Filed 5/24/12 Kansaku v. City of Hermosa Beach CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SCOTT KANSAKU, Plaintiff and Appellant, v. CITY OF HERMOSA BEACH et al., Defendants and Respondents.	B230611 (Los Angeles County Super. Ct. No. YC059310)

APPEAL from a judgment and order of the Superior Court of Los Angeles County. Michael P. Vicencia and Cary H. Nishimoto, Judges. Affirmed.

Corey W. Glave for Plaintiff and Appellant.

Liebert Cassidy Whitmore, Melanie M. Poturica and Jennifer M. Rosner for Defendants and Respondents.

Plaintiff Scott Kansaku appeals from a judgment entered after the trial court granted summary judgment in favor of defendants City of Hermosa Beach and Hermosa Beach Police Department in this action alleging violations of the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.) Kansaku also appeals from the denial of his motion to tax costs. We affirm.

BACKGROUND

In November 2001, Kansaku commenced his employment with the City of Hermosa Beach as a police officer in the Hermosa Beach Police Department. This action arises from an incident which occurred in May 2008.

On or about May 2, 2008, Kansaku issued a citation to a citizen for having an open container of beer while standing outside a bar. That citizen's sister, who apparently also received a citation for the same infraction, filed a complaint against Kansaku, asserting that he had "acted in a rude, angry, and derogatory manner toward [her sister] while issuing the citation." The complaining citizen alleged that "Kansaku's demeanor was unreasonably harsh for the situation, and he was insensitive when asking [about her sister's] age and weight."

The Hermosa Beach Police Department conducted an internal affairs investigation regarding the allegations in this citizen complaint. The investigation was completed in August 2008. The two citizens, Kansaku and another officer who was present at the incident were interviewed. A lieutenant involved in the investigation listened to an audio recording that Kansaku made of the interaction with the citizens. On the recording, Kansaku could be heard "exclaiming 'bullshit!'" after the citizens told him "that they were not aware that they could not drink alcohol in public." During the investigation, Kansaku admitted that he said "bullshit," but claimed that he did so "to lighten the situation while at the same time being sarcastic."

Based on the recording, the lieutenant found that Kansaku was not insensitive or derogatory when asking about the citizen's age and weight. The lieutenant concluded, however, that Kansaku's use of the word bullshit was "unreasonable under the circumstances" and violated Section 20.90 of the Hermosa Beach Police Department

Rules and Regulations regarding courtesy and respect. This provision requires officers to refrain from using "'harsh, violent, coarse, profane, sarcastic or insolent language.'"[1]

The lieutenant "recommended that the allegation against [Kansaku] for discourteous and disrespectful behavior be sustained." The Chief of Police reviewed the internal affairs investigation and agreed that the allegation should be sustained. The Chief decided not to impose discipline on Kansaku, but directed that a comment be entered in Kansaku's evaluation log regarding Kansaku's "use of profanity and sarcastic language when interacting with a citizen." On or about September 20, 2008, Kansaku signed the Disposition of Complaint form indicating that the allegation of misconduct was sustained and that an entry would be made in his evaluation log. The lieutenant showed Kansaku the entry that was made in his evaluation log.

In describing what an evaluation log is, the Chief of Police of the Hermosa Beach Police Department explained in his declaration in support of defendants' motion for summary judgment: "Supervisors maintain a log for each officer in the Department. The log contains notes or evaluation log entries about the officer. These evaluation log entries are merely used to assist the supervisor in completing an officer's annual performance evaluation. Comments from the evaluation log may be incorporated into an officer's annual performance evaluation. Once the officer's annual performance evaluation is completed, the evaluation log for that year is destroyed."

Hermosa Beach Police Department General Order 007, issued in June 2008, provides that the purpose of the evaluation log is "[t]o provide an effective process to document performance and facilitate continuing communication between supervisors and subordinates. It is intended that the contents of this folder be used primarily to assist the employee's rating supervisor(s) in creating an accurate *Annual Performance Evaluation*."

On or about October 3, 2008, Kansaku submitted a written request to the City of Hermosa Beach and the Hermosa Beach Police Department that he be provided an

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[1] These facts regarding the complaint and the investigation are included in the internal affairs investigation "Summary and Recommendation" report prepared by the lieutenant.

administrative appeal, maintaining that "the placement of such a negative comment in Officer [Kansaku]'s personnel file and/or any file used for personnel purposes, under the Hermosa Beach Police Department rules and state law constitutes disciplinary action." He characterized the evaluation log entry as a "written reprimand." The City denied Kansaku's request for an administrative appeal, concluding that the "notation in a log for evaluation purposes" does not constitute a written reprimand which would entitle Kansaku to an appeal.

