Filed 12/2/19 Wong v. City of Los Angeles CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

GARY WONG, Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Respondent.	B291785 (Los Angeles County Super. Ct. No. BC678089)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara A. Meiers, Judge. Reversed and remanded in part and affirmed in part.

Parker, Milliken, Clark, O'Hara & Samuelian, Thomas E. Shuck and Alan D. Weinfeld for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, Blithe S. Bock and Jonathan H. Eisenman for Defendant and Respondent.

Gary Wong brought a complaint against his employer, the City of Los Angeles, and others, for discrimination and harassment on the basis of race, age and retaliation, in violation of the Fair Employment and Housing Act (FEHA, Gov. Code, § 12940). The trial court sustained the City's demurrer, without leave to amend, to Wong's second amended complaint, on the basis that Wong failed to allege any actionable violation of FEHA. We reverse with respect to Wong's cause of action for age harassment (and related cause of action for failure to prevent age harassment) and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

As the appeal is taken from a dismissal following the sustaining of a demurrer without leave to amend, we take the relevant facts from Wong's operative complaint and documents of which the trial court properly took judicial notice.

1. *Wong's Employment with the City*

Wong, who is Asian-American, began working as an equipment mechanic with the City in 1981, when he was 23 years old. He worked for the City continuously, receiving positive reviews and promotions. In 2008, he was promoted to the position of heavy duty equipment mechanic.

The City paid a bonus for work on equipment at refuse disposal sites.[1] Wong was transferred to "CLARTS," a sanitation vehicle transfer yard, where he received the bonus pay. He received excellent reviews over his four years at the position.

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[1] According to a job announcement for such a position, employees at those sites "will encounter bad odors from various sources and flies during [their] daily work assignment[s]."

Although Wong would allege harassment and discrimination, he remained employed by the City and, as far as the record on appeal indicates, is still working for the City today.

2. *Wong is Transferred From CLARTS Against his Wishes*

In March 2013, Wong was transferred from CLARTS to a new location, called 7th Street, which was not a refuse disposal site, and therefore did come with the bonus pay. When Wong was at CLARTS, there was one other employee who worked with him, who was Hispanic and younger than Wong. The City believed that CLARTS could not support two full-time employees in this position, so transferred Wong away, and rotated other employees into Wong's former CLARTS position for training purposes. Wong did not want to transfer away from CLARTS and the bonus pay, and believed the younger employee should have been transferred instead – or that he and Wong should have rotated in the one remaining position.

Wong filed a union grievance regarding the transfer and refusal to rotate him back into the position. He believed his supervisors handled the grievance improperly. He also believed that, once he complained about his reassignment, his supervisors "began systematically and continuously harassing and discriminating against [him] on the basis of his race and age." His informal union grievance stated, "I furthermore [feel] that I am being push[ed] to retire before I am ready with the jokes at why am I still there and other remarks." By this time, Wong was 55 years old.

3. *Wong's February 2014 Administrative Charge*

On February 3, 2014, Wong filed a charge with both the state Department of Fair Employment and Housing (DFEH) and

the federal Equal Employment Opportunity Commission (EEOC). He alleged discrimination based on only age and retaliation; this complaint did not mention race discrimination. His complaint stated that his supervisors repeatedly asked him when he planned to retire, took away his bonus pay, and refused to allow him to rotate his schedule. He believed these acts constituted age discrimination and were improperly retaliatory. In his administrative charge, he stated the discriminatory act occurred on September 19, 2013, but he also checked the box for "continuing action."

DFEH sent Wong a notice indicating that the EEOC would investigate his complaint. The DFEH notice constituted a "right to sue" letter under FEHA, but advised Wong that the one-year period in which Wong could file a FEHA complaint would be tolled pending the EEOC's investigation.

The EEOC completed its investigation and dismissed Wong's charge via letter mailed January 26, 2015. The EEOC's letter provided that Wong had 90 days from the date he received the notice to file suit. Accordingly, Wong had until approximately the end of April 2015 to file his FEHA complaint in superior court for the actions encompassed by this first administrative complaint.[2] He did not do so.

4. *Wong's Treatment at 7th Street*

According to Wong, he was subject to discrimination and harassment at his new assignment at 7th Street, although his complaint frequently lacked details as to specifics. His

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[2] We discuss the substance of Wong's second administrative charge, filed on January 23, 2015, in section 5 of the Factual and Procedural Background; we discuss the law governing calculation of the time in which to sue in section 3A of the Discussion.

allegations can be grouped into five general categories: (a) criticism regarding his work performance; (b) vacation and overtime issues; (c) lack of training; (d) harassing comments and acts; and (e) denial of re-transfer to CLARTS.

