

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

OSCAR MEJIA,

Plaintiff and Respondent,

v.

CITY OF INGLEWOOD,

Defendant and Appellant.

B227193, B230079

(Los Angeles County
Super. Ct. No. BC 339419)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Yvette M. Palazuelos, Judge. Reversed.

Gonzalez Saggio & Harlan, Kenneth M. Jones, Cynthia L. Sands and JoAnn
Victor for Defendant and Appellant.

Law Offices of Michael F. Baltaxe and Michael F. Baltaxe for Plaintiff and
Respondent.

* * * * *

Following a jury trial, the City of Inglewood (the City) appeals from the judgment in favor of respondent Oscar Mejia, a sergeant in the Inglewood Police Department (the Department). The City also appeals from the trial court's order awarding attorney fees and costs to Sergeant Mejia.

Sergeant Mejia brought suit against the City and the Department for retaliation under the Fair Employment and Housing Act (FEHA; Gov. Code, § 12940, subd. (n)). We reverse, finding the evidence did not support the jury's verdict that he was the subject of actionable retaliation. We also reverse the order awarding attorney fees and costs.

FACTUAL BACKGROUND

This is the second lawsuit Sergeant Mejia has filed against the City and the Department. On August 23, 2002, Sergeant Mejia initially brought suit against the City and Department alleging racial and national origin discrimination and harassment. The 2002 discrimination lawsuit was tried in 2008 and resulted in a defense verdict. The parties do not dispute that the filing of the 2002 lawsuit constituted protected activity under the FEHA. In the instant case, Sergeant Mejia contends that the Department continuously retaliated against him for engaging in this protected activity. He argued at trial that he experienced retaliation consisting of the following:

- The Department denied Sergeant Mejia's training requests.
- It denied him collateral positions (positions on various teams and committees) that would have afforded him opportunities for career advancement.
- It marginalized his positions, duties, and responsibilities.
- It denied him transfers and gave him undesirable shifts and/or assignments.
- He was treated in an unprofessional and derogatory manner such that he was essentially a "pariah" in the Department.
- It unfairly evaluated his performance, downgrading him without looking at all the good he was doing and giving him ratings that were inconsistent.

- It sought to sabotage his career by removing or losing favorable documents from his personnel file or by instituting or trying to institute frivolous disciplinary proceedings.
- It attempted to set him up for failure by putting him in positions and not giving him the necessary training or support to do the job.
- It attempted to embarrass him in front of his peers or other police departments.
- It attempted to threaten or intimidate anyone who corroborated his contentions that he was being retaliated against.

We address the evidence in the following subparts.

1. Transfers, Shifts, and Assignments

a. Sergeant Mejia's Evidence

Sergeant Mejia began his employment with the Department in 1988 at the age of 23. Until 1992, he was a patrol officer riding in a police cruiser, and from there the Department transferred him to the anticrime team/bicycle unit. In 1995, Sergeant Mejia moved to the narcotics street team. In 1997, he moved to a unit that specialized in investigating major narcotics traffickers who distributed narcotics throughout the United States. In approximately 2000, the Drug Enforcement Administration (DEA) recruited Sergeant Mejia to participate in a task force based in Los Angeles and composed of officers from local police departments throughout Southern California. Sergeant Mejia was deputized as a DEA agent as well as an FBI agent. He remained with the task force for approximately two years. In November 2001, Sergeant Mejia submitted an application and resumé for the position of sergeant. He was promoted to sergeant in December 2002.

The Department consists of three bureaus -- the patrol bureau, the administrative services bureau, and the detective bureau. Upon being promoted to sergeant in 2002, Sergeant Mejia was first assigned to the patrol bureau as a patrol sergeant. Sergeant Mejia testified that the average time for a sergeant to spend in patrol was approximately one to one and a half years, and then the sergeant would usually be moved to other sections. He remained in the patrol position for approximately three years. The

Department twice passed him over for promotions out of the patrol bureau, instead transferring two sergeants who had less seniority in patrol than he did.

After that, Sergeant Mejia moved in December 2005 to a position in the training unit of the administrative bureau -- training sergeant. As a training sergeant, he was responsible for overseeing all the training within the Department, including the field training officers (FTO) who trained new recruits and the range master, who was directly under his command.

In 2006, Sergeant Mejia submitted an application for a promotion to lieutenant. As part of the application process, he was rated by the captains of each of the three bureaus in the Department -- Captain Eve Irvine, Captain Percy Roberts, and Captain Hampton Cantrell. Sergeant Mejia placed last on the list of everyone who took the lieutenant's exam. He felt the ratings they gave him were inaccurate and false. He filed a grievance regarding the promotional process.

A couple of months after he filed the grievance, in December 2006, the Department transferred him to the traffic division to oversee the civilian parking personnel who gave out parking tickets. In that capacity, he also supervised motorcycle officers from time to time. Sergeant Mejia "wasn't very happy" about his transfer to the traffic division and felt that it was "a form of humiliation."

Next, in August 2008, he moved to the narcotics unit of the detective bureau and was officer in charge of the narcotics unit. After approximately 14 months in that position, his superior told him that he was going to be transferred back to the patrol bureau because that bureau was short in personnel. Sergeant Mejia thought this was odd because the typical stay for a sergeant in the narcotics unit was four to five years. When he spoke to the lieutenants in patrol, though, they said they were actually overstaffed. He then met with his captain and lieutenant, and they handed him his yearly evaluation in which he was rated "below standard" overall (which is discussed further below). His superiors told him the evaluation was actually the reason for his transfer back to patrol. When Sergeant Mejia filed a grievance regarding his poor evaluation, the chief of the

Department, Jacqueline Seabrooks, put a hold on the transfer and told Sergeant Mejia she would look into the matter.

b. Defense Evidence

Sergeant Mejia's time as a patrol sergeant was less than others. Sergeant James Kirk began his employment with the Department in 1989, at almost the same time as Sergeant Mejia. He was promoted to sergeant in August 2002, again around the same time as Sergeant Mejia, and like Sergeant Mejia, he was assigned to patrol upon his promotion. He spent approximately five and a half years as a patrol sergeant.

Sergeant John Barrow started working for the Department around the same time as Sergeant Mejia also. Sergeant Barrow served five years in the patrol bureau when he was a sergeant. Captain Cantrell started at the Department in 1984. When he was promoted to sergeant, he spent approximately eight or nine years in the patrol bureau.

The lieutenants exam that Sergeant Mejia took in 2006 consisted of three equally weighted parts -- a written exam, an internal appraisal, and an oral interview by expert parties outside the Department. An average score of at least 70 was required to earn a candidate a spot on the promotion eligibility list. The candidates on the list are ranked in order of their scores. If a lieutenant spot opens up, the chief of police must choose among the top three candidates on the eligibility list.

The internal appraisal consisted of nine categories. A score of 70 to 79 indicated the candidate was "marginally promotable"; a score of 80 to 89 indicated the candidate was "promotable"; and a score of 90 to 100 indicated he or she was "very promotable." A score less than 70 indicated the candidate was "not promotable."

