Filed 3/5/18 Wilkerson v. Los Angeles City Fire 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

LESLIE WILKERSON, Plaintiff and Appellant, v. LOS ANGELES CITY FIRE DEPARTMENT et al., Defendants and Respondents.	B275517 (Los Angeles County Super. Ct. No. BC449758)

APPEAL from a judgment of the Superior Court of Los Angeles County, William Fahey, Judge. Affirmed.

McNicholas & McNicholas, Matthew McNicholas, Douglas Winter, and Abel Nair; Esner, Chang & Boyer, Andrew N. Chang and Joseph S. Persoff for Plaintiff and Appellant.

Lozano Smith, Mark W. Waterman and Mark K. Kitabayashi for Defendants and Respondents.

In this employment discrimination action, the trial court entered judgment for defendants based on a summary judgment ruling. Plaintiff Leslie Wilkerson appeals, arguing there are triable issues of material fact regarding both the statute of limitations defense and his substantive claims. We conclude summary judgment was properly granted based on the statute of limitations defense and affirm.

FACTUAL & PROCEDURAL BACKGROUND

Wilkerson is an arson investigator with the Los Angeles City Fire Department (LAFD).[1] After being hired as a fire fighter in 1983, he was appointed to his current position five years later. Since then, he has neither applied for nor been denied a promotion or other position.

In 2005, Battalion Chief John Miller, Captain Mike Rueda, and Captain Jaime Moore were appointed as the new command staff of the arson section. Wilkerson had no difficulties with these supervisors until a number of incidents occurred in 2007 and 2008, which he attributed to racial animus. Wilkerson, who is African American, filed an administrative charge with the Department of Fair Employment and Housing (DFEH) on June 23, 2010, claiming to have been subjected to discrimination, retaliation, and harassment by Miller, Rueda, Moore, the City, and the LAFD based on the 2007 and 2008 incidents. After Wilkerson received a right to sue letter from DFEH on July 15,

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[1] Although both the LAFD and the City of Los Angeles are named as defendants, the City alone is the proper defendant.

2010, he initiated this Fair Employment and Housing Act (FEHA) action on November 17, 2010 based on those incidents.[2]

To be timely, an administrative charge must be filed within one year of the alleged discriminatory acts. (Gov. Code, § 12960, subd. (d); *Holland v. Union Pacific Railroad Co.* (2007) 154 Cal.App.4th 940, 945.) Because the alleged incidents of unfair treatment, retaliation, and harassment (the enumerated incidents) occurred in 2007 and 2008,[3] Wilkerson's DFEH

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[2] We draw some facts from our previous opinion issued on March 16, 2015. (*Wilkerson v. Los Angeles City Fire Dept.* (Mar. 16, 2015, No. B248336) nonpub. opn.)

[3] *Reprimand Incident.* On May 30, 2007, Rueda reprimanded Wilkerson for being late to work. Wilkerson complained that a fellow investigator, David Liske, who is Caucasian, had not been reprimanded for similar violations and had been promoted to senior arson investigator.

Sick Leave Incident. In May 2007, Wilkerson was on sick leave when Rueda and Moore ordered him to undergo a psychological evaluation in order to return to work. He returned to work without that evaluation, but spent several days on unnecessary sick leave.

Cell Phone Incident. In December 2007, Miller ordered arson investigator Justin Davis to provide a cell phone number for Wilkerson. The cell phone was used by Wilkerson and his daughter, and he claimed he and his family members were inappropriately interrogated.

Mini-Drill Incident. In early 2008, the command staff directed Wilkerson to perform a mini-drill on a radiation monitor in front of other arson investigators. Wilkerson told Rueda he had not received the ten-hour training on this monitor. Rueda responded, "I guess we're going to have a ten hour drill." Without

administrative charge had to be filed within one year of their occurrence unless an exception applied.