A. *Criticism Regarding Work Performance*

Wong alleged, in general, that his supervisor at 7th Street, Richard Simas "repeatedly complained about Mr. Wong's performance, despite the fact that other, younger, non-Asian employees were performing at a similar level to Mr. Wong." He alleged that Simas told him that he failed to live up to standards of timeliness, but "on each of the tasks that Mr. Simas alleged Mr. Wong to be substandard in completing, there were extenuating circumstances that Mr. Simas conveniently forgot in disciplining Mr. Wong. Mr. Simas rarely disciplined non-Asian-American, younger employees, and never in such a harassing manner as he subjected Mr. Wong to. In many instances he merely counselled others while formally disciplining [Wong]." Wong alleged that throughout his time at 7th Street, he saw Simas "allowing his favored employees, usually of Hispanic descent, excessive time to complete tasks, or even allowing them to fail to complete any tasks at all, without reprimand." Yet Simas was quick to criticize Wong, even though he was doing his job.

While Wong's complaint uses language stating that he was "formally disciplin[ed]," "wrongly disciplined," or that Simas "wrote [him] up," he does not allege, specifically, what any of this discipline entailed. For example, he does not allege that he was suspended or lost pay as part of any of this discipline. He does not allege that any of the formal disciplinary writings were part of his annual evaluations, or that they otherwise became part of

his personnel file which might impact his opportunity for promotions or other favorable treatment.

In fact, he alleges that in 2013 and 2014, his supervisors failed to conduct his annual reviews.[3] When he had a review in April 2015, the evaluation was uneventful. Even though Simas had "constantly criticized" Wong for attendance deficiencies in the past, the evaluation report stated that Wong's attendance was "within department standards." The only negative fact Wong alleged regarding the evaluation was that, after Wong had signed it, Simas added false comments to it – that Wong talks excessively and tends to walk away from work to talk.

B. *Vacation and Overtime Issues*

Wong alleged that the City denied him vacation time on "at least one occasion" for "no stated reason." In his subsequently-filed second EEOC complaint, Wong would explain that, in November 2014, he had requested vacation time for Thanksgiving and Simas denied it "because more than 50% of the crew had to be present."[4]

Wong also alleged that Simas "failed to post overtime availability in a public area on a regular basis," and instead selectively informed certain employees, "who were usually of

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[3] To the extent he alleges that this, too, is discriminatory, he does not allege that the failure to conduct reviews adversely impacted his employment in any way.

[4] The EEOC charge was attached as an exhibit to the operative complaint. On appeal, the City assumes that the complaint's allegations of a denial of vacation time "[p]resumably" refers to the denial of vacation over Thanksgiving charged in the EEOC complaint. In his reply brief, Wong does not identify any other purported denial of vacation time.

Hispanic descent and often younger" of overtime availability. Wong alleged that it was only through his own diligence in searching out the overtime lists and asking other employees that he was able to obtain overtime.

C. *Lack of Training*

Wong alleged that, five months after he was moved to 7th Street (August 2013), he was sent on "emergency repair duty," which requires specialized training he never received. He was directed to learn on the fly with no assistance, but another employee actually provided assistance, so he accomplished the job. He believes the assignment was designed for him to fail.

Similarly, Wong had no experience in "road call" assignments, and asked for "road call" training, but Simas instead chose to train younger, Hispanic employees for road call work. Wong was forced to learn this hazardous job without training, which he also believes was a set up for him to fail.

Finally, in March 2017, Wong attempted to sign up for training from the California Highway Patrol, which would enable him to handle additional assignments. He was passed over for this by his supervisors, who selected "four Hispanic, significantly younger (and therefore junior in experience) employees to undergo the [CHP] training."

D. *Harassing Comments and Acts*

Wong alleged some acts of harassment, which were not specifically tied to age or race. For example, in the summer of 2016, Simas made Wong work in an outside repair bay, where there was no shade, when other employees were allowed to work in a shaded area or inside. Wong was forced to work in intolerable heat, while other employees could defer their outside work until later, when it was cooler.

At another time – not specifically identified – Wong's car was vandalized outside the 7th Street shop. His name was keyed on it and his tires were slashed; he thought that this treatment was due to his age and race.

Wong alleged no harassing statements or acts directed toward him which particularly reflected animus based on race. As to age harassment, he alleged that he was subjected to "relentless verbal attacks on [his] age," but alleged no specifics. He simply stated that "[f]ew days went by when [he] was not subjected to taunts about his age, with employees regularly mocking him for still working at his age and asking when he was going to retire." There was only one allegation of purported age harassment in which the speaker was identified: Wong alleged that, at some point in late 2014, after Wong unsuccessfully pursued a union grievance, Simas asked Wong why he was still coming to work and said, "You're never going to make more money here so you should just retire."

