Filed 2/27/12 Rodriguez v. Burbank Police Dept. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

OMAR RODRIGUEZ et al., Plaintiffs and Appellants, v. BURBANK POLICE DEPARTMENT et al., Defendants and Respondents.	B227414 (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.

Law Offices of Rheuban & Gresen, Steven M. Cischke and Solomon E. Gresen for Plaintiffs and Appellants.

Ballard, Rosenberg, Golper & Savitt and Linda Miller Savitt; Mitchell Silberberg & Knupp, Lawrence A. Michaels and Veronica T. von Grabow for Defendants and Respondents.

On May 28, 2009, appellants Omar Rodriguez, Cindy Guillen-Gomez, Steve Karagiosian, Elfego Rodriguez and Jamal Childs (collectively appellants) brought an action against respondent City of Burbank (City) and the Burbank Police Department under the California Fair Employment and Housing Act (FEHA)[1] and the Public Safety Officers Procedural Bill of Rights Act (POBRA).[2] City filed its motion for summary judgment against appellant Elfego Rodriguez[3] on February 26, 2010. The trial court granted the motion on July 12, 2010, a judgment was entered, and Elfego has appealed from the judgment against him.

In the meantime, on June 17, 2010, appellants filed a motion to disqualify the two law firms that represent City. The trial court denied that motion, and all appellants have appealed the denial of this motion.

We have consolidated the appeals for the purposes of oral argument and decision, and affirm the trial court's rulings.

ELFEGO'S APPEAL FROM SUMMARY JUDGMENT

The operative, first amended complaint (hereafter complaint) alleges seven causes of action; all but two are predicated on various subdivisions of Government Code section 12940 (hereafter section 12940). In numerical order, these five causes of action are for discrimination, harassment, wrongful retaliation, wrongful failure to accommodate, and failure to take reasonable steps to prevent

---

[1] Government Code section 12900 et seq.

[2] Government Code section 3300 et seq. This claim has been abandoned in the appeal.

[3] We will refer to Omar and Elfego Rodriguez by their first names to avoid confusion and not out of a lack of courtesy. The other defendants will be referred to by their last names.

discrimination, harassment and wrongful retaliation. The cause of action alleging violations of POBRA has been abandoned in this appeal. The final, seventh cause of action is for injunctive relief.

The factual allegations that pertain to Elfego individually are that Elfego was hired by the Burbank police department in June 2004; that he performed very well throughout, receiving numerous commendations; and that he was selected to serve in the prestigious Special Enforcement Detail (SED). The complaint alleges that during Elfego's tenure with the Burbank police department, he was subjected to discrimination, harassment and wrongful retaliation, that he reported these incidents but that nothing was done about them. The complaint alleges that Elfego, who is of Guatemalan descent, has been taunted by fellow officers as looking "like the bad guys we chase" and that Hispanics are commonly referred to by Burbank police officers in racially degrading ways, such as "half-breed." Offensive racial epithets are common, according to the complaint, which create, among other things, a hostile work environment. The complaint also alleges that Elfego, like other minorities, has been denied promotion because of his race.

Elfego contends that the trial court erred in (1) not allowing him to amend his complaint before hearing the summary judgment motion, (2) in sustaining various objections to the evidence he submitted in response to the motion, and (3) in granting summary judgment. None of the contentions has merit.

I. Amendment of the Complaint

A. Procedural Background

City's summary judgment motion was initially set for May 12, 2010. In the interim, on March 30, 2010, the Burbank police department terminated Elfego. Thereafter, on April 6, 2010, before Elfego had filed any responsive papers, he

filed an ex parte application to continue the hearing on the summary judgment motion or to take it off calendar. The application stated that there had been a change in Elfego's status, and that Elfego "intends to apply to this court for leave to amend the Complaint." The attorney's supporting declaration stated that "Plaintiffs intend to file a motion for leave to amend this Complaint to (a) include the new facts of Plaintiffs Elfego and Omar Rodriguez' wrongful termination in violation of FEHA and POBRA, and (b) plead a claim for disparate impact in the Complaint." The declaration stated that July 16, 2010 had been reserved for the hearing to amend the complaint.