The complaint did not allege the filing date of the DFEH administrative charge, and defendants did not raise the statute of limitations defense during the initial demurrers. The trial court dismissed the complaint as to Miller and Rueda after sustaining their demurrer to the third amended complaint without leave to amend. The trial court ruled the pleading failed to allege a prima facie claim for racial harassment against Miller and Rueda, the only claim for which they could be held personally liable.

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observing all of the mini-drill, Rueda later ordered that it be repeated because Wilkerson's performance had been inadequate.

Blower Incident. In June or July 2008, Moore told arson investigators Liske and Frank Oglesby, "'I am going to fuck with those investigators every chance I get.'" On October 15, 2008, Wilkerson and Davis responded to the scene of a fire started by a criminal suspect during a police stand-off. A SWAT team had used tear gas to subdue the suspect, and large fans ("blowers") had been placed next to the front door to remove remnants of gas before fire fighters and investigators could go in. Moore ordered the blowers turned off when he heard over the radio that Wilkerson's unit was being called to the scene. He told the blower operator, "'[W]atch me fuck with these guys.'" When Wilkerson entered the building, Moore told the operator to "'time him to see how long he stays there.'" Before he could leave the building, Wilkerson was exposed to "hot gas," a dangerous superheated form of tear gas. The blowers were later turned on at his request, and he and Davis went back in to complete the investigation. As a result of this incident, Wilkerson developed asthma, which has affected his performance as an arson investigator. He also has suffered from emotional distress and anxiety.

The remaining defendants—the City, the LAFD, and Moore (defendants)—first raised the statute of limitations defense in a motion for judgment on the pleadings directed at the third amended complaint. Because the date of the DFEH charge was not apparent on the face of that pleading, defendants requested that judicial notice be taken of the June 23, 2010 filing date. This request was granted. The court ruled that because Wilkerson did not file the DFEH charge within one year of the enumerated incidents, the complaint was untimely. It granted defendants' motion for judgment on the pleadings, but also granted Wilkerson leave to amend the allegations to plead an applicable exception to the statute of limitations.

Another demurrer was filed against the fourth amended complaint. As to the statute of limitations defense, the principal issues were whether equitable tolling applied during the LAFD's investigation of Wilkerson's internal complaint of racial discrimination and harassment, and, if so, the length of the tolling period. According to the new allegations, the internal investigation was conducted by the Equal Employment Opportunity (EEO) Unit of the Professional Standards Division of the LAFD. On April 6, 2009, Wilkerson was informed that the EEO Unit had completed its investigation and had referred his complaint to the Internal Affairs Section for further investigation. The trial court reasoned that the tolling period ended upon the April 6, 2009 transfer of the complaint to Internal Affairs, because the purpose of the further investigation was not to resolve a racial discrimination and harassment claim, but to investigate misconduct and impose discipline. The court found that because the DFEH charge was not filed within one year of the cessation of the tolling period, the complaint was untimely as

to the 2007 and 2008 events. After denying Wilkerson's motions for reconsideration and for leave to amend, the court sustained the demurrer and entered a judgment of dismissal as to all defendants.

We reversed the judgment of dismissal in the previous appeal by Wilkerson. (B248336.) In our March 15, 2015 decision, we concluded the demurrer to the fourth amended complaint was improperly sustained without leave to amend the allegations of equitable tolling. After reviewing Wilkerson's proposed fifth amended complaint and attachments,[4] we rejected defendants'