E. *Prevented from Transferring Back to CLARTS*

In October 2014, the City advertised an open heavy duty equipment mechanic position at CLARTS, for the night shift. Wong was unable to work nights. He alleged that the City recategorized his old position as a night-shift position purposely, in order to prevent him from returning to CLARTS and force him to remain in the oppressive conditions at 7th Street. Wong attached the job announcement to his complaint; it identified certain maintenance tasks as work to be done primarily at night. Wong makes no allegations that the City did not have a legitimate business reason for wanting a night shift heavy duty equipment mechanic at CLARTS, nor did it allege that the City knew Wong was unable to work nights.

5. *Wong's January 2015 Administrative Charge*

On January 23, 2015 – right before the EEOC dismissed Wong's first administrative charge – Wong filed a second administrative charge with the DFEH and EEOC. This time, he alleged principally race and retaliation-based discrimination; it was ambiguous as to whether Wong alleged age discrimination. The form contained boxes for the charging party to check under the heading "DISCRIMINATION BASED ON." Wong checked the boxes for "RACE" and "RETALIATION," but not the box for "AGE." However, at the end of his explanation of the particulars of the charge, he wrote, "I believe I have been discriminated against because of my race (Asian) and retaliated against for filing a previous charge of discrimination, in violation of Title VII of the Civil Rights Act of 1964, as amended; and the Age Discrimination in Employment Act of 1967, as amended." While this reference *could be* interpreted to mean only that Wong claimed retaliation for a prior age discrimination complaint, the semi-colon suggests age discrimination is a separate basis for Wong's second administrative charge.

The charge specifically alleged that, on November 1, 2014, Simas wrote Wong up for incidents dating back to July, while Hispanic heavy duty equipment mechanics who committed similar infractions were not written up. Wong also alleged as discriminatory the failure to give him vacation over Thanksgiving, and bypassing him for overtime in December 2014.

Again, DFEH sent Wong a notice indicating that the EEOC would investigate his complaint. The DFEH notice constituted a "right to sue" letter under FEHA, but noted that the one year period in which Wong could file a FEHA complaint would be tolled pending the EEOC's investigation. At the time Wong filed

his second administrative charge, he had not yet been notified that the investigation of his first charge had been completed. The second charge expressly referenced the case number of his previous charge (480-2013-03439), which had alleged a continuing violation. According to Wong, when the EEOC investigated his second charge, "the complaint was treated as referring to both racial and age-based discrimination, retaliation, and harassment."[5]

The EEOC completed its investigation and dismissed Wong's charge via letter dated June 29, 2017. Wong alleged that he received this notice on July 11, 2017. Accordingly, Wong had until October 9, 2017 to file his FEHA complaint for the actions encompassed by this administrative complaint.

6. *Wong's Initial Complaint*

Wong filed suit on September 29, 2017. He sued the City and named several individual defendants, including Simas. He alleged causes of action for racial discrimination and harassment, age discrimination and harassment, retaliation, failure to prevent or remedy discrimination and harassment, whistleblower retaliation, and unfair business practices. He filed a first amended complaint before the defendants filed a responsive pleading.

7. *Wong's First Amended Complaint*

Wong's first amended complaint, filed November 6, 2017, alleged the same causes of action as his original complaint, save whistleblower retaliation. He alleged nearly all of the facts discussed above; as we shall explain, his second amended

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[5] This statement was made in Wong's opposition to the City's demurrer.

complaint would reflect very little substantive change from his first amended complaint.

8. *Demurrer Sustained to First Amended Complaint*

The City filed a motion to strike, as time-barred, the allegations regarding Wong's 2013 transfer from CLARTS. It also demurred to the first amended complaint, arguing, among other things, that harassment was not properly alleged, and much of the complaint was barred for failure to exhaust administrative remedies.

The demurrer was sustained with leave to amend, in a detailed minute order.[6] The court first recounted Wong's allegations of criticisms of his work, and stated, "No adverse job consequences are shown to have followed from any of this." The court next addressed the allegations of denied vacation time, failure to inform of overtime, and that his annual evaluation was "doctored" after he had signed it, and again stated, "no adverse job consequences are shown from any of these alleged acts."[7]

The court also stated, that, as to harassment, "there is not one single fact which would tend to support any racial or age animus-not one untoward remark, not one specific act that on its facts would tend to even circumstantially show any such

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[6] It was sustained without leave to amend as to the individual city employee defendants. On appeal, Wong does not pursue his claims against the individual defendants.