City filed an opposition to the ex parte application to continue. City pointed out that the opposition to the summary judgment motion was then due on April 28, 2010 and that Elfego had not articulated what facts he could not discover by April 28, 2010.

The trial court denied the ex parte application to continue the summary judgment hearing. In its minute order, the court stated that it could not foresee whether the expected motion to amend the complaint would be granted and, if it were granted, whether an amendment to the complaint would affect the motion for summary judgment.

Elfego never filed a motion to amend the operative, first amended complaint. Instead, he filed his opposition to the motion for summary judgment on April 28, 2010. In a single footnote on the last page of Elfego's memorandum in opposition to the motion was the remark that if the court did not agree that Elfego had shown that he had a prima facie case, the court should "treat this motion as a motion for judgment on the pleadings and allow Plaintiff to file an amended complaint."

The hearing of the motion for summary judgment took place on May 21, 2010. The court's tentative ruling was to grant the motion, which remained the court's ruling. The judgment was entered on July 12, 2010.

B. The Trial Court Never Ruled that Elfego Could Not Amend his Complaint

Elfego contends that the trial court erred "in not allowing appellant to amend the complaint to allege the facts of his termination." (Capitalization and bolding omitted.) He is mistaken. Elfego never filed a motion to amend the first amended complaint. Thus, the court never ruled that Elfego would not be permitted to amend. To the contrary, the court simply denied Elfego's ex parte application to continue the hearing on the summary judgment motion, in the absence of a properly filed motion to amend the complaint.

In a single footnote on the last page of Elfego's memorandum in opposition to the motion for summary judgment was the comment that if the court did not agree that Elfego had shown that he had a prima facie case, the court should "treat this motion as a motion for judgment on the pleadings and allow Plaintiff to file an amended complaint." We note that, for the purposes of an appeal, an argument placed in a footnote in an appellate brief is deemed to have been waived and will not be considered by the court. (*Evans v. CenterStone Development Co.* (2005) 134 Cal.App.4th 151, 160.) We see no reason why this should not apply to a filing in a trial court. In fact, there is every reason to do so since a trial court, faced with the ever-daunting task of wading through hundreds of pages of text in a motion for summary judgment, which was certainly true of this case, can hardly be expected to rule on a bare request in a single footnote, unsupported by any factual material, case authority, or a proposed amended complaint, to "treat this [summary

judgment] motion as a motion for judgment on the pleadings and allow Plaintiff to file an amended complaint." To put it differently, if Elfego wanted to amend the complaint, it was his responsibility to file a motion to amend. It was not the trial court's duty, upon the reading of the footnote, to set a hearing for a non-existent motion to amend.

Finally, Elfego does not actually contend that the court erred in denying a continuance of the summary judgment motion. Accordingly, we need not address that issue. We note in passing, however, that the court's order of April 6, 2010 denied only the request for an ex parte hearing, and did not obviate properly a noticed motion for a continuance or an ex parte application to hear such a motion on shortened notice.

In sum, the trial court never ruled that Elfego could not amend the first amended complaint.

II. Summary Judgment

A. Adverse Employment Action

Elfego contends that he raised a triable issue of material fact as to whether he suffered an adverse employment action. Therefore, the trial court erred in adjudicating his first cause of action for employment discrimination based on race. (Gov. Code, § 12940, subd. (a) (hereafter "section 12940").[4] We disagree.

---

[4] It is an unlawful employment practice: "For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment." (§ 12940, subd. (a).)