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[4] In our previous opinion, we assumed Wilkerson was capable of alleging that he "filed a complaint with the Professional Standards Division pursuant to a complaint tracking system described in an internal bulletin, an authorized method of making discrimination and harassment complaints. . . . The Professional Standards Division coordinates the work of several units, including the Equal Employment Opportunity (EEO) Unit, Internal Affairs, and Litigation and Mediation. [Wilkerson's] December 2008 complaint of 'harassment and unfair treatment' included the improper interrogation in December 2007 and the drill in early 2008; the January 2009 amendment included the reprimand in May 2007 and the blower incident in October 2008. In February 2009, [Wilkerson] was interviewed by an investigator from the EEO Unit, and he was notified in April 2009 that the EEO Unit had referred his complaint to the Internal Affairs Unit for further investigation. Three to six months later, he was told by telephone that the EEO Unit had closed the case, but he was given no information about its status in the Internal Affairs Unit. Based on his experience at the LAFD and the internal bulletin on which he relied, [Wilkerson] reasonably believed Internal Affairs would investigate his complaint. In February 2010, [Wilkerson] learned Internal Affairs had not interviewed the witnesses to the tear gas

argument that by filing a complaint with the Professional Standards Division, Wilkerson was seeking to resolve his racial harassment and discrimination claims solely through disciplinary action against his supervisors. We stated that "[t]he proposed fifth amended complaint makes clear that [Wilkerson] followed internal LAFD procedures for reporting perceived race discrimination and harassment. Both the allegations and the attachments indicate the Professional Standards Division coordinates more than just disciplinary matters. [Wilkerson's] internal complaint was initially referred to the EEO Unit, placing the LAFD on notice [Wilkerson] sought 'to enforce the same rights or obtain the same relief' (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1416) as his FEHA claims for race discrimination and harassment."

Because it was not necessary to do so, our previous decision did not reach the parties' additional arguments as to whether the statute of limitations was tolled under the continuing violation doctrine or Civil Code section 51.7. We remanded with directions to allow Wilkerson to file a fifth amended complaint. This brings us to the events related to the current appeal.

In the fifth amended complaint, the operative pleading, Wilkerson continued to allege claims against the City and the LAFD for racial discrimination, retaliation, and harassment based on the enumerated incidents. However, as to Moore, only a single claim was alleged for racial harassment. It was based on the incident with the blowers in October 2008.

The following events are alleged in the operative complaint:

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incident, which led him to believe it had not investigated his complaint at all. He filed his DFEH complaint four months later."

- On December 9, 2008, Wilkerson filed an internal complaint with the Professional Standards Division of the LAFD (the December 2008 complaint). The December 2008 complaint was based on the December 2007 cell phone incident, and the mini-drill incident in early 2008.
- In January 2009, Wilkerson amended his December 2008 complaint to include the blower incident in October 2008, the reprimand in May 2007, and the sick leave incident in May 2007.
- In February 2009, Wilkerson was interviewed by an investigator with the EEO Unit but the interview was never completed. He alleged the failure to complete his interview was due to racial discrimination.
- On April 6, 2009, Wilkerson was notified that the EEO Unit was transferring the December 2008 complaint to the LAFD Internal Affairs Section for further investigation.
- Three to six months later, Wilkerson confirmed the EEO Unit had closed his December 2008 complaint. Wilkerson received no information about the status of the Internal Affairs investigation, and reasonably believed the Internal Affairs Section would investigate his December 2008 complaint and take appropriate steps to resolve it.
- In March 2010, Rueda filed a complaint against Wilkerson with the Professional Standards Division, alleging Wilkerson had raised his voice. Following an investigation, the Professional Standards Division

> closed Rueda's complaint without taking any further action. Wilkerson alleged that Rueda's complaint was untrue, and was designed to harass, retaliate, and discriminate against him.

Defendants moved for summary judgment of the operative complaint based on the statute of limitations and other grounds. As to the statute of limitations, they argued the action was untimely because Wilkerson did not file the DFEH complaint within one year of the enumerated incidents.