In November 2008, Kansaku left his employment with the City. Kansaku does not dispute that he left voluntarily. The circumstances of his departure from the City are not part of his claims against the City. When Kansaku resigned, the City destroyed his 2008 evaluation log, which included the entry at issue in this case, because he would not be receiving his annual performance evaluation.

In March 2009, Kansaku and two other officers who are not parties to this appeal filed this action against the City of Hermosa Beach and the Hermosa Beach Police Department (hereafter collectively referred to as the City).[2] In his first cause of action Kansaku asserts that the City violated the Public Safety Officers Procedural Bill of Rights Act (POBRA) by not affording him an administrative appeal of "discipline, in the form of [a] written reprimand[]." Kansaku alleges that he was entitled to an administrative appeal under POBRA (Gov. Code, § 3304, subd. (b))[3] after "Chief Savelli decided to implement discipline against Kansaku and placed an adverse comment, sustaining an allegation of misconduct, in a personnel file and/or a file used for personnel purposes," an action he characterizes as a "written reprimand."

In his second cause of action, Kansaku alleges that the City violated POBRA by not allowing him access to investigative materials, adverse comments entered in a file

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[2] Kansaku also sued four City employees, but they were dismissed from this action before the City filed the motion for summary judgment at issue on appeal.

[3] Further statutory references are to the Government Code unless otherwise indicated.

used for personnel purposes, and his personnel file. (§§ 3303, subd. (g), 3305, 3306.5, subd. (a).)[4]

In both his first and second causes of action, Kansaku alleges that the City violated POBRA by retaliating against him for his prior exercise of rights under POBRA. (§ 3304, subd. (a).) In support of his retaliation claim, Kansaku references a November 2006 action that he and three other officers filed against the City, asserting alleged violations of POBRA. In that prior action, Kansaku challenged the City's refusal to provide him an administrative appeal of a written reprimand which resulted from an internal affairs investigation. While that lawsuit was pending, the Hermosa Beach Civil Service Board granted Kansaku's and the other officers' requests for administrative appeals. The plaintiffs dismissed the 2006 action with prejudice after the matter settled and the trial court ordered the City to allow the officers to inspect their internal affairs investigation files and then destroy the files.

In his first amended complaint in this action, Kansaku alleges that the City retaliated against him for his prior exercise of rights under POBRA by denying him an administrative appeal in this case.[5]

In May 2010, the City filed its motion for summary judgment or in the alternative motion for summary adjudication against Kansaku, which Kansaku opposed. On October 18, 2010, the trial court granted the motion for summary judgment and entered judgment in favor of the City.[6]

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[4] The operative first amended complaint in the appellate record also includes a third cause of action for violation of civil rights under 42 U.S.C. section 1983. Kansaku does not dispute the City's representation that this cause of action was dismissed before the City filed its motion for summary judgment against Kansaku.

[5] In his opening appellate brief, Kansaku also references a 2005 action that he and two other officers filed against the City, alleging that the City violated POBRA by failing to complete an internal affairs investigation in a timely manner and by failing to provide the officers with investigative materials, among other alleged violations.

[6] The trial court denied the City's motions for summary judgment against the other two plaintiffs in this action, but granted motions for summary adjudication. The other two plaintiffs settled their claims against the City in this action.

On November 19, 2010, the City filed and served its memorandum of costs. On December 10, 2010, Kansaku filed a motion to tax costs. On January 14, 2011, the trial court denied Kansaku's motion to tax costs on the ground that it was untimely.

DISCUSSION

1. Standard of Review

Motion for summary judgment

A trial court should grant summary judgment "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A defendant may establish its right to summary judgment by showing that one or more elements of each cause of action cannot be established. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the moving defendant has satisfied its burden, the burden shifts to the plaintiff to show that a triable issue of material fact exists as to each cause of action. (*Ibid*.) A triable issue of material fact exists where "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.)

We review the trial court's ruling on a motion for summary judgment de novo. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 60.) We "must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations] in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 843.)

Motion to tax costs

We review the trial court's denial of Kansaku's motion to tax costs for abuse of discretion. (*Chaaban v. Wet Seal, Inc.* (2012) 203 Cal.App.4th 49, 52.)