[7] The court also noted, in this discussion, that Wong had not identified, in his first amended complaint, any reason why he could not apply to transfer to the new night-shift CLARTS position. The first amended complaint had not alleged that Wong could not work nights; Wong remedied this in his second amended complaint, but failed to allege that the City *knew* he could not work nights.

motivation, nothing. All of what is alleged, if it occurred as plaintiff perceives (as opposed to just subjective conclusions), could be just as due to justifiable acts on the part of the employer or a personal animus on the part of supervisors-none of which is actionable as discrimination or harassment in violation of civil or statutory rights." The court concluded that "this all appears to be simply an attempt to rehash run-of-the-mill everyday employment administrative actions and to have a court re-evaluate all of them as to who was or was not right with no showing of anything other than a plaintiff's subjective characterizations as to a race or age based motivation and the employee[']s own evaluation of his work performance as being undeserving of the criticisms given."

The court granted leave to file a second amended complaint, and directed Wong to "effectively deal with all of these issues" in his next complaint, with the warning that if he did not, it would not withstand another demurrer. Specifically, Wong was directed "to eliminate all references to matters occurring in 2013 or earlier except to the extent that [he] can show some basis for a claim that what is being complained of in the present action is retaliation for his" February 2014 administrative charge.

9. *Wong's Operative Second Amended Complaint*

The second amended complaint eliminated the individual defendants from his complaint, as well as the cause of action for unfair business practices. Wong named only the City, and alleged only racial discrimination, racial harassment, age discrimination, age harassment, failure to prevent or remedy discrimination or harassment, and retaliation, all under FEHA.

In his second amended complaint, Wong addressed only one of the weaknesses in his first amended complaint that the trial

court had identified. Specifically, in response to the court's observation that he had failed to allege any racial- or age-based animus in connection with his allegations of harassment, Wong added the allegation that he was frequently mocked by fellow employees for his age, and the specific statement Simas made that Wong was never going to make more money, so should just retire.

Beyond this, there were few relevant changes in the factual allegations. Wong corrected some typographical errors, and changed a reference to himself from "Gary" to "Mr. Wong." But in terms of actual substantive allegations, the only real additions to the complaint were two paragraphs relating to training (specifically, the refusal of Simas to give him "road call" training, and Simas approving other employees for CHP training). He also added a sentence later in his complaint, which stated, "Each of the above allegations raise a reasonable inference of discriminatory intent, particularly given Mr. Simas' ongoing hostility towards Mr. Wong and his blatant preference for younger, non-Asian-American employees, particularly Hispanics."

Wong did not comply with the court's directive to remove allegations relating to the 2013 transfer except in the context of alleging unlawful retaliation for his administrative charge complaining about the transfer. Instead, he continued to specifically allege that the transfer from CLARTS constituted discrimination on the basis of race and/or age.

10. *Demurrer to Second Amended Complaint*

The City demurred to the second amended complaint, raising several attacks which, together, would defeat the entire complaint. The City argued that all of the allegations which were encompassed in the February 2014 administrative charge could

not be raised in this action, as Wong did not timely sue after he received his FEHA right-to-sue letter. With the transfer omitted from the complaint, the City argued, the remaining allegations were insufficient to establish an adverse employment action. Similarly, the City argued Wong did not sufficiently allege harassment, only non-actionable personnel management decisions.

11. *Hearing on the Demurrer*

The hearing on the demurrer encompassed 30 pages of reporter's transcript, in which the trial court pointed out numerous flaws in Wong's complaint, while Wong's counsel attempted to defend the sufficiency of the pleading.

It began with the trial court stating Wong's complaint did not identify how many other Asian employees were at 7th Street and/or the ages of the other employees. The City's counsel represented that, as to race, Wong was not the only Asian employee at that location; and, as to age, every employee at 7th Street was over 40 years old. Wong's counsel countered that Wong is the oldest employee there.

The court expressed its opinion that a bad performance evaluation is not an adverse employment action (for the purposes of a discrimination cause of action) and asked Wong's counsel to identify a legally cognizable adverse employment action he had pleaded. Wong's counsel identified the 2013 transfer from CLARTS, when he lost his bonus pay. Believing that issue to be barred by Wong's failure to timely sue after his 2014 administrative charge challenging the transfer was denied, the court asked Wong's counsel to identify a subsequent adverse

employment action. Wong's counsel failed to do so, turning instead to his allegations of ongoing harassment.[8]

The court then addressed harassment, and stated the complaint alleged insufficient detail for the court to determine whether the harassment was isolated or actionable. The court said, "I don't know how many times he was asked to work outside or how many others were outside that day." Wong's counsel responded that he had tried to be specific, but "that's what discovery is for." The court disagreed, stating, "No, it isn't. You're supposed to have probable cause to file a lawsuit before you file it."