In a footnote, defendants argued the exception under the continuing violation doctrine was inapplicable because the enumerated incidents were not sufficiently related to the only incident that occurred within the limitations period (Rueda's March 2010 complaint against Wilkerson for yelling). (Citing *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823 [discussing the continuing violation doctrine requirements of similarity, frequency, and permanence] (*Richards*).) In the same footnote, they also argued that equitable tolling failed to cure the timeliness defect because the DFEH administrative complaint was filed more than one year after Wilkerson learned the EEO Unit had completed its investigation on April 6, 2009. (Citing *Acuna v. San Diego Gas & Electric Co.*, *supra*, 217 Cal.App.4th at pp. 1416–1417 ["[i]nformal negotiations or discussions between an employer and employee do not toll a statute of limitations under the equitable tolling doctrine," and the doctrine is inapplicable "once the employee is on notice that his or her rights had been violated and that her alternate remedies will be unsuccessful"].)[5]

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[5] On the merits, defendants argued there was no evidence of an adverse employment action, a necessary element of a claim

In a footnote in his opposition papers, Wilkerson argued that the continuing violation exception applied because the LAFD had "engaged in a series of discriminatory and retaliatory actions that began outside the limitations period and continued within the limitations period." He argued there was a material issue of fact as to when the continuing acts of discrimination, retaliation, and harassment reached a point of permanency such that a reasonable employee would infer that any further efforts to end the discrimination would be futile. (Citing *Richards*, *supra*, 26 Cal.4th at p. 823.) He argued the series of continuing violations did not acquire a degree of permanence until "April 20, 2010, [when he] received correspondence from [the Professional Standards Division] that the Complaint had been closed and the Department is taking no further action."

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for discrimination or retaliation in violation of the FEHA. (Citing *Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511 (*Thomas*); *McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 386 (*McRae*).) They contended there was no evidence of a discriminatory racial motive, or of any improper statement, comment, or joke regarding race. Defendants submitted declarations in support of their position that all of the enumerated actions were based on legitimate nondiscriminatory reasons. They contended the dispute was based on ordinary "job-related conduct, such as making appointments to positions, addressing stress leave, making reprimands for tardiness, contacting an employee about work schedules, and making assignments regarding presentations and training." Defendants asserted their actions do not constitute racial harassment under California law. In addition, defendants denied that Moore intentionally turned off the blowers (or had them turned off) in order to expose Wilkerson to tear gas, and argued that Wilkerson was not the only person exposed to tear gas during the October 2008 incident.

The April 20, 2010 letter was incorporated in paragraph 23 of Wilkerson's declaration. It was clear on the face of the letter that it pertained to a different complaint, which had been filed *against* Wilkerson. The letter stated: "The Professional Standards Division has completed its review of the investigation into the complaint *filed against you*." (Italics added.) Notably, it did not mention Wilkerson's December 2008 complaint.

Defendants objected to paragraph 23 in its entirety, thus necessarily placing the April 20, 2010 letter within scope of the objection. Defendants argued the letter was immaterial and irrelevant to the statute of limitations defense, and the only document relevant to calculation of the statutory period was the April 6, 2009 letter. They asserted that because the April 6, 2009 letter notified Wilkerson "that the EEO Unit had completed its investigation of any FEHA-related aspect of [his] internal complaint," it triggered the one-year period for filing an administrative charge with the DFEH. The court accepted their argument and sustained their objection, thus striking paragraph 23 from Wilkerson's declaration. As a result of the exclusion of paragraph 23, the record on the summary judgment motion lacked evidentiary support for the April 20, 2010 commencement date advanced by Wilkerson.

In their reply papers, defendants asserted the complaint was untimely because Wilkerson did not file the DFEH administrative charge within one year of the enumerated incidents. They also argued that, as to equitable tolling, the evidence was undisputed that the April 6, 2009 letter informed Wilkerson of the completion of the EEO Unit's investigation of his racial discrimination and harassment claims, and thus terminated the tolling period.

The trial court granted summary judgment on several grounds. The court found the action was untimely because Wilkerson did not file the DFEH complaint within one year of the enumerated incidents. The court found no evidentiary support for a continuing violation theory and concluded the enumerated incidents involved isolated employment decisions made by different individuals over a two-year period. It also concluded that each incident had attained permanence more than one year before the DFEH complaint was filed.