2. Contentions, Relief Sought and Mootness

As set forth above, in his first amended complaint, Kansaku maintains that the City violated POBRA (1) by not providing him an administrative appeal of "discipline, in the form of [a] written reprimand[]" (§ 3304, subd. (b)), (2) by not allowing him access to

investigative materials (§ 3303, subd. (g)), adverse comments entered in a file used for personnel purposes (§ 3305) and his personnel file (§ 3306.5), and (3) by retaliating against him because he exercised his rights under POBRA (§ 3304, subd. (a)). He seeks, among other relief, an order preventing the City from using, maintaining or releasing information about the evaluation log entry based on the sustained allegation of misconduct. In the alternative, he seeks an order requiring the City to provide him an administrative appeal.

We asked the parties to file supplemental briefing addressing whether this appeal is moot. As set forth above, Kansaku is no longer employed by the City as a police officer. He left his employment in November 2008, before he filed this action. The circumstances of his voluntary departure from the City are not part of his claims against the City. The evaluation log entry was destroyed when he left his employment. The City has represented that Kansaku obtained employment with a police department in another city. Kansaku does not dispute this representation and concedes that he obtained employment with another agency.

After reviewing the parties' supplemental briefing, we agree with Kansaku's assertion that this appeal is not moot. Kansaku seeks injunctive relief against the City "to prevent future violations of a like or similar nature" to the purported violations that he alleges in this action. (§ 3309.5, subd. (c).) As the Court of Appeal explained in *Jaramillo v. County of Orange* (2011) 200 Cal.App.4th 811, 827, where a trial court finds that an agency violated POBRA during the time that a former employee plaintiff was employed by an agency, the trial court has "no choice but to order an 'appropriate injunction,' regardless of [the plaintiff]'s own standing" and inability to benefit from the injunctive relief. Moreover, Kansaku seeks civil penalties and attorney fees based on allegations that the City's violations of POBRA were "malicious" within the meaning of section 3309.5, subdivision (e).

Accordingly, we review the merits of Kansaku's appeal.

3. Motion for Summary Judgment

Administrative appeal rights under POBRA

In his first cause of action, Kansaku asserts that the City violated POBRA by denying his request for an administrative appeal of "discipline, in the form of [a] written reprimand[]." Kansaku alleges that he was entitled to an administrative appeal under POBRA (§ 3304, subd. (b)) after "Chief Savelli decided to implement discipline against Kansaku and placed an adverse comment, sustaining an allegation of misconduct, in a personnel file and/or a file used for personnel purposes," an action he characterizes as a "written reprimand." The City argues that Kansaku is not entitled to an administrative appeal because "an evaluation log entry based on a sustained allegation of misconduct does not constitute punitive action as a matter of law." (Initial capitals omitted.) Applying the law to the undisputed facts in this case, we agree with the City.

Section 3304, subdivision (b), provides that "[n]o punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any public safety officer . . . without providing the public safety officer with an opportunity for administrative appeal." "[P]unitive action means any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment." (§ 3303.) "The statute does *not* require a showing that an adverse employment consequence has occurred or is likely to occur," but only that an adverse employment consequence may occur at some point in the future. (*Otto v. Los Angeles Unified School Dist.* (2001) 89 Cal.App.4th 985, 997 [*Otto*], citing *Calcoa v. County of San Diego* (1999) 72 Cal.App.4th 1209, 1222-1223.)

"[N]ot every action taken by a law enforcement agency in reviewing, evaluating or commenting upon the performance of one of its peace officers constitutes punitive action. For example, a routine performance evaluation would not constitute punitive action, even though it contained negative comments. [Citation.] '"Certainly, the Legislature did not contemplate an administrative appeal every time an employee receives an adverse evaluation. Indeed, the Legislature has obviously drawn a distinction between 'punitive action' and adverse comments entered in a personnel file. As to the former, an

administrative appeal is mandated (Gov. Code, § 3304, subd. (b)), but as to the latter, the officer merely has the right to notice and to respond (Gov. Code, §§ 3305, 3306.)" [Citation.]'" (*Otto, supra*, 89 Cal.App.4th at p. 996, quoting *Gordon v. Horsley* (2001) 86 Cal.App.4th 336, 350.)