Captain Irvine's average rating of Sergeant Mejia across the nine categories was a 79.22. She gave him ratings in the "not promotable" category in three areas -- decision making, community involvement, and commitment. In the "commitment" category, she commented that he "inappropriately criticize[d] [the] organization [and] procedures to further his [own] agenda," and he did not fully support the Department's goals.

Captain Cantrell gave Sergeant Mejia an average score of 79. Captain Roberts gave him an average score of 79.55. After averaging the scores from the captains, his

weighted score on the internal appraisal portion of the exam was 26.42. The total of Sergeant Mejia's scores on all three parts of the exam were sufficient to get him on the promotional eligibility list; he was ranked ninth on the list, which was the last place on the list. Had he received a perfect score from the captains on the internal appraisal, the highest his weighted score could have been on that portion of the exam was 33.33 (because it accounted for one-third of his overall results). His weighed score on the written component was 23.33, and his weighted score on the oral interview was 24.11. Assuming he had scored perfectly on his internal appraisal, his total score from all three parts would have been 80.77 out of 100. This would have placed him only seventh on the promotional eligibility list instead of ninth. The list would continue to be the promotion eligibility list until approximately February 2008.

2. *Yearly Performance Evaluations*

a. Sergeant Mejia's Evidence

The performance evaluations consisted of ratings in 20 categories. For the rating period from December 2003 to December 2004, Sergeant Mejia was given ratings of "above standard" or "exceptional" in all 20 categories. The evaluation included recommendations that he "continue to concentrate on his supervisory skills" and "seek to transfer to those [supervisory] positions" to become a "marketable commodity within the Department."

For the next rating period from December 2004 to December 2005, Sergeant Mejia received "above standard" or "exceptional" ratings in all categories *except* cooperation, quantity of work, support of organizational goals, and approachability -- in these categories, he received a "satisfactory" rating. This evaluation recommended that Sergeant Mejia seek training to provide additional skills in leadership, team building, and current trends in law enforcement and ongoing changes in the law.

No evidence regarding the specifics of Sergeant Mejia's evaluation for the December 2005 to December 2006 rating period was presented at trial because the evaluation could not be located. He recalled that it had been favorable.

During the December 2006 to December 2007 rating period, he received a commendation from the Los Angeles County Sherriff for outstanding leadership skills. For this rating period, he was again rated “above standard” or “exceptional” in all categories, *except* that he was rated “satisfactory” in problem solving and decisionmaking, acceptance of responsibility, and quality of written work.

For the December 2007 to December 2008 rating period, Sergeant Mejia was not pleased with his evaluation. His overall rating fell to “satisfactory,” whereas in his previous three evaluations that were discussed at trial, his overall rating was “above standard.” He filed a grievance in July 2009 disputing comments and ratings on this evaluation, and at the time of trial in April 2010, he had not received a response regarding the grievance.

For the December 2008 to December 2009 period, his overall rating fell again, this time to “below standard.” He had never received a “below standard” review up to that point. During that period he had received a number of awards or recognitions for leadership, law enforcement excellence, community involvement and participation, professionalism, significant narcotics seizures, and/or participation in a narcotics survey, including the “officer of the year” award from the National Latino Peace Officers Association, a special commendation from the Inglewood City Council, a resolution from a state assemblyperson, a certificate of appreciation and a letter of appreciation from a state senator, a citizen commendation, a commendation by a city councilperson, and a letter of appreciation from the Department of Justice.

Sergeant Mejia filed a grievance with respect to this evaluation as well, and at the time of trial, he had not received a response. His superior and evaluator for the 2008 to 2009 period was Lieutenant David Salcedo. Sergeant Mejia submitted this grievance, as well as the one for the 2007 to 2008 period, to the chief of police along with an approximately four-inch high stack of documents. He believed that his evidence rebutted Lieutenant Salcedo’s negative statements in the evaluations.

For instance, one concern expressed in his evaluation that he felt was frivolous related to a transfer of narcotics to the Downey Police Department. His supervisor

claimed that the transfer was done without first notifying the chain of command. But he informed the lieutenant and captain in his chain of command that he was transferring the narcotics. The Downey department had called him to ask whether it could use some of the Department's seized narcotics to conduct a reverse sting operation (i.e., sell the narcotics while undercover). Sergeant Mejia agreed to transfer the narcotics to Downey as long as it had a court order. The Downey department faxed him a court order, which he sent to his superiors, and he sent them an e-mail as well informing them of the transfer. When the Downey department arrived to pick up the narcotics, his captain was present and met the Downey officers. He thus argued that the chain of command was well aware of the narcotics transfer.

b. Defense Evidence

Sergeant's Mejia's supervisor in narcotics in 2008 and 2009, Lieutenant Salcedo, felt that Sergeant Mejia faced challenges with administrative duties. He would not turn in reports on time, and the lieutenant was required to correct, revise, and edit his reports, which took more time. He would also fail to respond on time when the lieutenant asked him to investigate incidents. Lieutenant Salcedo felt that he had very good investigative skills, but not good administrative or supervisory skills. The lieutenant also thought Sergeant Mejia did not do a good job of keeping the lieutenant informed of the cases he was handling. The lieutenant would have to direct Sergeant Mejia several times to call him and keep him up to date, and still he would not do this. Communication was critical because Lieutenant Salcedo oversaw so many units, and he depended on his sergeants to keep him informed so that he could report to the command staff. Lieutenant Salcedo also had an issue with Sergeant Mejia trying to "delegate up" work to him. For instance, he asked Sergeant Mejia to summarize an investigation by another detective, and instead of doing so, Sergeant Mejia e-mailed him the detective's two page report, saying he had never been taught to summarize. Lieutenant Salcedo gave him some samples, and after that, Sergeant Mejia summarized the report.

Lieutenant Salcedo had to advise Sergeant Mejia repeatedly regarding the same performance issues. In one meeting during which he was trying to advise him of his

performance, Sergeant Mejia became insubordinate. During the meeting they both became upset, so the lieutenant decided to terminate the meeting and resume the discussion at a later time. Sergeant Mejia refused to leave his office until the lieutenant heard his concerns. Lieutenant Salcedo explained that he had already heard his concerns because they had been talking about them, and now he wanted a “cooling off period.” He gave Sergeant Mejia a direct order to leave several times, and several times Sergeant Mejia refused to leave. Lieutenant Salcedo eventually listened to Sergeant Mejia express his concerns again because he did not want to involve any superior officers and “embarrass[] the office.”

Lieutenant Salcedo ultimately recommended that Sergeant Mejia be removed from the narcotics unit because Sergeant Mejia had so many difficulties with keeping the lieutenant informed of what was going on in the unit, and Sergeant Mejia was difficult to supervise. The lieutenant wanted a sergeant who was going to continuously make an effort to communicate with him, and he found it very frustrating and challenging to always be seeking information from Sergeant Mejia, rather than have it provided in a timely manner.