The court asked counsel to identify a specific racial slur, or an allegation that Wong was the only Asian employee, from which the court could infer race-based harassment. Wong's counsel pointed to a paragraph in the complaint in which he had pleaded that Wong was criticized for taking too long for a job, but two Hispanic employees were not criticized for a greater delay on a similar job. The court asked how Wong knew this, stating, "Based on what? He was standing over their shoulders and watching their work and listening to everything the employer said to them? What is that based on? Is that information and belief? What's it based on?" Wong's counsel said, "That's fair, Your Honor," and represented that he could clarify the allegation. Wong's counsel then raised two more incidents of unfair criticism

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[8] When the court said the 2013 transfer was a "dead horse" and asked Wong's counsel to identify what had happened after the transfer that constitutes an adverse employment action, counsel replied, "It continues to go along," and "the impacts of this kind of conduct on a conscientious employee are things that are measured by damage work that we have to do in the process of preparing the case."

which had been alleged in the complaint. The court responded that three incidents in two years do not constitute harassment. Wong's counsel said it was not realistic to ask Wong to recall every incident over four years; the court rejoined that "if it's so hard to remember because they were so far spread apart, then it speaks for itself." The court said, "This is not harassment. You haven't painted a picture of harassment. I think you know what the law says about that. It has to be intent. It has to be frequent. It has to be a lot of other things that are no way set forth in your papers."

Near the end of the hearing, Wong's counsel asked for "a chance to do this again," and include more instances of harassment and the relevant demographic information of the employees at 7th Street. He agreed that "We need a better view of what the shop looks like and . . . we can certainly supply that."

The court added that, if leave to amend were granted, "you would have to do what I told you last time, and that is start this complaint with the time when the earlier complaint ran out." The court once again explained that the 2013 transfer should not be included, unless Wong could plead retaliation for his administrative charge challenging the transfer, which would require allegations that the individuals who allegedly retaliated against him knew about the administrative charge. The court explained, "I thought I made it clear last time that we didn't have that." Ultimately, Wong's counsel stated that he would "like to have an opportunity" to amend. The trial court responded, "I know you would. And I might give you leave to amend, but I did spend a lot of time on that last ruling trying to spell out what was needed and I was not successful. And I think we had the same

kind of colloquy at length the last time aside from what I wrote out."

12. *Ruling, Judgment, and Appeal*

The next day, the court issued a minute order, stating that it was taking judicial notice of its prior ruling and the fact that Wong did not address "much less cure" any of the defects the court had pointed out in its prior ruling. The demurrer was sustained without leave to amend.

Judgment was entered in favor of the City. Wong filed a timely notice of appeal.

DISCUSSION

On appeal, Wong argues the trial court erred in sustaining his demurrer, on the basis that his allegations were sufficient with respect to each of the six causes of action alleged in his second amended complaint. At the very end of his brief, he suggests that, if we conclude his complaint is inadequate, leave to amend should be granted in that there were seven enumerated refinements and other changes by which he could clarify his pleading.

1. *Standard of Review*

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to

amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

"To meet [the] burden of showing abuse of discretion, the plaintiff must show how the complaint can be amended to state a cause of action. [Citation.] However, such a showing need not be made in the trial court so long as it is made to the reviewing court." (*William S. Hart Union High School Dist. v. Regional Planning Com.* (1991) 226 Cal.App.3d 1612, 1621.)

2. *FEHA*

FEHA declares that it is unlawful, for an employer "because of the race . . . [or] age . . . of any person . . . to discriminate against the person in compensation or in terms, conditions, or privileges of employment." (Gov. Code, § 12940, subd. (a).) Wong alleges causes of action for racial and age discrimination. (Causes of action 1 and 3.) FEHA also prohibits an employer from harassing an employee, based on the same protected characteristics. (Gov. Code, § 12940, subd. (j)(1).) Wong alleges causes of action for racial and age harassment. (Causes of action 2 and 4.) FEHA prohibits retaliation; that it, it prohibits discriminating against a person because that person has opposed any practices otherwise forbidden by FEHA. (Gov. Code, § 12940, subd. (h).) Wong alleges a cause of action for retaliation, based on both discrimination and harassment. (Cause of action 6.) Finally, FEHA prohibits employers from failing to "take all reasonable steps to prevent discrimination and

harassment from occurring." (Gov. Code, § 12940, subd. (k).) Wong alleges this cause of action as well. (Cause of action 5.)

3. *Wong Has Not Alleged Discrimination – No Adverse Employment Action*

Whether the alleged discrimination is founded on race, age, or retaliation, a cause of action for discrimination under FEHA must be based on an adverse employment action. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1050-1051.) This requirement "must be interpreted broadly to further the fundamental antidiscrimination purposes of the FEHA. Appropriately viewed, this provision protects an employee against unlawful discrimination with respect not only to so-called ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." (*Id.* at pp. 1053-1054, fn. omitted.) "[T]he determination of what type of adverse treatment properly should be considered discrimination in the terms, conditions, or privileges of employment is not, by its nature, susceptible to a mathematically precise test, and the significance of particular types of adverse actions must be evaluated by taking into account the legitimate interests of both the employer and the employee. Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable, but adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for

advancement or promotion falls within the reach of the antidiscrimination provisions of sections 12940(a) and 12940(h)." (*Id*. at pp. 1054-1055.) Allegations of mere "commonplace indignities typical of the workplace" do not support a cause of action for an adverse employment action. (*Id*. at p. 1060.)