Kansaku does not assert that the sustained allegation of misconduct and the evaluation log entry resulted in dismissal, demotion, suspension, reduction in salary, or transfer. As set forth in his opening appellate brief, however, he maintains that the "'performance log entry' based on sustained allegation of misconduct constitutes a written reprimand" within the meaning of section 3303. (Initial capitals omitted.) As Kansaku points out, the term "written reprimand" is not defined in the statute. The City's Memorandum of Understanding between the City and the Hermosa Beach Police Officers Association (MOU) defines reprimand as "[a]ny reprimand record or other writing containing negative comments (with the exception of Performance Evaluations) included in the employee[']s personnel package." (MOU, art. 34, § A(5).) Case law makes clear that "a written reprimand need not be labeled as such in order to constitute punitive action." (*Otto, supra*, 89 Cal.App.4th at p. 997.)

In appellate cases that Kansaku discusses, the punitive action under POBRA consisted of placing a memorandum, letter or report describing misconduct in an officer's personnel file. (See e.g., *Otto, supra,* 89 Cal.App.4th at pp. 991, 998 ["summary of conference" memorandum placed in officer Otto's personnel file "advised Otto of his responsibility to use the voice mail tracking system properly [when leaving his post for a break] and warned that 'continued failure to do so, could lead to future disciplinary action'"]; *Gordon v. Horsely, supra,* 86 Cal.App.4th at pp. 339, 340, 342 [letter from sheriff placed in deputy sheriff's personnel file restricted deputy's "powers to arrest and to carry a concealed firearm off duty" after the deputy pointed his service weapon at a driver who "cut him off"]; *Hopson v. City of Los Angeles* (1983) 139 Cal.App.3d 347, 349-350 [report by Board of Police Commissioners placed in officers' personnel files concluded that they violated department policies "'concerning the use of firearms and

deadly force, and that the officers made serious errors in judgment, and in their choice of tactics, which contributed to [a] fatal shooting . . . .'"].)

In another case Kansaku discusses, a Citizens Law Enforcement Review Board report containing "findings of serious misconduct" against four deputy sheriffs was not placed in the deputies' personnel files, but was sent to the board of supervisors and the sheriff, and there was evidence that the report would be considered in future personnel decisions and might lead to punitive action. (*Calcoa v. County of San Diego*, *supra*, 72 Cal.App.4th at pp. 1216, 1222.)

As described above, the evaluation log entry at issue here resulted from an investigation of a citizen's complaint alleging that "Kansaku acted in a rude, angry, and derogatory manner toward [another citizen] while issuing [a] citation." After listening to an audio recording that Kansaku made of his interaction with the citizens, the investigating lieutenant determined that Kansaku violated a specific section of the police department's rules and regulations regarding courtesy and respect which requires officers to refrain from using profane, sarcastic and insolent language." Kansaku admitted that he said "bullshit" when the citizens told him they were unaware of the law regarding drinking alcohol in public. The lieutenant found that Kansaku's use of the word "bullshit" was "unreasonable under the circumstances."

In a report regarding the citizen complaint, which was part of the internal affairs investigation file, the lieutenant recommended that the allegation of misconduct be sustained.[7] The Chief of Police agreed with the recommendation and decided that no discipline should be imposed, but "directed that a comment in [Kansaku]'s evaluation log be entered with regard to his use of profanity and sarcastic language when interacting with a citizen." As described above, the evaluation log aids supervisors in preparing annual performance evaluations of employees. The purpose of the evaluation log is "[t]o

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[7] This report does not constitute a written reprimand. Kansaku has cited no authority—and we are aware of none—indicating that a report in an internal affairs investigation file summarizing the investigation constitutes punitive action which triggers appeal rights under section 3304, subdivision (b).

provide an effective process to document performance and facilitate continuing communication between supervisors and subordinates."

The City's action in entering a comment in Kansaku's evaluation log based on a sustained allegation of misconduct does not constitute punitive action within the meaning of section 3304, subdivision (b). The City did not impose any discipline on Kansaku for the rules violation. Nor did the City issue a written warning to Kansaku that discipline might be forthcoming if this type of behavior continued. The City did not place a letter, memorandum, report or any other documentation regarding the incident in Kansaku's personnel file. The City entered a comment in Kansaku's evaluation log to remind his supervisor of the behavior when it came time to complete Kansaku's annual performance evaluation. We conclude that this comment does not constitute a "written reprimand" within the meaning of section 3303.