Summary judgment is granted when the moving party satisfies "the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. . . . There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted (*Aguilar*).) A defendant moving for summary judgment bears an initial burden of production to make a prima facie showing that one or more elements of the cause of action cannot be established, or that there is a complete defense. He may sustain this burden by showing that the plaintiff does not have, and cannot reasonably obtain, evidence to prove one or more elements of the cause of action by a preponderance of the evidence. If he succeeds, the burden of production shifts to the plaintiff to make a prima facie showing that a triable issue of material fact exists as to the cause of action. (See *Aguilar, supra*, 25 Cal.4th at pp. 850-851.)

In determining whether a triable issue of material fact exists, the court must strictly construe the moving party's papers. However, the opposing party's evidence must be liberally construed to determine the existence of a triable issue of fact. "All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment." (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562; see *Aguilar, supra*, 25 Cal.4th at p. 843.)

The prohibition of discrimination set forth in section 12940 "is often restated in judicial opinions as a requirement that the discriminatory action result in 'adverse employment action.'" (*Horsford v. Board of Trustees of California State*

University (2005) 132 Cal.App.4th 359, 373.) "In some cases, adverse action affecting 'terms, conditions, or privileges of employment' (actionable) is contrasted with changes that merely displease the employee (not actionable). [Citation.] In other words, changes in terms and conditions of employment must be both *substantial and detrimental* to be actionable." (*Ibid.*, italics added.) Examples of adverse employment actions are removing a police lieutenant from a position near the top of the department and then removing him from all law enforcement duties; and suspension from duty, even if the leave is with pay. (*Id.* at p. 374.)

As the court held it in *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355, an employee with a FEHA discrimination claim under section 12940, subdivision (a) must provide evidence that he or she suffered an adverse employment action, such as termination, demotion, or denial of an available job. The standard for defining an adverse employment action is the "materiality" test, "a standard that requires an employer's adverse action to materially affect the terms and conditions of employment." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1036.) Here, as City demonstrated in its motion, Elfego claims to have been subjected to four adverse employment actions, none of which rises to the level of an adverse employment action. Therefore, he does not have and cannot produce evidence to support that essential element of his cause of action.

The first alleged adverse employment action on which Elfego relies is the "loss of assignment to the prestigious SED [Special Enforcement Detail] unit when it was disbanded." However, as City's evidence showed, Elfego was selected for SED by Captain Janice Lowers in or around October 2008. Later, SED, whose function was to assist police detectives, was disbanded in May 2009. In a declaration filed in support of summary judgment, Captain Lowers explained that

the reasons for disbanding SED were budgetary and the decision to shift more officers into patrol.

Elfego claims that SED was disbanded because Elfego and fellow officer and co-plaintiff Steve Karagiosian complained about racist comments that were allegedly displayed on a board in a hallway. But he supports this contention by citing his own statement of disputed facts, as he does throughout his opening brief. City, citing *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 178, footnote 4, points out, correctly, that the statement of a disputed fact is not evidence and it is *evidence* that Elfego must produce; we set forth the relevant holding in the margin.[5]

In any event, there is simply no evidence that SED was disbanded because Elfego and others complained about the racist comments on the board. Elfego claims in his brief that this was so, but he produced no evidence below to support this assertion. Even if the employer has lied about the reasons for the employment action (and that of course is Elfego's position), there must be "evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions." (*Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at p. 361.) To illustrate, if the chief of police had said that blacks and Mexicans could not serve in SED, this would be evidence of intentional discrimination. But there is nothing discriminatory in being upset about complaints, even if one were to assume that this was true.

---

[5] "Here, both parties repeatedly cite their own 'separate statement' (see Code Civ. Proc., § 437c, subd. (b)) as the *sole* support for numerous 'facts.' However, a separate statement is not evidence; it *refers* to evidence submitted in support of or opposition to a summary judgment motion. In an appellate brief, an assertion of fact should be followed by a citation to the page(s) of the record containing the supporting evidence." (*Jackson v. County of Los Angeles, supra,* 60 Cal.App.4th at p. 178, fn. 4.)