Due to the exclusion of paragraph 23 of Wilkerson's declaration, there was no factual basis to support his equitable tolling theory. The court's written decision did not expressly mention the equitable tolling theory, but referenced the exclusionary orders it had issued in connection with its summary judgment ruling.

Turning to the merits, the court found there was no evidence of an adverse employment action. It found: (1) The undisputed evidence showed that the incident with the baby bottle was directed at someone else;[6] (2) Wilkerson conceded he did not have to undergo a psychological test; and (3) the evidence was undisputed that the mini-drills were randomly assigned to each member of the arson unit. As to the reprimand, the court concluded that even assuming it was racially motivated—that Wilkerson "was reprimanded for being late and a white arson

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[6] The trial court struck Wilkerson's deposition testimony that during a January 2007 staff meeting, Moore tossed a plastic baby bottle at an investigator after accusing that investigator of whining.

investigator was not"—this was an isolated instance that would not support a claim for discrimination or harassment.

The court also found the evidence was legally insufficient to establish either racial animus or hostile work environment. Only one statement involving race was attributed to Moore—"Les when you make accusations about race and operations gets involved you create problems"—and the court found it was not racially discriminatory.

As to the incident regarding the blowers, the court found it was an isolated act that was legally insufficient to sustain a claim of racial harassment. The court pointed out that the striking of Cardona's testimony had eliminated the only evidence that Moore knowingly ordered him to turn the blowers off in order to expose Wilkerson to tear gas.[7]

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[7] In his opposition papers, Wilkerson asserted the Internal Affairs Section failed to conduct a proper investigation of his December 2008 complaint. He claimed that, in retaliation for the misconduct allegations he had filed against the command staff, the Internal Affairs Section "conducted a poor investigation by not fully investigating the blower incident and interviewing all witnesses."

In support of his retaliation theory, Wilkerson cited the deposition testimony of Tony Cardona, the person responsible for operating the blowers during the October 2008 incident. Cardona testified that, after the Internal Affairs Section refused to interview him about the October 2008 incident with the blowers, he filed a complaint alleging that the investigation was improper. Wilkerson argued that if a proper investigation had been conducted, the Internal Affairs Section would have learned that during the blower incident, Moore told Cardona he was going to "fuck with the arson unit" and to turn off the blowers. (These statements were testified to by Cardona during his deposition in

The court entered judgment for defendants based on its summary judgment ruling. This timely appeal followed.

DISCUSSION

We independently review an order granting summary judgment. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) We apply the same legal standard as the trial court in determining whether there is an issue of material fact or "whether the moving party is entitled to judgment as a matter of law. [Citations.] We accept as true the facts shown by the losing party's evidence and reasonable inferences therefrom, and we resolve evidentiary doubts or ambiguities in the losing party's favor. [Citations.]" (*Spinner v. American Broadcasting Companies*, *Inc.* (2013) 215 Cal.App.4th 172, 184 (*Spinner*).)

In reviewing the record, "we apply the same three-step analysis as the trial court. First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue. [Citation.]" (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.)

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this case.) However, the court excluded Cardona's testimony from the summary judgment hearing on foundational grounds. Accordingly, the summary judgment record did not support Wilkerson's theories that the investigation by Internal Affairs was inadequate due to the failure to interview Cardona or that Moore had ordered Cardona to turn the blowers off in order to expose Wilkerson to tear gas. On appeal, Wilkerson does not challenge the exclusion of Cardona's testimony.