Kansaku has not raised a triable issue of material fact on his first cause of action. He has not pointed to evidence indicating that the sustained allegation of misconduct and the evaluation log entry based on the sustained allegation of misconduct might have led to adverse employment consequences, such as "dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment." (§ 3303.) There is no evidence that the City planned to place documentation in his personnel file regarding the incident. The evidence shows that, at most, his performance evaluation might have addressed his use of profanity and sarcastic language during this one citizen interaction. Because he left his employment with the City, he did not receive his performance evaluation and the evaluation log entry was destroyed. As set forth above, a negative comment in a performance evaluation—or in this case the possibility of a negative comment in a performance evaluation—does not trigger appeal rights under section 3304, subdivision (b). (See *Otto*, *supra*, 89 Cal.App.4th at p. 996.)[8]

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[8] In support of his position on this issue Kansaku references other administrative cases, including a prior case involving Kansaku, in which the Hermosa Beach Civil Service Commission ruled that the police officers were entitled to administrative appeals under POBRA. Kansaku argues that those rulings are binding on the City and this court in this

Access to investigative materials, adverse comments and personnel file

In his second cause of action, Kansaku asserts that the City violated POBRA by not allowing him access to investigative materials, adverse comments entered in a file used for personnel purposes, and his personnel file. The City argues that these claims regarding lack of access fail as a matter of law. Applying the law to the undisputed facts in this case, we agree with the City.

Investigative materials

Kansaku contends that the City did not comply with section 3303, subdivision (g), which provides: "The complete interrogation of a public safety officer may be recorded. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential. No notes or reports that are deemed to be confidential may be entered in the officer's personnel file. The public safety officer being interrogated shall have the right to bring his or her own recording device and record any and all aspects of the interrogation."

Section 3303, subdivision (g), does not require disclosure of investigative documents and materials prior to an officer's interrogation. (*Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 579.) As Kansaku acknowledges, an officer is entitled to these documents and materials after his interrogation only "if any further proceedings are contemplated or prior to any further interrogation at a subsequent

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case, and establish that he is entitled to an administrative appeal in this case. Kansaku is wrong. While unchallenged administrative findings may be binding on the parties in a subsequent civil action involving the same subject matter (see *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 76), there is no legal support for Kansaku's argument that administrative findings are binding on parties in unrelated cases arising from different incidents and facts.

time." (§ 3303, subd. (g); *Pasadena Police Officers Assn. v. City of Pasadena, supra*, 51 Cal.3d at pp. 575-576.)

Kansaku was interrogated once. Thereafter, he signed a document indicating that the allegation of misconduct had been sustained and that an entry was going to be made in his evaluation log. The lieutenant showed Kansaku the evaluation log entry. Kansaku requested an administrative appeal, and the City denied his request.

Kansaku contends that the City was required to provide him with investigative documents and materials under section 3303, subdivision (g), after he was interrogated because further proceedings were contemplated. His assertion that further proceedings were contemplated is not supported by any evidence in the record. As discussed in the preceding section of this opinion, Kansaku was not entitled to an appeal hearing because the City did not take punitive action against him. His characterization of the evaluation log entry as a "further proceeding" is not supported by any legal authority.

Adverse comments

Section 3305 provides in pertinent part: "No public safety officer shall have any comment adverse to his interest entered in his personnel file, or any other file used for any personnel purposes by his employer, without the public safety officer having first read and signed the instrument containing the adverse comment indicating he is aware of such comment, except that such entry may be made if after reading such instrument the public safety officer refuses to sign it. . . ." Section 3306 provides that the officer may "file a written response to any adverse comment entered in his personnel file."

The City has demonstrated that it complied with these provisions. It is undisputed that Kansaku reviewed and signed the disposition of the citizen complaint, indicating that the allegation of misconduct had been sustained and that an entry was going to be made in his evaluation log. It is also undisputed that the lieutenant showed Kansaku the evaluation log entry. Kansaku does not contend that the City denied him the opportunity to file a written response to the evaluation log entry.

Personnel file

Section 3306.5, subdivision (a), provides: "Every employer shall, at reasonable times and at reasonable intervals, upon the request of a public safety officer, during usual business hours, with no loss of compensation to the officer, permit that officer to inspect personnel files that are used or have been used to determine that officer's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action."

The City has established that on the occasion that Kansaku requested to see his personnel file, his request was granted. Kansaku has presented no evidence indicating that he requested to see his personnel file and was denied.

Retaliation Claim Under POBRA

In his first and second causes of action, Kansaku asserts that the City violated POBRA by retaliating against him after he exercised rights under POBRA. The City argues that Kansaku cannot establish a retaliation claim as a matter of law. Based on the undisputed facts in the record, we agree with the City.