The next alleged adverse employment action was that Elfego was passed over for service in the Special Response Team (SRT) for two "lesser qualified Caucasian candidates." As City's evidence showed, Elfego was passed over three times for SRT, which is Burbank's equivalent of a SWAT team. The qualifications of the three officers who preceded Elfego were four years on an SRT-type police team in Monrovia, service on the Los Angeles sheriff department's Emergency Response Team, Marine Corps service as an expert marksman and training in close quarters combat tactics. Elfego had no particular qualifications, and certainly none of the foregoing. It was also true that he did not perform as well as the three officers did on the shooting range and the obstacle course test. Finally, Elfego preceded another Caucasian officer to the SRT. Moreover, as with SED, Elfego was actually selected for SRT.

The third allegedly adverse employment action was that Elfego was not selected to fill in for a Training Officer for the period between June 27 and July 4, 2009. The fact of the matter is that Elfego served as a Field Training Officer from January 2007 to October 2008, when he joined SED. The two officers who were selected for the one-week period were picked because they had expressed an interest and were otherwise good officers. Elfego produced no evidence that he was passed over for this one-week assignment because of intentional discrimination.

The fourth and final alleged adverse employment action was the "worst patrol assignment in the entire department following the disbandment of SED." Because Elfego provides no evidence to support this claim, we disregard it.

As we have noted, the standard for defining an adverse employment action is the "materiality" test, "a standard that requires an employer's adverse action to materially affect the terms and conditions of employment." (*Yanowitz v. L'Oreal*

USA, Inc., supra, 36 Cal.4th at p. 1036.) As City points out, Elfego's actual complaint is not that he was denied SED, SRT and work as a Training Officer; he is complaining about the *timing* of these assignments. Given that timing appears to be the issue, Elfego fails to offer even a rudimentary explanation why timing rendered the aforesaid assignments adverse employment actions.

When viewed realistically, the employment actions of which he complains were not material since he actually did get these assignments, though not at the precise times that he wanted them. The fact that he did receive all three assignments militates heavily against the finding that the employment actions were even adverse, to begin with, and, if adverse, whether they were substantial, as the law requires. (*Horsford v. Board of Trustees of California State University, supra*, 132 Cal.App.4th at p. 373.) In other words, Elfego has failed to raise a triable issue that he was subjected to adverse employment actions.

B. Harassment

Elfego contends that triable issues of material exist as to his second cause of action for harassment. However, as City demonstrated in its motion below, his deposition testimony flatly contradicts the claim of harassment.

In 2008, an outside investigator and attorney, Irma R. Moisa, was retained to investigate charges made in an anonymous letter about racial and ethnic slurs made by unnamed Burbank police officers. Elfego was among those interviewed by Moisa. Elfego told her that had heard some derogatory comments about Hispanics during his first year with the Burbank police department (he started in 2004) but had heard no offensive remarks thereafter. Elfego confirmed this in his deposition that was taken in October 2009.

Not every utterance of a racial slur in the workplace violates FEHA. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 130.) The harassment, to be actionable, must be so pervasive and severe that it alters the conditions of employment and creates an abusive work environment. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 610.) Illustrative of statements that Elfego cites in his appeal and that do not qualify under the foregoing test is the statement by another officer that Elfego looked like "the bad guys" the Burbank police chases.

Finally, we agree with City that claims based on racial slurs made during Elfego's first year with the Burbank police in 2004-2005 are time-barred since the applicable statute is one year (Gov. Code, § 12960, subd. (d)) and Elfego filed his complaint in May 2009.

B. Retaliation and Failure to Prevent Discrimination

"To establish a prima facie case of retaliation 'a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two.'" (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 138.)

In the present case, there is insufficient evidence to raise a triable issue that City took adverse employment actions against Elfego. Therefore, Elfego's claims for retaliation and harassment fail.

C. Ruling on Objections

Elfego contends that a number of the trial court's rulings sustaining City's objections to evidence propounded by Elfego were erroneous. "The court's evidentiary rulings made on summary judgment are reviewed for abuse of

discretion." (*Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1169.) We briefly discuss the rulings to which Elfego refers. We find no reversible error.