I

The plaintiff has the burden of pleading and proving a timely DFEH claim, and where, as here, the defendant raises a statute of limitations defense, the plaintiff must show an exception applies. (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1402.) In the trial court, Wilkerson relied solely on the continuing violation theory to create a triable issue of fact as to the summary judgment defense. On appeal, he asks that we also consider the equitable tolling theory. He concedes he did not raise this theory below, but contends the record is undisputed that the Professional Standards Division did not complete the investigation of his December 2008 complaint until April 20, 2010, and, therefore, his DFEH administrative charge was timely filed on June 23, 2010. (Citing *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370 [equitable tolling is judicial doctrine to prevent unjust technical forfeiture where defendant would suffer no prejudice]; *Bjorndal v. Superior Court* (2012) 211 Cal.App.4th 1100, 1109–1110 [administrative deadline tolled while plaintiff pursued alternative administrative remedy].)

We conclude the equitable tolling issue was forfeited by the failure to raise it below. (*GoTek Energy, Inc. v. SoCal IP Law Group, LLP* (2016) 3 Cal.App.5th 1240, 1248.)

In any event, the equitable tolling theory is based solely on the April 20, 2010 letter that was excluded below. And even had the letter been admitted, it is not sufficient to create a triable issue of fact because the letter addressed a different complaint filed *against* Wilkerson.

In his opening brief, Wilkerson cited the April 20, 2010 letter as the sole basis for the equitable tolling theory, but failed

to mention that it referred to the investigation of a complaint against him, or that it had been excluded by the trial court.[8] At oral argument, Wilkerson's appellate counsel was asked to explain the relevance of the letter to this case. He acknowledged that the letter referred to the completion of the investigation of Rueda's complaint against Wilkerson, but argued that Wilkerson, a lay person, reasonably believed that the letter referred to the completion of the investigation of his own complaint.

Because Wilkerson had been notified in the April 6, 2009 letter of the completion of the EEO Unit's investigation of his December 2008 complaint, Wilkerson's reliance on the April 20, 2010 letter is a misguided attempt to create a triable issue of fact. The only justification asserted for Wilkerson's misinterpretation of the April 20, 2010 letter is his lack of legal training. However, because the letter stated in ordinary language that the "Professional Standards Division has completed its review of the investigation into the complaint filed against you," Wilkerson's interpretation is not sufficient to

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[8] In another section of the opening brief, Wilkerson challenged the exclusion of his declaration "testimony about the significance of the complaint filed against him," which we assume is a reference to Rueda's complaint, and argued the omitted testimony was "clearly relevant to the statute of limitations issue." Because Wilkerson did not fully brief this issue—he did not provide a reasoned explanation supported by citations to applicable legal authority regarding the relevance of the internal investigation of Rueda's complaint—we conclude this issue was forfeited. (*Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 599–600.) In any event, for the reasons discussed in the body of the opinion, the exclusion of this testimony was not prejudicial.

create a factual dispute regarding the April 6, 2009 commencement date of the one-year limitations period. An issue of material fact exists "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, 845, distinguished by *McGrory v. Applied Signal Technology*, *Inc.* (2013) 212 Cal.App.4th 1510, 1530, fn. 14.) That standard has not been met, as the evidence fails to support a reasonable finding that the investigation of Wilkerson's December 2008 complaint was completed on April 20, 2010. (*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 891 ["inference must be reasonable to raise a triable issue of material fact on summary judgment"].)

II

Wilkerson argues that summary judgment was improper because there is a triable issue of material fact regarding the continuing violation theory. We do not agree.

Under the continuing violation doctrine, "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 v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1056.) Although there is no universal test for all circumstances (see *Richards*, *supra*, 26 Cal.4th at pp. 812–817 [discussing various approaches used to apply continuing violation theory]), the general theory is that if there are unlawful acts occurring outside the limitations period that are sufficiently linked to unlawful conduct within the limitations period, and if the acts occurring outside the

limitations period have not acquired a degree of permanence, the acts may be treated as a single course of conduct that is governed by the same limitations period. (*Id.* at pp. 823–824; *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1040-1042.)