3. Training Requests

a. Sergeant Mejia’s Evidence

When an officer is promoted to sergeant, the California Commission on Peace Officer Standards and Training (POST) mandates that the sergeant attend an 80-hour supervisory training either before the sergeant is promoted or within the 12-month period after he or she has been promoted. The Department did not send Sergeant Mejia to the mandatory training until after the 12-month deadline. He did not receive any type of formal training during the period right after he was promoted.

While Sergeant Mejia was in the traffic division, there was a second sergeant in the division who rode a motorcycle and would supervise the motorcycle officers in the field on his own motorcycle. When that sergeant was not there, he would ask Sergeant Mejia to supervise the motorcycle officers. Sergeant Mejia could not go into the field on a motorcycle and supervise them because he requested but was denied motorcycle

training. Similarly, when he was in charge of supervising the Department's range master (during his tenure as training sergeant), he sought and was denied range training. He researched and found a free local course by the FBI on range and firearms training, and the Department denied his three requests for that training. But the officer who replaced him as the supervisor of the training unit, Sergeant Kirk, was allowed to attend the range master and firearms training. From 2007 to the time of trial in 2010, Sergeant Kirk had logged approximately 460 hours of training, which was almost as much as Sergeant Mejia had logged from 2003 to the time of trial.

The Department also denied Sergeant Mejia's request for tactical commander's training, which he felt was important because at the time he was a patrol sergeant in the field, and often times he and his officers would be the first responders to a scene and would have to make tactical command decisions. He also requested and was denied background investigators training when he was training sergeant. He felt this was important because at the time, his supervisor had him start overseeing personnel, and personnel was in charge of background investigations for potential new recruits. He had also started going to the police academy to find potential recruits.

Sergeant Mejia requested to attend a weapons of mass destruction bomb awareness training that would be paid for by the federal government and free to the Department. The Department denied his request to attend the training as an approved absence with pay. He ended up going to the training anyway by using his vacation time.

Sergeant Mejia submitted a request to attend another training in weapons of mass destruction in Alabama, which was also free. Another officer at the Department, Jose Gallegos, had previously been permitted to attend this training, and he found out about it from Officer Gallegos. When his captain, Captain Irvine, denied this request, he complained to his union representative. The following morning, Captain Irvine called him at home and "yell[ed]" at him for going to the union and causing people to question her about the denial of his request. After some discussion, his request to attend this training was approved as an absence with pay. He attempted to obtain free training videos from the Department of Homeland Security, but Captain Irvine did not allow it.

He was aware that the formal protocol for training requests required a written request to be submitted at least 30 days prior to the training, and some of his requests were denied by Captain Irvine because they did not follow this protocol. But frequently other officers submitted training requests that did not comply with the rules, and their requests were approved. For example, Sergeant Kirk attended certain training classes on his own time, and when he did so, he did not fill out a written training request. He would ask his supervisor and show him or her the training flyer, and he would receive verbal approval.

Captain Joseph Sissac, who supervised Sergeant Mejia while he was a training sergeant and Captain Sissac was a lieutenant, came to the conclusion that Sergeant Mejia was being treated differently than his peers with respect to training. Several times Sergeant Mejia was denied trainings that Captain Sissac had approved. For instance, Captain Sissac approved weapons training for him when one of his duties was to supervise the range master and firearms range. He felt it was appropriate because Sergeant Mejia did not have any expertise in that area and he should be exposed to it as the supervisor. After he approved the training, however, Captain Roberts denied it. Captain Sissac felt that some in the Department perceived Sergeant Mejia as “disruptive” and a “loose cannon,” and based on that perception, there were discussions about not approving certain training classes for Sergeant Mejia, with no other basis in fact or his performance. Captain Sissac was present at a command staff meeting with the chief and captains when they were discussing Sergeant Mejia, and Captain Irvine said that she did not like Sergeant Mejia and “that’s why we’re not going to send him to different places.” Captain Sissac told the command staff members that if they treated Sergeant Mejia fairly, his lawsuit would “go away.” They told him that he did not understand the complexities of the situation and did not know all of the facts, and he was “off the mark.”

b. Defense Evidence

An officer’s superiors in the chain of command had the discretion to deny a training request. The superior might consider whether it was appropriate training for the officer requesting it, and whether it was going to cost the City money to send the officer.

POST requires officers to have at least 24 hours of POST training every two years. In 2003, Sergeant Mejia logged 40 hours of training; in 2004, 136 hours of training; in 2005, 80 hours of training; in 2006, 123 hours of training; in 2007, 30 hours of training; in 2008, 56 hours of training; and in 2009, 62 hours of training.

Regarding the training that was required within 12 months after Sergeant Mejia was promoted to sergeant, he took that course in January 2004, a little over a year after he was promoted. Regarding the weapons of mass destruction training in Alabama, Captain Irvine testified that she had concerns with this request because the Department had never sent anyone to this training before, it had not been run by the Department's weapons of mass destruction supervisors or terrorism liaison officers, and it involved exposing the attendees to live anthrax, which was not done in California trainings and which created a potential liability issue. She met with Sergeant Mejia about her concerns a few days after she received the request. At the meeting she discovered that he had already made arrangements to attend the training, including airline reservations. She explained to him that his requests did not follow proper protocol insofar as he made arrangements to attend before he had received final approval from her. She told him she would take the request under submission, and her first inclination was to deny it because she did not want to establish a precedent for arranging training outside of proper protocol. She sent him a memorandum to remind him of the proper protocol for requesting training because it seemed to her he was continuing to make the same mistakes. But she ultimately approved the training because she did not want to make the Department look foolish to the federal government, which had planned the training and had already paid for Sergeant Mejia's and other officers' flights and room and board.

Captain Irvine did not allow Sergeant Mejia to obtain free training videos from the Department of Homeland Security because she could never find out from him what was on the videos. She requested syllabi from him for the Department of Homeland Security trainings, and she never received them. Had she received them, she could have made an informed decision about whether the trainings were consistent with the Department's training and whether she wanted them.

Regarding the tactical commander training Sergeant Mejia requested, Captain Irvine denied that request because he was not a SWAT team member or a commander of the team, and the Department had never sent anyone to such a training who was not a member or commander of the SWAT team.

Regarding the range master and firearms training, Captain Cantrell denied the training because he felt the Department had enough officers experienced in range master duties that it could already provide the range master with assistance, if he needed it. Also, he had certain goals for Sergeant Mejia to accomplish in the training section; he wanted him to focus on designing in-house courses for newly promoted sergeants and pre-academy cadets and liability avoidance training for field officers. He told Sergeant Mejia he was willing to entertain sending him to firearms training after Sergeant Mejia completed these goals.

Captain Cantrell also denied Sergeant Mejia's request for training in background investigations. In his view, it was unrelated to what a training sergeant was expected to do.

4. Collateral Positions

While a sergeant in the patrol bureau, Sergeant Mejia applied to be a member of the officer involved shooting team (OIST), the team that assisted internal affairs in conducting investigations into officer-involved shootings. He believed he had a strong background in investigations and therefore a strong background to support putting him on the OIST. He submitted several requests to be on the OIST before the Department put him on the team. He believed that he was initially denied the position because of his lawsuit. This was because when he was promoted, a lieutenant asked him if he was "going to drop the lawsuit" now that he had been promoted, and the lieutenant "indicated that there was a black cloud hanging over" him because of the lawsuit.