We have a general observation that applies to many of the objections Elfego addresses. The crux of the matter is whether Elfego can point to evidence that intentional discrimination was the true cause of the employer's actions (*Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 361); it need not be direct evidence, but the inference must be rational (*ibid.*). Measured against this standard, much of the evidence that Elfego has propounded is immaterial. As an illustration, the evidence that the chief of police used the word "Nigger" is not of probative significance. The chief could have used the word as an illustration of what *not* to say, or he could have been quoting someone, or it could have been an aside uttered in bad taste but without any intent to demean anyone. The circumstances under which the word was used, or the setting in which it was used, would go a long way to instill some relevance to this item of evidence. Without the setting in which the word was used, it is not evidence of intentional discrimination.

The court sustained City's objection to the following in Elfego's declaration:

Objection 110

"I [Elfego] witnessed and heard Chief Stehr use the word 'Nigger' in a management meeting in November 2008. He did not use the term as an instruction to the officers that they should discontinue its use. While it is true that Chief Stehr did not encourage the officers to use the term, it was clear in his tone that he regretted that the term could no longer be used publicly."

We agree with City that the bulk of the foregoing is speculation about Chief Stehr's state of mind. Even if the first sentence was not speculative, it was, at best, of marginal relevance for reasons that we have given above.

Objection 126

An objection was sustained to this passage in Deputy Chief William Taylor's declaration:

"I was at a Management Team meeting on or about November 2008 in which Chief Stehr used the word 'Nigger.' I did not interpret Chief Stehr's comment as an effort on his part to teach anyone in the room that use of that term was unauthorized or would not be tolerated."

The second sentence speculates about Stehr's state of mind and was inadmissible. Even if otherwise admissible, the first sentence was of marginal relevance for the stated reasons.

Objection 8

The trial court sustained an objection to the following from Elfego's declaration:

"Nevertheless, racial and ethnic slurs have continued in the Department, though not as frequent since this lawsuit was filed. During the past two years I have heard the term 'wetback,' 'Julios,' 'gardeners,' and 'half-breed' used on the Burbank Police Department premises on numerous occasions."

This statement contradicts Elfego's deposition testimony that he had not heard any racial slurs since October 2009 and therefore the court properly disregarded it. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21-22.) This rule is of particular importance to this case. The complaint alleges that there were "numerous incidents of race based . . . discrimination;" when the complaint is closely examined, the "incidents" boil down to racial epithets. It is therefore particularly significant that Elfego's deposition testimony effectively nullifies an important part of his case.

Objection 101

Another objection was sustained to a similar passage, and the ruling is it is correct for the same reason that objection 8 was correctly sustained.

The remaining objections were interposed to the declaration of Deputy Chief William Taylor.

Objection 118

"Assignment as a Field Training Officer is an excellent opportunity for professional growth."

This is irrelevant. Standing alone, whether this assignment was valuable simply sheds no light on whether the police department intentionally discriminated against Elfego. In other words, there is no connection between the value of serving as a Field Training Officer and intentional discrimination.

Objection 122

The statement was that SED budgetary issues had been resolved prior to Elfego's assignment to that unit.

If Elfego's point is that City was dissembling when it claimed that SED was disbanded because of budgetary consideration, this still does not amount to evidence of intentional discrimination. Even if the employer has lied about the reasons for the employment action, there still must be evidence, direct or circumstantial, of intentional discrimination. (*Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 361.)

Objection 123

A lengthy passage addressed the planning of a Special Problems Unit to replace SED.

This is irrelevant. Elfego's point is once again that City is dissembling about the disbanding of SED. Our observation about objection 122 applies here as well.

Objection 124

The statement was that Taylor was normally involved in the decision making process.

It is difficult to see a connection between this fact and Elfego's case. Very possibly, the point of this is once again that the reason given for disbanding SED was a subterfuge. If so, our comment about objection 122 applies.