Based on the continuing violation theory, Wilkerson argues defendants should be held liable for a "'series of subtle, yet damaging, injuries'" (*McRae*, *supra*, 142 Cal.App.4th at p. 388) that occurred in 2007 and 2008. However, because the DFEH charge was filed on June 23, 2010, the only conduct falling within the one-year limitations period is the March 2010 complaint filed by Rueda against Wilkerson. Notwithstanding the resolution of that complaint in Wilkerson's favor, Wilkerson argues that the complaint violated the FEHA because it was filed in retaliation for engaging in protected activity.

Assuming the mere filing of Rueda's complaint constituted an adverse action,[9] most if not all of the incidents that occurred outside the limitations period fail to qualify as adverse actions. (See *Thomas*, *supra*, 77 Cal.App.4th at p. 512 [plaintiff did not

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[9] "In California, an employee seeking recovery on a theory of unlawful discrimination or retaliation must demonstrate that he or she has been subjected to an adverse employment action that materially affects the terms, conditions, or privileges of employment, rather than simply that the employee has been subjected to an adverse action or treatment that reasonably would deter an employee from engaging in the protected activity. [Citation.]" (*McRae*, *supra*, 142 Cal.App.4th at p. 386.) This requirement addresses a legitimate concern "'that employers will be paralyzed into inaction once an employee has lodged a complaint . . . , making such a complaint tantamount to a "get out of jail free" card for employees engaged in job misconduct.'" (*Id.* at p. 387.)

suffer material changes in terms of employment; her evidence of "one time events, such as a delayed check, an early job change, and failure to receive one overtime check" and "general assertion that [plaintiff] was assigned more duties than other employees in the same unit" failed to indicate "a substantial and detrimental effect on her employment"].)

We find no evidence of a material change in the terms of Wilkerson's employment as a result of the cell phone incident and mini drills. The record is undisputed that both incidents involved ordinary employment decisions that served a legitimate business purpose. As to the sick leave incident, notwithstanding the discussion of a psychiatric evaluation, the evidence was undisputed that Wilkerson was not required to undergo such evaluation and was permitted to return to duty based on a doctor's note. There is no evidence that the May 2007 reprimand constituted an adverse action. Following the reprimand, Wilkerson remained in the same assignment with no material changes in the terms of his employment.

As to the October 2007 incident with the blowers—the basis for the sole claim of racial harassment alleged against Moore—there is no substantial evidence that the incident was racially motivated. In his declaration, Wilkerson stated it was Moore's responsibility to notify him of the tear gas, and he relied on Moore to keep him safe. However, without evidence of racial animus, Moore's failure to carry out his responsibilities is not cognizable as racial harassment. There is no evidence that Moore made racially derogatory remarks, or that such remarks were made by others in Wilkerson's presence. On its face, the offensive statement attributed to Moore—"'I am going to fuck with those investigators every chance I get'"—was directed at a

group of investigators, and there is no evidence it was directed at any particular individual based on race.

Viewed in the light most favorable to Wilkerson, Moore's May 2007 statement—"Les when you make accusations about race and operations gets involved you create problems"— does not reasonably support a finding of racial animus. Given the absence of evidence of racial animus, summary judgment may not be denied solely to cross-examine Moore. (*Spinner*, *supra*, 215 Cal.App.4th at pp. 183–184.) Speculation alone is insufficient to create a triable issue of material fact. (*Sinai Memorial Chapel v. Dudler* (1991) 231 Cal.App.3d 190, 196–197.)

III

The remaining evidentiary issues are moot. Because summary judgment was properly granted on a theory (statute of limitations) that would have withstood the admission of the excluded evidence, the challenged evidentiary rulings do not support a claim of prejudice. (See *In re Automobile Antitrust Cases I & II* (2016) 1 Cal.App.5th 127, 141–142 [under either de novo or abuse of discretion standard of review, "plaintiffs must demonstrate that, absent the error, 'a different result would have been probable'"].)

DISPOSITION

The judgment is affirmed. Defendants are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.