5. "Marginalized" Positions, Duties, and Responsibilities

a. Sergeant Mejia's Evidence

Sergeant Mejia testified that when he was transferred into the training sergeant position, he would often encounter obstacles to putting on the training programs he

developed. For instance, Lieutenant Oscar Serrano in the patrol bureau would frequently use his personnel without informing him -- in particular, the range master -- for projects unrelated to the training unit. As a result, the range master was not able to fulfill all his duties at the range.

Lieutenant Serrano was also planning trainings in patrol without coordinating or communicating with Sergeant Mejia. Captain Sissac, who was Sergeant Mejia's superior at the time, asked Lieutenant Serrano to stop this because it did not allow Sergeant Mejia as the training sergeant to keep an accurate record of the trainings that officers attended. Lieutenant Serrano did not comply with this request and continued to plan trainings without communicating with Sergeant Mejia. Captain Sissac alerted Captain Roberts to the issue, and the issue was taken to the city attorney. The city attorney directed that Lieutenant Serrano stop coordinating training for the patrol bureau, but that directive was not followed.

As a patrol sergeant, one of the collateral positions Sergeant Mejia sought out was that of FTO sergeant. When he had been a senior FTO sergeant for a few months, he complained to the chief of police that he was merely a "figurehead" in the FTO program because he had "no say in anything that ha[d] to do with the program structure." For instance, he had repeatedly tried to coordinate a training for the FTO's because some had expressed concerns over the lack of training and/or lack of consistency among the FTO's. Every time he attempted to hold this training, superiors in his chain of command would initially tell him that the training was a good idea, and then later he would be told something different. By contrast, others were allowed to provide training with little or no obstacles. He felt that he was being treated differently. After he complained to the chief about this inconsistent treatment, the situation did not change.

Sergeant Mejia supervised Officer Gallegos from 2004 to 2005 in the patrol bureau. Lieutenant Serrano advised Officer Gallegos to bypass Sergeant Mejia when it came to training requests. The lieutenant asked Officer Gallegos whether he had ever been discriminated against or had issues with getting approval for trainings. Officer Gallegos told the lieutenant he had not been discriminated against, but he felt there was

preferential treatment relating to trainings. Lieutenant Serrano told Officer Gallegos to come to him if he wanted to attend a training, and the lieutenant would “take care of it.” Officer Gallegos said he would prefer to follow the chain of command, which required him to seek approval from Sergeant Mejia first.

b. Defense Evidence

Sergeant Mejia raised with Captain Roberts the issue regarding Lieutenant Serrano’s failure to coordinate trainings. The captain subsequently directed Lieutenant Serrano to coordinate with Sergeant Mejia.

6. Personnel File/Disciplinary Record

a. Sergeant Mejia’s Evidence

Sergeant Mejia’s favorable evaluation for 2005 to 2006 was missing from his personnel file. In addition, commendations were missing. As part of his application for promotion to lieutenant, he looked at his file, and that was when he discovered the missing commendations. He also discovered by looking at his file that he had an internal affairs investigation pending. It came about because in May 2006, the Department received a mandate that it was to train the entire force in a certain area of weapons of mass destruction, and if it did not, the federal government was going to eliminate grant money to the Department. As officer-in-charge of the training unit at the time, Sergeant Mejia was responsible for conducting that training. He had to attend a training class in order to be able to train the rest of the force. The Department’s shotgun training was occurring at the same time as this other training class, and as a result, he was unable to participate in the shotgun training. He sent e-mails informing his superiors of why he was missing the training. Nevertheless, his superiors generated an internal affairs investigation against him because he missed the shotgun training.

He did not find out about the investigation until he looked at his personnel file after the lieutenant’s exam, when he found it worked against him in the application process. He found the investigation was generated the day before his internal appraisal by the captains.

b. Defense Evidence

Shotgun training was mandatory at the Department. An officer was subject to disciplinary action for missing mandatory training. It was Department policy that officers who did not attend a mandatory shotgun training and who did not have their absence excused from that training would receive a written reprimand.

7. “Unprofessional and Derogatory” Treatment

a. Sergeant Mejia’s Evidence

Lieutenant Serrano once ordered Sergeant Mejia to take a patrol car to Rancho Cucamonga to pick up another officer who had called in sick for duty. The lieutenant instructed him to take the officer to the doctor. Although he felt uncomfortable with it, and he told the lieutenant this, he complied with the order. Lieutenant Serrano directed him to drive the officer to a doctor in Culver City, and on the way, he had to pull over because the officer vomited. They discovered the facility in Culver City was closed when they arrived, so the lieutenant then directed him to take the officer to a hospital in Inglewood. He remained there for several hours while the doctor examined the officer, who was deemed sick. Sergeant Mejia then drove the officer back to Rancho Cucamonga. In his history of working at the Department, he was not aware of this having been done with a sick officer before.

When Sergeant Mejia was in the traffic unit, he received an e-mail from some colleagues complementing him on the job he was doing. His lieutenant was either copied on the e-mail, or he forwarded the e-mail to the lieutenant. His lieutenant replied to the complimentary e-mail by saying, “looks like you might be getting off the leper colony after all,” or something to that effect. He took that to mean that he was “black-balled” and “on an island by” himself.

b. Defense Evidence

The Department’s sick leave policy allowed the Department to send a supervisor to visit employees who were absent due to illness and/or allowed it to require such employees to visit a City doctor for sick leave verification.

8. *“Embarrassment” in Front of Peers or Other Departments*

On one occasion, Sergeant Mejia arranged for a free training by the federal government to take place at the Department. The federal government was paying for it, including flying in instructors and the course materials. He cleared this training with his supervisor, Captain Sissac. He invited agencies from all over Southern California to attend, and he was working with a congressperson to put on the training. Weeks before the class was to begin, the Department forced him to cancel the training, but said he could reschedule it. He made arrangements with the instructors, the congressperson, and the participating agencies to reschedule the training for the following month, and the following month, the Department forced him to cancel it again. Rather than cancel the program again, he called the training sergeant at the Hawthorne Police Department and asked her to host it. The training was successfully held at the Hawthorne department.

On another occasion, in 2006, he was planning a training that involved instructors from the Department of Homeland Security, who were driving in equipment from Florida. The training was at no cost to the Department, and other agencies would be attending as well. After he began planning the training, his captain told him the Department could not host it. He called a friend at the Bell Gardens Police Department, and Bell Gardens agreed to host it instead. The captain, Captain Cantrell, gave his approval for him and other officers to attend the training. In the middle of the class, a lieutenant from Bell Gardens pulled him out of the class to tell him that the Department was calling for him. He was informed that Captain Cantrell was looking for him and wanted to know who authorized his attendance. He told the captain, “This is the class I told you about.” When he returned to work after the training, Captain Cantrell sent him an e-mail directing him to write a memo explaining who had authorized his attendance, and who had authorized him to use the Department’s logo on the flyer used to promote the class. He called one of the union attorneys and involved him, and he wrote the requested memo. He also produced an e-mail demonstrating that he had sent the promotional flyer to Captain Cantrell and it had been approved. After that, the matter “went away.”