Objection 119

A lengthy statement that SED was a valuable experience for a police officer.

We cannot see how this is relevant since Elfego did serve in the SED.

Objection 125

The statement was that Captain Lynch was targeting minority recruits for termination.

This was inadmissible insofar as it speculated regarding Captain Lynch's state of mind. Even if it was admissible, it is conclusory and its exclusion was not prejudicial.

Objection 127

"Chief Stehr told me that Ms. Moisa uncovered some very serious discrimination concerns. Chief Stehr told me that despite numerous allegations of discrimination, there would only be two small investigations. I suggested to Chief Stehr that there should be more investigations, but he disagreed. He then restated that he would only authorize two small investigations."

The bulk of this is inadmissible hearsay.

City interposed 281 objections. The trial court overruled seven of them and sustained the rest. We see no prejudicial error in the trial court's rulings.

D. Conclusion

We conclude that Elfego's contentions are without merit and that the trial court did not err in granting the motion for summary judgment.

APPELLANT'S APPEAL FROM THE DENIAL OF THE DISQUALIFICATION MOTION

Appellants contend that the trial court erred in denying their motion to disqualify counsel for the City. For the reasons set forth below, we disagree.

I. The Pertinent Facts

City noticed the depositions of appellants in June 2009 and concurrently served each of them with requests to produce documents. Among the documents produced was a 44-page statement by appellant Omar.[6] It was, in fact, produced twice, once by Omar and also by Guillen. The Gomez productions occurred on or about July 31, 2009. We will refer to this document as the Statement.

During the first deposition, City's counsel posed a question to Omar about the Statement, which seems to have been the first time that the Statement surfaced after its production. After some colloquy, Omar's counsel Gresen stated that the Statement might be privileged. In a letter dated August 12, 2009, Gresen flatly asserted that it was privileged, a position City's counsel rejected in a letter responding to Gresen's August 12th communication.

---

[6] As before, we use Omar Rodriguez's first name for clarity and not out of a lack of courtesy.

The Statement referred to a number of exhibits, some of which turned out to be confidential police personnel records. A dispute later arose over those records, resulting in City bringing a cross-complaint against Omar for conversion.

The matter slumbered until December 22, 2009 when City, learning that Omar was seeking a protective order with regard to the Statement, asked retired Judge Wayne, the discovery referee, to have the issue briefed. City was still contending that the Statement was not privileged. After the briefs were in and a hearing had been held, the discovery referee recommended that City be ordered to return the Statement, a recommendation the court adopted on March 15, 2010.

The motion to disqualify City's two law firms was filed on June 17, 2010.

We note that the standard of review is abuse of discretion. (*Brand v. 20th Century Ins. Co./21st Century Ins. Co.* (2004) 124 Cal.App.4th 594, 601.)[7]

II. City Acted Reasonably In Contending that the Statement Was Not Privileged

We have examined the Statement that has been filed in this court under seal. We agree with the trial court that there is nothing about the Statement that suggests that it was privileged. It is by-and-large a chronological account of Omar's career in the Burbank police department from 1988 to 2009 and, as the trial court observed, the document could have been prepared for many possible purposes. It

---

[7] "We review a trial court's ruling on a disqualification motion for abuse of discretion, and we accept as correct all express or implied findings that are supported by substantial evidence. [Citations.] 'However, the trial court's discretion is limited by the applicable legal principles. [Citation.] Thus, where there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law. [Citation.] In any event, a disqualification motion involves concerns that justify careful review of the trial court's exercise of discretion. [Citation.]'" (*Brand v. 20th Century Ins. Co./21st Century Ins. Co., supra,* 124 Cal.App.4th at p. 601.)

is not marked "Confidential" or "Privileged" at any point of its 44 pages and it is not directed to an attorney. Litigation is not mentioned or discussed. While there are four passing references to meetings with a lawyer at pages 39, 41 and 42, these references are very brief and completely neutral.