Section 3304, subdivision (a), provides in pertinent part that "[n]o public safety officer shall be subjected to punitive action, or denied promotion, or be threatened with any such treatment, because of the lawful exercise of the rights granted under this chapter, or the exercise of any rights under any existing administrative grievance procedure."

Kansaku contends that the City retaliated against him for his prior exercise of his rights under POBRA by sustaining the allegation of misconduct and making an entry in his evaluation log and then denying his request for an administrative appeal. As discussed above, the evaluation log entry based on the sustained allegation of misconduct does not constitute punitive action and Kansaku is not entitled to an administrative appeal. Accordingly, this retaliation claim under section 3304, subdivision (a), fails as a matter of law.

Kansaku also contends that the City retaliated against him for his prior exercise of his rights under POBRA by denying him a "specialty assignment." On August 26, 2007,

Kansaku submitted a memorandum to a supervising lieutenant, expressing his interest in a downtown foot patrol assignment. On September 10, 2007, the lieutenant issued a memorandum to all personnel stating that the downtown foot patrol assignment would not be filled because several officers were out on IOD status (injured on duty). He explained that the City would "consider filling the position" when there were "fewer people out on IOD or modified duty status." On or about October 1, 2007, Kansaku filed a grievance asserting that the City decided not to fill the position because the two officers who applied were involved in legal actions against the City. The same day, the City informed Kansaku that if he wanted to pursue the grievance he needed to file it on the appropriate form, which had been provided to him previously on September 17, 2007. On December 4, 2007, after officers were released from IOD status, the City gave Kansaku the downtown foot patrol assignment with the accompanying seven percent pay raise.

The City met its burden on summary judgment of demonstrating that it did not subject Kansaku to punitive action because of his exercise of rights under POBRA. The City presented facts showing that it did not initially fill the downtown foot patrol assignment because there were officers out on IOD status. After officers were released from IOD status, the City gave the position and accompanying pay raise to Kansaku.

Kansaku has not raised a triable issue of material fact. He speculates that the City initially decided not to fill the position because he and the other officer who applied had filed a lawsuit against the City. His speculation about the City's motivation is not supported by any facts. He has not presented facts disputing the City's evidence that the City did not fill the position initially because there were several officers out on IOD status. Nor has he presented facts disputing the City's evidence that the City filled the position after officers were released from IOD status. Kansaku's theory about a connection between his exercise of his rights under POBRA and the initial denial of the specialty assignment is not supported by the evidence in the record.

4. Denial of Motion to Tax Costs

Kansaku contends that the trial court erred in denying his motion to tax costs on the ground that it was untimely. He cannot show that the court abused its discretion.

"A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment or dismissal by the clerk under Code of Civil Procedure section 664.5 or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first." (Cal. Rules of Court, rule 3.1700(a)(1).) "Any notice of motion to strike or to tax costs must be served and filed 15 days after service of the cost memorandum. If the cost memorandum was served by mail, the period is extended as provided in Code of Civil Procedure section 1013." (Cal. Rules of Court, rule 3.1700(b)(1).)

On October 18, 2010, the trial court entered judgment in this matter. On November 19, 2010, the City served its memorandum of costs. Because the City served it by mail, Kansaku had 20 days to file his motion to tax costs. Twenty one days later, on December 10, 2010, Kansaku filed his motion to tax costs. Kansaku filed his motion one day late. The trial court did not abuse its discretion in ruling that Kansaku's motion was untimely.

Kansaku asserts that his motion to tax costs was not untimely because the City's memorandum of costs "was premature." Kansaku argues that the City should not have filed and served its memorandum of costs until after the executed judgment was served on Kansaku. Kansaku's argument is without merit. A prevailing party must wait until judgment is entered before filing a memorandum of costs. (*Boonyarit v. Payless Shoesource, Inc.* (2006) 145 Cal.App.4th 1188, 1192.) The City did that here. There is no requirement that notice of entry of judgment be served before the prevailing party files its memorandum of costs.

Kansaku also argues that the trial court should have extended the time for filing the motion to tax costs under California Rules of Court, rule 3.1700(b)(3), which provides in pertinent part: "In the absence of an agreement, the court may extend the

time for serving and filing . . . the notice of motion to strike or tax costs for a period not to exceed 30 days." He cannot show, however, that the court abused its discretion in declining to extend the time.

DISPOSITION

The judgment and the order denying the motion to tax costs are affirmed. Respondents are entitled to recover costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.