9. Treatment of Supporters

a. Sergeant Mejia's Evidence

Officer Gallegos received a letter from the chief of police indicating that he should meet with an investigator for the City regarding accusations by Sergeant Mejia of harassment and discrimination. He met with the investigator at a Department substation. He told his watch commander the day of the meeting that he had a confidential meeting to attend and he would be at the substation. He also told his sergeant, Sergeant Barrow, he had a confidential meeting to attend, and he told dispatch where he could be found. The meeting was interrupted when dispatch called Officer Gallegos with instructions to call his sergeant. When he called, the sergeant asked where he was, and he explained that he had told the sergeant he was going to be at a location in the City doing a confidential interview. The meeting was interrupted again when he was required to call the sergeant a second time. This time, the sergeant directed him to call Captain Irvine. He did so, and Captain Irvine asked him where he was and what the meeting was about. He told her it was a confidential meeting directed by the chief. She requested to speak to the investigator, and he heard the investigator tell Captain Irvine the matter pertained to Sergeant Mejia. When he and the investigator finished their conversation, he told the investigator to put what had happened on the record because he felt that now the Department knew he was a witness, it was going to “come after” him.

On another occasion, Captain Irvine instructed Officer Gallegos to see a lieutenant in the administrative bureau, Lieutenant Tenbrook. The instructions came through another officer. That officer told Officer Gallegos he was “going to save” Officer Gallegos because he was “pulling an Oscar Mejia.” Officer Gallegos went to go see Lieutenant Tenbrook. The lieutenant asked whether he wanted to be a sergeant and told him, “[W]e take care of our own here.” He then suggested he wanted Officer Gallegos to provide “intelligence” on Sergeant Mejia. As Officer Gallegos was leaving that meeting with the lieutenant, he saw Lieutenant Serrano walking in front of him. He followed the Lieutenant Serrano and saw him knock on Captain Irvine’s office door and say to her, “[w]e got Gallegos.”

Captain Sissac, when he was a lieutenant, advised Captain Roberts that he felt the way the Department was treating Sergeant Mejia was inappropriate and unlawful. The two had a long conversation about it that turned into an argument. After the argument, Captain Sissac went to his office and drafted a memorandum regarding his thoughts on the Department's treatment of Sergeant Mejia. Captain Roberts came into his office and saw what he was doing. Shortly thereafter, Captain Sissac was removed from the administrative bureau and sent back to the patrol bureau. His performance was exceptional at the time and he was receiving praise from all the captains and the chief. He felt that, at their Department, being transferred out of patrol was a promotion, and being transferred back was a demotion. He also received the worst evaluation of his entire career after the incident with Captain Roberts.

b. Defense Evidence

Captain Irvine testified that she called Officer Gallegos when he was meeting with an investigator, but she did not do it to intimidate him. Sergeant Barrow had called her one Saturday morning and said Officer Gallegos went on a "special detail" in full uniform and with his gun, and the officer would not tell the sergeant what that detail was. The sergeant asked Captain Irvine if she knew what was going on with the special detail. She did not, and so the sergeant looked into it further and reported back to Captain Irvine that Officer Gallegos was working on a confidential matter ordered by the chief of police. She called the chief, Ron Banks, and he did not know what Gallegos was doing. The chief ordered Captain Irvine to call Gallegos and find out what he was working on. She followed the order and called Gallegos, and he told her he was meeting with an independent investigator regarding a grievance. She told him it was not a problem if he met with the investigator, but he had to let his sergeant know what he was doing, i.e., that he was being interviewed for a grievance process and could not talk further about it. She pieced together herself that the meeting must have been about Sergeant Mejia's investigation.

Sergeant Barrow also testified about the circumstances of his call with Officer Gallegos that day. Sergeant Barrow was the field sergeant at that time, and when he

arrived at work, he discovered that there was a large gang funeral going on, and they needed to get officers to the funeral as soon as possible to monitor it. The sergeant ran into Officer Gallegos and asked him to go to the funeral, but Officer Gallegos said he could not go because he was on a confidential mission from the chief, and he had to meet with some City official. Sergeant Barrow told him he needed everyone at the funeral, and the sergeant said he would call the chief and explain what had happened. Shortly thereafter, Sergeant Barrow found out Officer Gallegos told dispatch he would be out in the City on an investigation, but he would not tell dispatch exactly where. Sergeant Barrow thought this was unacceptable. The sergeant called the chief, and he told the sergeant he did not recall giving Officer Gallegos a confidential mission. The sergeant then called Captain Irvine to tell her that he was going to send Officer Gallegos home for being insubordinate. Captain Irvine directed the sergeant to have Officer Gallegos call her, which was why Sergeant Barrow contacted Officer Gallegos in the field.

PROCEDURAL BACKGROUND

Sergeant Mejia's first amended complaint (FAC), filed on November 13, 2008, alleged a single cause of action for retaliation in violation of the FEHA. Trial commenced on April 28, 2010. On May 12, 2010, the jury returned a verdict in favor of Sergeant Mejia and against the City. The jury awarded him \$51,000 in lost wages and \$100,000 in noneconomic damages, including mental suffering.

The City moved for a judgment notwithstanding the verdict and a new trial on the grounds, among others, that there was insufficient evidence of (1) adverse employment actions, (2) a causal nexus between those actions and Sergeant Mejia's protected activity, and (3) damages. The trial court denied both motions and awarded Sergeant Mejia \$368,729.20 in attorney fees. The City filed a timely appeal.

STANDARD OF REVIEW

A jury's verdict stands if it is supported by substantial evidence. (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 389 (*McRae*).) In determining whether a judgment is supported by substantial evidence, we do not confine our consideration to isolated pieces of evidence, but view the whole record in a

light most favorable to the judgment, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the decision of the jury. (*Ibid.*) “‘However, we may not defer to [the factfinder’s] decision entirely. “[I]f the word ‘substantial’ means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with ‘any’ evidence. It must be reasonable in nature, credible, and of solid value; it must actually be ‘substantial’ proof of the essentials which the law requires in a particular case.” [Citations.]” (*Ibid.*)

Moreover, “a judgment may be supported by inference, but the inference must be a reasonable conclusion from the evidence and cannot be based upon suspicion, imagination, speculation, surmise, conjecture or guesswork. [Citation.] Thus, an inference cannot stand if it is unreasonable when viewed in light of the whole record. [Citation.]” (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1204.)