A. *The Transfer From CLARTS is Time-Barred*

When asked at the hearing on demurrer for the adverse employment action on which he relied, Wong identified only the 2013 transfer from CLARTS. We agree that a transfer to a position where the employee loses bonus pay may constitute an adverse employment action. (Cf. *Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, 358 [there is no adverse employment action in a transfer to a position which provides equal pay, benefits, and opportunities as the prior position].) The City argues, however, that Wong cannot rely on the transfer, because he failed to timely file suit after receiving his right-to-sue letter.

A person claiming to be aggrieved by a FEHA violation may file a complaint with the DFEH. (Gov. Code, § 12960, subd. (b).) The doctrine of exhaustion of administrative remedies requires that the person do so before bringing a civil action under FEHA. (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1724.) If the DFEH determines that it will not pursue a civil action, it is required to issue the complainant a right-to-sue letter, which "shall indicate that the person claiming to be aggrieved may bring a civil action under this part . . . within one year from the date of that notice." (Gov. Code, § 12965, subd. (b).) That one-year period may be tolled if the charge of discrimination is concurrently filed with the DFEH and the EEOC, and the EEOC is handling the investigation. (Gov. Code, § 12965,

subd. (d)(1).) If that is the case, the time for commencing the action expires when the federal right-to-sue period expires, or one year from the DFEH's right-to-sue notice, whichever is later. (Gov. Code, § 12965, subd. (d)(2).)

In this case, a timeline may help to clarify:

February 3, 2014	Wong filed first charge with DFEH/EEOC.
Early February 2014	DFEH issued right-to-sue letter (with tolling pending EEOC investigation) on first charge.
January 23, 2015	Wong filed *second* charge with DFEH/EEOC.
January 26, 2015	EEOC issued 90-day (from receipt) right-to-sue notice on *first* EEOC charge. No lawsuit was filed within 90 days.
Late January 2015	DFEH issued right-to-sue letter (with tolling pending EEOC investigation) on second charge.
July 11, 2017	Wong received EEOC's 90-day (from receipt) right-to-sue notice on second charge.
September 29, 2017	Wong timely filed his complaint in trial court with respect to second charge.

The record is not clear as to the precise date when the period ran with respect to Wong's first administrative charge, challenging his transfer, because it does not indicate either the date of the DFEH right-to-sue letter (which was issued sometime in February 2014) or the date Wong received the EEOC right-to-sue letter (which was mailed in late January 2015). However, one year from the DFEH's notice would have expired at some

point in February 2015; 90 days from the EEOC's notice would have expired around the end of April 2015. This action, filed in September 2017, is time-barred with respect to the allegations encompassed by Wong's February 2014 administrative charge.

Wong attempts to avoid this result by relying on the continuing violation doctrine. Under this law, "an employer is liable for actions that take place outside the limitations period if these actions are sufficiently linked to unlawful conduct that occurred within the limitations period. [Citation.]" (*Yanowitz, supra,* 36 Cal.4th at p. 1056.) The doctrine applies when: (1) the employer's actions inside and outside the limitations period are sufficiently similar in kind; (2) the acts occurred with reasonable frequency; and (3) the acts had not yet acquired a degree of permanence. (*Id*. at p. 1059.)

It may well be that the continuing violation doctrine would apply to allow Wong to pursue, in this action, acts of verbal harassment which were encompassed by his February 2014 administrative charge but were similar to acts of verbal harassment which continued throughout the years leading up to his filing of the complaint; we address the issue briefly below. However, the continuing violation doctrine does not apply to allow Wong to pursue claims based on his 2013 transfer away from CLARTS. This act is *not* similar in kind to the other acts of purported harassment and discrimination which Wong alleges. The transfer, outside the limitations period, is Wong's only allegation regarding assignments and bonus pay; all of his other allegations pertain to work criticisms, failure to inform him of overtime opportunities, harassing statements, and the like. To the extent Wong attempts to find the necessary similarity in the City's job announcement for a night shift heavy duty equipment

mechanic at CLARTS, we conclude that the job announcement, as alleged, is not a discriminatory act as a matter of law. Wong alleges only that, some 18 months after the City determined that it did not need both daytime heavy duty equipment mechanics at CLARTS, it decided to hire a nighttime heavy duty equipment mechanic there. Wong has failed to allege anything discriminatory by this decision; he has alleged only that he could not apply for the job because he does not work nights.[9]

In sum, Wong cannot rely on the continuing violation doctrine to pursue, in this action, any claims arising from the March 2013 transfer, for which he lost his right to sue in April 2015.