It is true that if a lawyer comes into possession of a document that is clearly and indubitably privileged, the lawyer is under a duty not to examine the document and must notify the possessor of the privilege that the lawyer has the document. (*Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 817.) But this is not such a case.

This brings us to the observation that Omar's, rather his counsel's, conduct between August and December 2009 certainly did *not* signal that Omar's side of this case considered the Statement either vital or privileged. The logical thing to have done in August, once the Statement surfaced, was to demand the document back immediately and, once this was refused, file an expedited motion in court. City was entitled to interpret Omar's inaction as a lack of zeal for the proposition that the Statement was privileged. If Omar had doubts, City was certainly entitled to have *its* doubts.

III. There is No Chance that the Statement Will Affect the Outcome of the Case

We begin with the observation that it is far from clear that the Statement is privileged. We have already noted its principal features, none of which suggests that it is privileged. In essence, the Statement is a long litany of complaints about the Burbank police department and a good number of its members. Every item of information in the Statement could have properly been elicited in discovery.

Assuming, however, that the Statement is privileged, there are two points to be made.

First, "'Mere exposure to the confidences of an adversary does not, standing alone, warrant disqualification. Protecting the integrity of judicial proceedings does not require so draconian a rule. Such a rule would nullify a party's right to representation by chosen counsel any time inadvertence or devious design put an adversary's confidences in an attorney's mailbox.'" (*State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 657.)

Second. "Since the purpose of a disqualification order must be prophylactic, not punitive, the significant question is whether there exists a genuine likelihood that the status or misconduct of the attorney in question will affect the outcome of the proceedings before the court. Thus, disqualification is proper where, as a result of a prior representation or through improper means, there is a reasonable probability counsel has obtained information the court believes would likely be used advantageously against an adverse party during the course of the litigation." (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 308-309.)

That City's lawyers have seen the contents of the Statement could not have any effect on the outcome of the case. The Statement contains no secrets and no information that is otherwise unavailable. In fact, almost all of it involves conversations with other people and some of it describes actions by others as well as by Omar when in the company of others. In a word, everything in the Statement is public knowledge.

There is, finally, the point that the court in *Gregori v. Bank of America, supra*, put very well: "Additionally, as courts are increasingly aware, motions to disqualify counsel often pose the very threat to the integrity of the judicial process that they purport to prevent. [Citation.] Such motions can be misused to harass

opposing counsel [citation], to delay the litigation [citation], or to intimidate an adversary into accepting settlement on terms that would not otherwise be acceptable." (*Gregori v. Bank of America*, *supra*, 207 Cal.App.3d at pp. 300-301.) There is really no explanation why Omar's counsel waited ten months to file the motion to disqualify counsel. Given that the motivations behind such motions are usually hard to identify reliably, all one can do is to note the delay and its pragmatic effect. And that was to inject new issues into a case that already appeared to be failing.

Finally, we address the final issue whether City used the Statement during the fall of 2009. Once the Statement came to light in August and the tentative claim of privilege was asserted, the parties agreed that the Statement would not be used by City until the issue of confidentiality had been resolved. Omar contends that City breached this agreement in several ways, which City denies.

As the trial court correctly observed, the Statement could not be considered privileged until December 30, 2009, when the discovery referee ordered that City return the Statement to Omar. Until then the matter was hotly contested and, as we have observed, City acted reasonably in contesting the matter.

Without detailing them, City's disclaimers that it did not make use of the Statement are convincing. Nonetheless, if it made some use of the Statement prior to December 30, 2009, it was entitled to do so. If Omar did not want this to happen, it was up to his lawyer to act with dispatch to prevent it, which he did not.

IV. Conclusion

The trial court's order denying the motion to disqualify counsel is supported by substantial evidence and was a sound exercise of its discretion.

DISPOSITION

The judgment and the order denying the motion to disqualify are affirmed. City is to recover its costs in both appeals.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.