DISCUSSION

1. Substantial Evidence Did Not Support the Verdict

The FEHA, Government Code section 12940, subdivision (h), makes it unlawful for an employer to “discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under [the FEHA] or because the person has filed a complaint, testified, or assisted in any proceeding under [the FEHA].” To prove retaliation under the FEHA, an employee must show (1) he or she engaged in protected activity, (2) an adverse employment action by the employer, (3) retaliatory animus on the part of the employer, (4) a causal link between the retaliatory animus and the adverse employment action, (5) damages, and (6) causation (between the adverse employment action and damages). (*Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*); *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713-714; CACI No. 2505.) The City contends that there was insufficient evidence of several elements, including an adverse employment action, a causal link between the protected activity and the adverse employment action, and damages. Although the sheer

number of alleged retaliatory acts identified by Sergeant Mejia might suggest otherwise, we agree that the verdict was not supported by substantial evidence.

a. Relevant Law

“Retaliation claims are inherently fact-specific, and the impact of an employer’s action in a particular case must be evaluated in context.” (*Yanowitz, supra*, 36 Cal.4th at p. 1052.) Each alleged retaliatory act need not constitute an adverse employment action in and of itself. (*Id.* at p. 1055.) “[T]here is no requirement that an employer’s retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries.” (*Ibid.*) When the employee alleges that the employer’s actions formed a pattern of systematic retaliation, it is appropriate to consider the actions collectively under a totality of the circumstances approach. (*Id.* at pp. 1055-1056; *McRae, supra*, 142 Cal.App.4th at pp. 387-388.) “Enforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute.” (*Yanowitz, supra*, at p. 1056.)

The FEHA protects employees against ultimate employment actions such as retaliatory terminations or demotions, as well as “the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee’s job performance or opportunity for advancement in his or her career.” (*Yanowitz, supra*, 36 Cal.4th at pp. 1053-1054.) Thus disadvantageous transfers or assignments, transfers of job duties, refusals to promote, unwarranted negative job evaluations, toleration of harassment by other employees, written reprimands, employer’s solicitation of negative comments by coworkers, and suspensions may constitute adverse employment actions. (*Id.* at pp. 1055, fn. 15, 1060-1061 [citing with approval various adverse employment actions found in federal Title VII cases].)¹

¹ “‘Because the antidiscrimination objectives and relevant wording of title VII of the Civil Rights Act of 1964 (Title VII) [(42 U.S.C. § 2000e et seq.)] . . . are similar to those of the FEHA, California courts often look to federal decisions interpreting these

But “a mere offensive utterance or even a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment.” (*Yanowitz, supra*, 36 Cal.4th at p. 1054.) Furthermore, minor or relatively trivial adverse actions that are reasonably and objectively likely to do nothing more than anger or upset an employee are also not actionable. (*Ibid.*) And an action that is merely contrary to the employee’s interests or liking is insufficient. (*McRae, supra*, 142 Cal.App.4th at p. 386.) Workplaces seldom are “‘idyllic retreats,’” and if every minor or trivial action were considered an adverse employment action, then “any ‘action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.’” (*Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511.)

The employee must show the employer’s actions had a “detrimental and substantial effect on the plaintiff’s employment.” (*McRae, supra*, 142 Cal.App.4th at p. 386.) Such a standard guards against “‘judicial micromanagement of business practices.’” (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1455.) “Absent this threshold showing, courts will be thrust into the role of personnel officers, becoming entangled in every conceivable form of employee job dissatisfaction.” (*Ibid.*) Employers must be permitted to manage employees without fear that routine employment decisions or attempts at improving employee performance will result in litigation. (*McRae, supra*, at p. 387.) And employees have an interest in knowing whether their performance is substandard. (*Ibid.*) An employee does not have license to litigate his or her displeasure or grievances with an employer’s valid work-related criticisms. (*Pinero v. Specialty Restaurants Corp.* (2005) 130 Cal.App.4th 635, 642.) While the FEHA provisions are to be interpreted broadly to prevent unlawful discrimination, the Legislature “could not have intended to provide employees a remedy for any possible

statutes for assistance in interpreting the FEHA.’” (*Reno v. Baird* (1998) 18 Cal.4th 640, 647.)

slight resulting from the filing of a discrimination complaint.” (*Akers v. County of San Diego, supra*, at p. 1455.)

b. Analysis

i. Transfer, Assignment, and Promotion

We begin with Sergeant Mejia’s complaints that he was kept in patrol for an overly long period, was humiliated by his transfer to the traffic division, and was not promoted to lieutenant. He testified that officers newly promoted to sergeant typically spend approximately one to one and a half years in patrol, and he spent three there. First, the evidence suggested that one to one and a half years in patrol was not necessarily the norm. Sergeant Kirk and Sergeant Barrow spent five and a half years and five years in patrol, respectively. They were both promoted around the same time as Sergeant Mejia and had been with the Department a comparable amount of time. Captain Cantrell spent approximately eight or nine years in patrol upon his promotion to sergeant. Second, and more importantly, Sergeant Mejia presented no tangible evidence that keeping him in patrol for three years was actually detrimental to him. He received above standard or exceptional ratings on all categories of his performance reviews during his period in patrol, and his overall ratings for that period were above standard. He presented no evidence that he suffered a diminution in pay while in patrol or would have been compensated higher had he been in another assignment. His evaluations show that he in fact received merit increases during each review period in patrol. The assignment simply did not suit him because he wanted an investigative position where he could use the skills he had developed doing narcotics work prior to his promotion. However, “[m]ere idiosyncrasies of personal preference are not sufficient to state an injury.” (*McRae, supra*, 142 Cal.App.4th at p. 393; see also *Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, 358 [assignment to a less preferred position alone does not constitute an adverse employment action].)

Sergeant Mejia’s transfer to the traffic division also was not an actionable adverse employment action. A transfer can be an adverse employment action when it results in substantial and tangible harm, but it is not one simply because the employee finds it to be

“‘personally humiliating.’” (*Yanowitz, supra*, 36 Cal.4th at p. 1054, fn. 13; see also *McRae, supra*, 142 Cal.App.4th at p. 393.) A lateral transfer to a comparable position -- that is, one in which the employee suffers no diminution in pay or benefits -- is not actionable unless the employee can demonstrate some objectively tangible harm. (*McRae, supra*, at p. 393.) Again, Sergeant Mejia did not demonstrate any tangible harm or detriment and cited simply his feeling that the transfer was humiliating and a demotion. He presented no evidence that he suffered in pay or benefits during his time in the traffic division (December 2006 to August 2008). Although he was not pleased with his performance review for the December 2007 to August 2008 period, he still continued to receive mostly exceptional or above standard ratings in all categories, with some satisfactory ratings.