B. *The Criticisms of His Work Do Not Constitute Adverse Employment Actions*

Wong next suggests that Simas's criticisms of his work, and unspecified discipline, constitute adverse employment actions.[10] As alleged in his complaint, the criticisms do not amount to an adverse employment action as a matter of law. In order to constitute an adverse employment action, the employer's act must have a substantial and material adverse effect on the terms and conditions of employment. (*Pinero v. Specialty Restaurants*

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[9] This job announcement was issued in October 2014, and Wong failed to include any mention of it in his second, January 2015, administrative charge. Thus, he failed to exhaust his administrative remedies with respect to this job announcement.

[10] The alleged criticisms of Wong's work take two forms – criticisms which Wong may have deserved, but which were purportedly withheld from other employees whom Wong believed deserved them more, and criticisms which Wong believed were undeserved.

Corp. (2005) 130 Cal.App.4th 635, 641.) Mere oral or written criticism of an employee does not constitute an adverse employment action. (*Id.* at p. 646.) Even a supervisor's "letter of instruction" does not rise to the level of an adverse employment action, when it has no immediate effect on the terms and conditions of employment. (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 392 (*McRae*).) In contrast, when there is evidence that a particular disciplinary action "can destroy" the employee's career, or otherwise impact the conditions of employment, it is an adverse employment action. (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 369, 374 (*Horsford*).)

Here, relying on *Horsford*, Wong argues that, as a matter of law, negative performance evaluations constitute adverse employment actions. But in *Horsford*, there was evidence that the negative evaluations would impact the plaintiffs' careers. (*Horsford, supra,* 132 Cal.App.4th at pp. 369, 374). Wong made no such allegations, and, in fact, failed to even allege the type of negative evaluation/discipline he received, and whether it was recorded in his file in any way.

C. *The Remaining Allegations Do Not Amount to An Adverse Employment Action*

Wong argues that, taken together, his allegations show a course of conduct amounting to adverse employment action. To be sure, "[t]here is no requirement that an employer's [discriminatory] acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. [Citations.]" (*Yanowitz, supra,* 36 Cal.4th at p. 1055.) This does not mean that a plaintiff can pursue an action based on a series of minor acts which, taken together, do not materially affect the terms, conditions, or

privileges of employment. (*McRae, supra,* 142 Cal.App.4th at p. 386.) " 'If every minor change in working conditions or trivial action were a materially adverse action then any "action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." ' The plaintiff must show the employer's retaliatory actions had a detrimental and substantial effect on the plaintiff's employment." (*Ibid.,* internal citations omitted.)

Even assuming that all of Wong's allegations, other than the 2013 transfer, can be considered part of the course of conduct, Wong has not sufficiently alleged acts having a detrimental and substantial effect on his employment. Over four years, he received criticisms of his work which he considered unfair; he was denied a single vacation over one Thanksgiving; overtime opportunities were not readily posted, but he found out about them nonetheless; he was not given training for necessary work, but found other employees to help him and he succeeded; he was rejected for another training program (with the CHP) which only four employees attended, and which was not alleged to lead to promotions or better pay; and he worked outside in the hot sun (for an unknown number of days in one summer) while other employees were not required to do so. These circumstances, taken alone or together, do not amount to a substantial and detrimental effect on the terms, conditions or privileges of employment.[11]

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[11] In addition, at least as to racial discrimination, Wong has not sufficiently alleged racial animus. To be actionable, the adverse employment action must be tied to animus. (*Horsford, supra,* 132 Cal.App.4th at pp. 374-375.) There are no allegations that Simas ever said anything to Wong reflecting a bias against Asian-Americans. Wong alleges that Simas often treated

4. *Wong Has Sufficiently Alleged Age Harassment*

We reach a different conclusion as to harassment (and failure to prevent harassment), at least when based on age. While discrimination under FEHA addresses explicit changes in the terms, conditions, or privileges of employment, harassment "focuses on situations in which the *social environment* of the workplace becomes intolerable because the harassment (whether verbal, physical, or visual) communicates an offensive message to the harassed employee." (*Roby v. McKesson* (2010) 47 Cal.4th 686, 706.) If the harasser is a supervisor, the employer is strictly liable; when the harasser is a nonsupervisory employee, employer liability turns on whether the employer knew or should have known of the harassment and failed to take corrective action. (*Id*. at p. 707.)

