the recording), but rather was precluded only from playing the entire tape without limit. Also, City was able to, and did, establish what transpired during the interview through the trial testimony of Bent and Karagiosian. In particular, Bent testified Karagiosian admitted he was not offended by harassing comments and that he did not appear to be afraid to talk or provide information. Karagiosian did

not dispute the statements attributed to him by Bent. In short, the trial court did not abuse its discretion in precluding City from playing Bent's interview of Karagiosian in its entirety.

IV. *City's Mistrial Motion*

City contends the trial court erred not granting a mistrial, because the accusations of BPD "profiling" by Karagiosian and his attorney were inflammatory and violated a court order. No abuse of discretion occurred.

Our Supreme Court "has narrowly defined the grounds for *grants* of mistrials, but has emphasized the deferential abuse of discretion standard in ruling on *denials* of motions for mistrial: 'A trial court should *grant* a mistrial *only* when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling *denying* a mistrial.' [Citations.]" (*Blumenthal v. Superior Court* (2006) 137 Cal.App.4th 672, 679.)

In a motion in limine, City sought to exclude evidence and argument about profiling of Armenian citizens or suspects by BPD as prejudicial because the accusation was made by Karagiosian, a BPD police officer. In opposition, Karagiosian argued he was entitled to testify about witnessing incidents involving profiling of Armenians, because such observations pertained to his work environment.

At the hearing, the trial court granted the motion "with the exception of evidence brought by Officer Karagiosian that he was harassed by these—by being instructed on how to profile [Armenian] citizens and suspects."

In his opening statement, Karagiosian's counsel, Solomon Gresen, argued: "Even more frightening, and you will see that document, . . . Sergeant Yadon, a supervisor, created a cheat sheet about how to pull over

Armenian vehicles, as there are several vehicle code violations that Armenians would typically violate in how they drive or otherwise maintain their cars. That's profiling. That's illegal."

City's counsel, Lawrence Michaels, both objected and moved to strike the reference to illegal profiling and for a mistrial, because the court had granted City's motion in limine to exclude evidence of purported profiling of Armenians. Mr. Gresen responded his statement was within the court's "exception" regarding evidence that Karagiosian was harassed by being instructed on how to profile Armenians. The court admonished "[t]he term 'profiling' is not to be used." In declining to grant a mistrial, the court instructed the jury "this case has nothing to do with profiling, and you are to disregard Mr. Gresen's comment regarding profiling."

Later, Karagiosian testified that in 2007, after a training session, Sergeant Yadon said something to the effect of "This is how you cite Armenians. . . . That's when their vehicles don't register to them." Mr. Gresen asked whether Karagiosian was offended by Sergeant Yadon's comment. Karagiosian replied that he was offended "[b]ecause it was directed toward Armenians, and . . . it's a crime." When asked "What's a crime[,]" he responded: "It's profiling of individuals."

City moved for a mistrial for the reason Karagiosian improperly was "trying to inflame the jury." The trial court found what Karagiosian testified to was "completely inappropriate and wrong, and it would be grounds for a mistrial, possibly." The court further found Karagiosian "did it deliberately to inflame the jury in [his] favor."

Rather than declaring a mistrial, the court announced its intention to give a curative instruction to be drafted by Linda Savitt, one of City's attorneys. Although she protested such instruction would not be adequate,

she provided the court with a proposed instruction. The court instructed the jury essentially in the proposed language as follows: "There is no evidence that the City . . . has ever engaged in racial or ethnic profiling of suspects or citizens. This case only addresses whether there was harassment of [Karagiosian] because of his national origin, [which is Armenian]." Further, the court admonished: "The jury should disregard any comments or suggestions about profiling."

As City acknowledges, the trial court in each of the two instances of improper comments about profiling gave a curative instruction to dissipate any prejudice which might flow from such comments. City, however, contends such instructions were insufficient because the comment about profiling was extremely inflammatory nature, repeated twice, deliberately made in violation of a court order made with the intent to inflame the jury, and City was without any viable means to counter that comment. We are not persuaded.

First, the jury is presumed to have understood and adhered to the court's curative instructions. (*Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 984.) Second, the two references to profiling were not so inflammatory as to be incurable by the court's admonitions. Indeed, the basis of the "profiling" referred to by Karagiosian's attorney in his opening statement, and by Karagiosian in his testimony, was Karagiosian's claim that Sergeant Yadon was suggesting that officers target Armenians. However, in his testimony, Sergeant Yadon denied making the comment, and in its special verdict, the jury found that no act of harassment was committed by a supervisor (see fn. 9, *ante*). This finding necessarily implies that the jury either disbelieved Karagiosian's testimony that Sergeant Yadon made the comment Karagiosian attributed to him, or concluded that, if it was made, it

did not constitute harassment. Thus, the profiling alleged by Karagiosian and his counsel did not affect the verdict. Third, in rejecting Karagiosian's cause of action based on the City's failure to prevent harassment, the jury found that the City did not fail to "take reasonable steps to prevent harassment from occurring." This finding bolsters the conclusion that the references to "profiling" had no effect on the outcome of the trial. For these reasons, we find no abuse of discretion in the trial court's denial of a mistrial.