Sergeant Mejia’s failure to promote to lieutenant in 2006 was also not actionable. Even if we presume for the sake of argument that the three captains had retaliatory animus and rated him poorly because of that animus, he did not proffer substantial evidence of a causal link between their animus and his failure to promote. (*Mamou v. Trendwest Resorts, Inc., supra*, 165 Cal.App.4th at pp. 713-714; CACI No. 2505.) The internal appraisal by the captains constituted one-third of his score on the lieutenant’s exam. Assuming he received perfect scores from all three captains, that was not enough to move him to the top three spots on the promotion list -- the spots that were actually eligible for promotion -- given his lower scores on the other portions of the exam. A perfect score from the captains would have moved him from ninth place to only seventh place on the list. It would be pure speculation to say that Sergeant Mejia would have reached the top three eligibility spots before the promotion list expired in February 2008, as he presented no evidence of how many officers were promoted during that period. He also presented no evidence whatsoever that retaliatory animus affected the other portions of the exam such that his overall score should have been even higher. His response to the written exam was blind-graded such that the graders could not have known which exam was his. The third portion of the exam was an interview conducted by raters outside the Department, and he did not offer any proof that they knew of his protected activity or had

any reason to harbor retaliatory animus. Sergeant Mejia argued to the jury that, in addition to rating him poorly, the captains could have artificially inflated the scores of the other candidates. Again, this was pure speculation with no supporting evidence. For example, the jury did not know who the other candidates were, what scores they earned, and whether the scores were merited.

ii. Collateral Positions

Sergeant Mejia's complaint that he was denied collateral positions was not actionable. In actuality, he attained the two collateral positions for which he applied, the OIST position and the FTO sergeant position. The evidence showed that he was initially denied a spot on the OIST before he was accepted. But there was no evidence to demonstrate how a delay in placing him on the OIST materially and adversely affected his job performance or opportunity for advancement. That he attained the collateral position later than he would have liked was merely contrary to his liking.

iii. Yearly Performance Evaluations

Sergeant Mejia filed grievances regarding the two negative evaluations he felt were unwarranted, the 2007 to 2008 and 2008 to 2009 evaluations. At the time of trial in May 2010, he had submitted his grievances and substantial rebuttal documentation to the chief of police, who had not ruled on the grievance yet. Although Sergeant Mejia had been told he was being transferred from narcotics to patrol because of Lieutenant Salcedo's negative evaluation for 2008 to 2009, the chief of police put a hold on that transfer until she could investigate his grievance. Thus, at the time of trial Sergeant Mejia was still serving in narcotics.

Here again, Sergeant Mejia made no showing that these evaluations had any effect on the terms or conditions of his employment, much less a substantial and detrimental effect. For instance, he did not demonstrate a diminution in pay or benefits, a demotion, a change in responsibilities, or new restrictions placed on him. The evidence showed no effect on his employment, and the chief had not even determined whether Lieutenant Salcedo's negative evaluations were warranted.

Moreover, even assuming the evaluations had a substantial and detrimental effect, substantial evidence did not support a causal link between Sergeant Mejia's protected activity and the evaluations. An employee may establish a prima facie case for the causal nexus element "by producing evidence of nothing more than the employer's knowledge that the employee engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision." (*McRae, supra*, 142 Cal.App.4th at p. 388.) He did not establish even this prima facie case. The evidence showed that he filed a discrimination lawsuit in 2002. For five years after that, Sergeant Mejia received uniformly positive performance reviews, and in some years, merit increases in pay. The gap of several years between the negative reviews and the lawsuit filing does not give rise to a reasonable inference of causation. (See, e.g., *Villiarimo v. Aloha Island Air, Inc.* (9th Cir. 2002) 281 F.3d 1054, 1065 [nearly 18-month lapse between protected activity and adverse employment action was too long to give rise to an inference of causation; adverse action must occur fairly soon after protected activity].) Sergeant Mejia argues -- without citation to the record -- that "there were a series of ongoing protected activities, starting in 2003 and continuing pretty steadily thereafter," including "the continued prosecution of the original lawsuit (which was not tried until October, 2008)." However, the jury did not hear evidence of when or how the 2002 lawsuit was adjudicated, only that it was filed in 2002. Similarly, his FAC alleged that he filed a series of complaints with the Department of Fair Employment and Housing after 2002, but he did not submit evidence of these complaints to the jury.

iv. Training Requests

The denial of Sergeant Mejia's training requests likewise was not actionable. His case again failed to provide substantial evidence of an effect on the terms and conditions of his employment. Instead, he showed only that the decisions to deny certain training requests were not to his liking. Sergeant Mejia actually attended hundreds of hours of training, and his training hours well exceeded the number required by POST. The only mandated training he complained about was the course officers are to receive within one year after their promotion to sergeant. He was promoted in December 2002, and he

received the training just after the year deadline. He proffered no evidence that the slight delay affected his performance or employment conditions, such as a poor performance review. His performance review for the 2002 to 2003 period was not discussed at trial.

Other denied trainings included tactical commander training, range and firearms training, motorcycle training, and background investigations. He felt these related to his duties in field patrol, as training sergeant, and in the traffic division. He was a patrol sergeant from 2002 to December 2005, training sergeant from December 2005 to December 2006, and head of the traffic division from December 2006 to August 2008. Once more, we fail to see any evidence in the record that the lack of these training courses affected his job performance or conditions. We refer again to his performance reviews. His reviews during his time as patrol sergeant, training sergeant, and his first year in the traffic division were very favorable and do not mention any deficits in the areas in which he sought training. His review during his last eight months in traffic was less favorable, but the criticisms did not relate to his supervision of motorcycle officers or any other area in which he sought training. Rather, his lieutenant faulted him for “delegating work up” to the lieutenant that he should have been able to complete, sloppy written work, and untimely completion of work. In short, although Sergeant Mejia claims he was “set up to fail,” there is no evidence that the denial of these courses made him a less effective or less successful employee.

To the extent he claims his lack of training affected the decision not to promote him to lieutenant, this claim also fails for lack of evidence. In fact, he received very high marks from all three captains in the “education/training” category of the exam. Each gave him a score of 90 out of 100, which put him in the “very promotable” range for that category.

As to his weapons of mass destruction and bomb awareness trainings, he was ultimately permitted to attend them after initial denials, whether on his own time or Department time. There was no evidence that his employment was substantially and adversely affected when he actually attended them.

v. Personnel File/Disciplinary Record

Sergeant Mejia testified that his favorable evaluation from 2005 to 2006 and some unspecified commendations were missing from his personnel file. He also presented evidence that the Department generated an internal affairs investigation against him before the lieutenant's exam.

Without more, it is pure conjecture to say that someone in the Department intentionally removed the favorable documents from his file, as opposed to them having been unintentionally misplaced. The jury had nothing more than his testimony that the documents were missing. Other very favorable performance evaluations did not go missing from his file. Sufficient evidence did not support the conclusion that the missing documents were actually a purposeful action by Sergeant Mejia's employer. (*Beck Development Co. v. Southern Pacific Transportation Co.*, *supra*, 44 Cal.App.4th at p. 1204 [judgments cannot be supported by inferences that result purely from suspicion, imagination, speculation, surmise, conjecture or guesswork].)