Generally, commonly necessary personnel management actions may constitute discrimination, but they are not harassment. (*Roby, supra,* 47 Cal.4th at p. 707.) To be sure, sometimes the hostile message that constitutes harassment is conveyed via official employment actions, so evidence that would normally be associated with discrimination may form the basis of harassment. (*Id*. at p. 708.) For example, when an employer granted promotions and favorable job assignments to female employees involved in sexual relationships with a male

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Hispanic employees better than he treated Wong, but there is no allegation as to Simas's treatment of any other Asian-American workers under his supervision which might give rise to an inference that Simas was biased against Asian-Americans. The failure to allege discriminatory animus suggests that Simas may well have treated all of his other subordinates of any race well, but simply disliked Wong. That would not be actionable.

supervisor, these promotions and favorable job assignments (personnel management decisions that are usually the domain of discrimination) were evidence of harassment of the other female employees in the workplace, because the promotions and favorable assignments conveyed to them the message that women were sexual playthings. (*Id*. at pp. 707-708.) But it was the sex-biased message itself which constituted the harassment. (*Id*. at p. 708.)

Below, Wong alleged several acts which, although not amounting to discrimination, may constitute harassment – including forcing him alone to work outside in the hot sun; denying him training opportunities given younger employees; declining to offer him overtime opportunities offered to younger employees; and criticizing him for alleged performance defects not criticized in younger employees. More than that, Wong specifically alleged that his fellow employees consistently taunted him about his age and suggested he should retire. Simas himself is alleged to have said to Wong, "You're never going to make more money here so you should just retire."[12]

The City suggests that Wong cannot pursue his age harassment cause of action because he has not exhausted his administrative remedies with respect to age harassment – specifically, because (1) he did not timely sue following his first administrative charge, which had raised age harassment; and (2) he failed to raise age harassment in his second administrative charge on which he did timely sue. But the administrative

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[12] In contrast, as noted in the context of Wong's race discrimination claim, he made no allegations of race-based taunts or comments, which otherwise might have suggested race-based harassment.

exhaustion requirement is satisfied if FEHA claims in the judicial complaint are " 'like or reasonably related to' " those in the DFEH complaint or likely to be uncovered in the course of a DFEH investigation. (*Okoli v. Lockheed Technical Operations Co.* (1999) 36 Cal.App.4th 1607, 1614-1615.)

Wong has alleged age harassment throughout various proceedings with the City; indeed, as early as his May 2013 informal union grievance, Wong complained about jokes trying to push him to retire. In his first administrative charge, he raised age harassment – specifically claiming that he had been repeatedly asked when he anticipated retiring – and checked the box for "continuing action." His second administrative charge was filed while the EEOC was still investigating the first charge. The second charge referenced by case number the first, and asserted a violation of the Age Discrimination in Employment Act. In opposition to the demurrer, Wong argued that the EEOC's investigation of the second charge encompassed age-based harassment. Under these circumstances, we conclude Wong's allegations are sufficient to survive demurrer on the issue of failure to exhaust, based on the continuing violation doctrine.

5. *Cause of Action for Failing to Prevent Discrimination and Harassment*

The cause of action for failure to prevent discrimination and harassment is not independently actionable, but depends on underlying discrimination or harassment. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 289.) As Wong has properly pleaded a cause of action for age harassment, he can also pursue his cause of action for failing to prevent age harassment. As his other discrimination and harassment causes

of action cannot proceed, the failure to prevent cause of action cannot proceed on any other basis.

6. *Denial of Leave to Amend was Proper*

Wong argues that the trial court erred in denying him leave to amend. As discussed above, "To meet [the] burden of showing abuse of discretion, the plaintiff must show how the complaint can be amended to state a cause of action. [Citation.] However, such a showing need not be made in the trial court so long as it is made to the reviewing court." (*William S. Hart Union High School Dist. v. Regional Planning Com., supra,* 226 Cal.App.3d at p. 1621.)

On appeal, he identifies seven areas in which he could modify his complaint to cure any defects in it. However, he states only the categories; he gives no specific details as to how he could amend his complaint. For example, he states that he could, "[p]lead any missing components of the continuing violation doctrine to avoid the statute of limitations." He does not explain in what way he can allege acts within the statutory period that were sufficiently similar to the 2013 transfer from CLARTS, such that the continuing violation doctrine might apply. Wong has simply identified areas the trial court found problematic in his complaint, and represented that he could resolve them. He has not, in any way, "show[n] how the complaint can be amended to state a cause of action."

DISPOSITION

The judgment is reversed and the matter remanded to the trial court with directions to vacate its order sustaining the City's demurrer without leave to amend, and enter a new and different order overruling the demurrer with respect to the causes of action for age harassment (cause of action 4) and failure to prevent

discrimination and harassment (cause of action 5, as to age harassment only), and sustaining the demurrer without leave to amend in all other respects. The parties are to pay their own costs on appeal.

RUBIN, P. J.

I CONCUR:

MOOR, J.

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BAKER, J., Concurring

I join the court's opinion with the exception of the majority's observations in footnote 11.

BAKER, J.