V. *Attorney Fees*

City contends that the trial court abused its discretion in awarding Karagiosian $719,527.50 in attorney fees. We conclude that the award was within the wide discretion of the trial court.

Under FEHA, as the prevailing party, Karagiosian was entitled to an award of reasonable attorney fees. (§ 12965, subd. (b).) Our Supreme Court "has stated that '[i]n deciding whether to, and how to, award fees under section 12965, subdivision (b), courts will look to the rules set forth in cases interpreting [Code of Civil Procedure] section 1021. 5.' [Citation.] Under Code of Civil Procedure section 1021.5, if a court determines that attorney fees should be awarded, computation of those fees is based on the lodestar adjustment method as set forth in *Serrano v. Priest* (1977) 20 Cal.3d 25. [Citation.] Using that method, the trial court first determines a touchstone or lodestar figure based on a careful compilation of the time spent by, and the reasonable hourly compensation for, each attorney, and the resulting dollar amount is then adjusted upward or downward by taking various relevant factors into account. [Citations.] When using the lodestar method to calculate attorney fees under the FEHA, the ultimate goal is 'to determine a "reasonable" attorney fee, and not to encourage unnecessary litigation of

claims that serve no public purpose either because they have no broad public impact or because they are factually or legally weak.' [Citation.]" (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 985.)

"[T]he trial court has broad authority to determine the amount of a reasonable fee." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 (*PLCM*).) "'The "experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong"' — meaning that it abused its discretion. [Citations.]" (*Ibid.*) At the attorney fee request hearing, counsel for City expressly acknowledged the trial court "is more than familiar with the facts of the case."

Here, Karagiosian requested $2,033,689 in attorney fees. In a lengthy, thoughtful written ruling, the court explained that he was entitled to much less: $719,527.50. First, the court fixed the reasonable number of attorney hours. Karagiosian requested a total of 1,134.74 partner attorney hours, and 872.75 associate attorney hours. The court noted that Karagiosian prevailed on only one of his five original causes of action, and thus was entitled only to fees incurred with respect to that cause of action. However, although the billing records submitted "appear[ed] thorough," the court observed that they were "block billed and include[d] general descriptions" of work performed. Thus, the court could not "determine from these descriptions that the hours [claimed] were necessary for the claim on which plaintiff prevailed." Further, some of the hours requested were spent on other claims. Based on these considerations, the court reduced the partner hours to 734.34, and the associate hours to 572.45, concluding that the reduction was "reasonable."

Next, the court considered the reasonable hourly rate based on the prevailing rate for attorneys of similar skill. (See *PLCM, supra*, 22 Cal.4th at p. 1095.) Karagiosian requested a lodestar hourly rate of $550 for each of the two partners who worked on the case, and $450 for the associates. The court concluded that the declarations of the two partner attorneys justified their requested rates, but noted that there was no showing justifying an hourly rate of $450 for the associates. Thus, the court reduced the hourly associate rate to $300. Using these rates, and multiplying them by the reasonable hours attributed to the partners and associates, the court calculated an award of $575,622.

The court then considered Karagiosian's request to enhance the award by a multiplier of two. The court considered the relevant factors (see *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1138; *Serrano v. Priest, supra,* 20 Cal.3d at p. 49), and reasoned that "[a]lthough the case was extensively litigated by both sides, the actual issues were neither novel nor complex. Plaintiff's counsel, though competent, did not display extraordinary skill. The judgment achieved was comparatively modest. However, plaintiff's counsel took the case on a contingent fee basis which is inherently risky. Therefore, the plaintiff is entitled to a modest multiplier. A reasonable multiplier is .25, bringing the total amount of fees plaintiff may recover to $719,527.50."

On appeal, in challenging the attorney fee award, City argues that the award was "speculative, arbitrary, and capricious," in that it was "based on nothing more than an arbitrary reduction off of an obviously and wildly inflated request." City does not challenge the hourly rates awarded, but rather, apparently, the hours and multiplier. On this record, however, the challenge is unavailing. As the trial court noted, detailed timesheets of hours

spent on particular matters are not a prerequisite for an award of attorney fees. (*Balsam v. Trancos, Inc.* (2012) 203 Cal.App.4th 1083, 1103.) The trial court, having presided over the trial, considered all relevant factors in determining a proper award of attorney fees, and applied those factors to its knowledge of the case in setting the award. The court's considered ruling was far from abuse of the court's wide discretion.

DISPOSITION

The judgment and the order awarding Karagiosian attorney fees are affirmed. Karagiosian shall recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.