Additionally, Sergeant Mejia lacked substantial evidence that the internal affairs investigation or the missing documents materially and adversely affected him. He points to the fact that the captains noted the internal affairs investigation in the "Discipline" section of the appraisal for the lieutenant's exam. But one captain did not note the investigation at all in his appraisal and commented under "Discipline" that Sergeant Mejia was "not [the] subject of frequent or serious complaints." The second captain noted, "good record – but (1) unadjudicated complaint." The third captain noted simply, "1 pending I/A for missing shotgun shoot." All three captains gave him a score of 89 out of 100 for discipline. This placed him at the very top of the "promotable" range for that category. Even had he placed in the "very promotable" range for discipline absent the investigation, we have already discussed in a foregoing part how a perfect score from the captains would not have materially affected his overall placement on the promotion list.

vi. "Marginalized" Positions, Duties, and Responsibilities

Sergeant Mejia also failed to substantiate the adverse effect of the actions in this area. He protested his treatment as an FTO sergeant in August 2005, telling the chief of

police that he was merely a “figurehead” in the FTO program because the Department was not implementing his ideas for training the new officers. He felt that others were able to implement their training ideas with less interference. Even if we assume this was true, there was no evidence his performance as FTO sergeant suffered. His December 2004 to December 2005 evaluation noted his appointment to the FTO program as one of his “strongest points” and “specific achievements” for the period, and he received a merit increase in pay. His displeasure alone is not enough, and we see no other evidence in the record that this perceived slight affected his employment. (*McRae, supra*, 142 Cal.App.4th at p. 386 [actions merely contrary to an employee’s interests or liking do not constitute adverse employment actions].)

The same can be said of Lieutenant Serrano’s actions toward Sergeant Mejia. The lieutenant was interfering with his duties as training sergeant by using the range master and planning trainings without coordinating with him. This slight may have upset Sergeant Mejia, but the evidence of tangible effect on his performance or terms and conditions of his employment was absent. He had a favorable review for the period during which he was training sergeant, December 2005 to December 2006. Similarly, when Lieutenant Serrano advised Officer Gallegos to bypass Sergeant Mejia and come straight to him with training requests, there was no actual effect on the sergeant. Officer Gallegos declined and said he would continue to take his requests to Sergeant Mejia first.

vii. “Unprofessional,” “Derogatory,” or “Embarrassing” Treatment

Sergeant Mejia felt he was a pariah in the Department, evidenced in part by treatment he believed was unprofessional, derogatory, or embarrassing. At the outset, we reiterate that mere offensive utterances, social slights, and minor or relatively trivial actions that are reasonably and objectively likely to do nothing more than anger or upset an employee are not actionable adverse actions. (*Yanowitz, supra*, 36 Cal.4th at p. 1054.) The “leper colony” comment and the comment that Officer Gallegos was “pulling an Oscar Mejia” may have offended and upset Sergeant Mejia, but the record does not evince any other harm caused by them. Likewise, having to transport a sick officer from his home to a doctor’s appointment may have upset Sergeant Mejia, but evidence of other

harm is lacking. The evidence showed that the visit to the sick officer was consistent with Department sick leave policy, which permitted it to check in on sick employees.

Captain Cantrell's calling him at a training at the Bell Gardens Police Department was again a minor action that occasioned no harm other than Sergeant Mejia's anger or embarrassment. The captain asked him who had approved his attendance and the use of the Department's logo in connection with the training, and when he produced documentation that the captain had actually approved these things, he said the matter "went away." The fact that Sergeant Mejia rescheduled and relocated certain trainings he had planned with federal agencies falls into the same category. According to him, these trainings were successfully held at the Hawthorne and Bell Gardens Police Departments. Evidence of any harm beyond his embarrassment at having to reschedule the trainings was lacking.

viii. Treatment of Supporters

The evidence was insufficient to find that treatment of Sergeant Mejia's supporters amounted to an adverse employment action against the sergeant. Lieutenant Tenbrook intimidated Officer Gallegos and suggested that he wanted the officer to collect intelligence on Sergeant Mejia. But the evidence did not show that Officer Gallegos in fact collected any intelligence. While he and Sergeant Mejia may have been upset by the incident, Sergeant Mejia did not show any actual effect on his job performance or prospects for advancement as a result. We note once again that his performance evaluation for the period during which he supervised Officer Gallegos (2004 to 2005) was very positive.

Captain Sissac voiced his opinion that the Department was treating Sergeant Mejia unfairly when it came to training requests. The captain was transferred between bureaus and received the worst evaluation of his career shortly thereafter. Even if these actions were retaliation against Captain Sissac, they did not affect *Sergeant Mejia's* job conditions, performance, or prospects for advancement. They related solely to Captain Sissac.

In conclusion, Sergeant Mejia lacked substantial proof of an adverse employment action or, in the case of the failure to promote, a causal nexus. He identified many, many decisions or acts with which he disagreed, found upsetting, or found offensive. Proving retaliation, however, is more than a matter of stacking complaints one on top of another. We are mindful of our Supreme Court's declaration in *Yanowitz* that each alleged retaliatory act need not constitute an adverse employment action in and of itself, and of *Yanowitz*'s holding that we should consider an employer's actions collectively. (*Yanowitz, supra*, 36 Cal.4th at p. 1055.) Nevertheless, this approach does not negate the requirement that the employer's actions materially and adversely affect the employee's terms and conditions of employment, job performance, or prospects for advancement. (*Id.* at p. 1060.) Even the collective effect of Sergeant Mejia's grievances did not rise to this level, when the majority of his grievances had no effect whatsoever beyond causing him upset. The Department did not always fulfill his personal desires -- or when it did, it did not necessarily do so on his desired timeline. To find liability on these grounds goes far afield of preventing unlawful retaliation and into the territory of judicial micromanagement of business practices.

Yanowitz, on which Sergeant Mejia principally relies, is distinguishable from his case. In *Yanowitz*, the alleged retaliatory acts consisted of the employer actively soliciting negative comments from the plaintiff's subordinates and then using this information to criticize her in front of the subordinates and in written memoranda; refusing to hear her response to the negative comments; using the negative comments to impose new, restrictive conditions on the manner in which she performed her duties; impliedly threatening termination by asking the plaintiff whether she thought she had been brought to a meeting to be terminated, delivering criticism during the meeting, and then closing the meeting with, "It would be a shame to end an eighteen-year career this way"; and inducing a stress-related disability leave. (*Yanowitz, supra*, 36 Cal.4th at pp. 1039-1040, 1060.) The court held that these actions collectively established a prima facie case of adverse employment action under the FEHA. (*Id.* at p. 1060.)

It is not hard to see how these collective actions materially and adversely affected the plaintiff's employment in that her job conditions actually changed for the worse and she eventually lost her job when she did not return from disability leave. Sergeant Mejia did not proffer comparable evidence of adverse changes in duties or terms of his employment. The jury's finding of liability was not supported by the evidence.

2. Award of Attorney Fees and Costs

The trial court awarded attorney fees and costs to Sergeant Mejia as the prevailing party pursuant to statute. (Civ. Proc. Code, § 1032; Gov. Code, § 12965, subd. (b).) Sergeant Mejia does not dispute that the award of attorney fees and costs should be reversed if we reverse the judgment in its entirety. We agree. Insofar as we find the verdict unsupported, Sergeant Mejia is no longer the prevailing party and the award of fees and costs should be reversed.

DISPOSITION

The judgment is reversed. The order awarding attorney fees and costs is reversed. Appellant is awarded its costs on appeal.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.