

**ENDORSED FILED**  
Clerk of the Superior Court

MAR 02 2018

By G. Ureta  
DEPUTY CLERK

SMITH PATTEN  
DOW W. PATTEN, ESQ. (SBN:135931)  
888 S. Figueroa Street, Suite 2030  
Los Angeles, CA 90017  
Telephone (415) 402-0084  
Facsimile (415) 520-0104

Attorney for Plaintiff  
JAY BROME

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SOLANO**

JAY BROME,  
Plaintiff

v.

CALIFORNIA HIGHWAY PATROL, et. al.,

Defendants

) Case No. FCS047706  
)  
) **PLAINTIFF JAY BROME'S**  
) **MEMORANDUM IN OPPOSITION TO**  
) **MOTION FOR SUMMARY JUDGMENT**  
) **OR, IN THE ALTERNATIVE,**  
) **SUMMARY ADJUDICATION**  
)  
) Date: March 19, 2018  
) Time: 9:00 a.m.  
) Dept: 10  
) Judge: The Honorable Michael C. Mattice  
) Trial Date: June 8, 2018 (Trial Call)  
) Action Filed: September 16, 2016

BY FAX

**TABLE OF CONTENTS**

1

2

3 **TABLE OF CONTENTS**..... i

4 **TABLE OF AUTHORITIES**..... ii

5 **I. INTRODUCTION**..... 1

6 **II. STATEMENT OF FACTS**..... 2

7 **III. LAW AND ARGUMENT**..... 5

8     **A. PLAINTIFF'S FEHA CLAIMS ARE NOT TIME-BARRED**..... 5

9         **1. Equitable Tolling**..... 5

10         **2. Continuing Violation Doctrine**..... 8

11     **B. PLAINTIFF SUFFERED ADVERSE EMPLOYMENT ACTION**

12         **DURING THE LIMITATIONS PERIOD**..... 9

13         **1. Materiality Test**..... 9

14         **2. Constructive Discharge**..... 12

15     **C. PLAINTIFF'S INTENTIONAL INFLICTION CLAIM IS NOT**

16         **SUBJECT TO SUMMARY ADJUDICATION**..... 13

17 **IV. CONCLUSION**..... 13

18

19

20

21

22

23

24

25

26

27

28

**TABLE OF AUTHORITIES**

**Cases**

*Accardi v. Superior Court*,  
(1993) 17 Cal.App.4th 341.....13

*Brown v. Bunge Corp.*,  
(5th Cir. 2000) 207 F.3d 776.....12-13

*Brown v. Kinney Shoe Corp.*,  
(5th Cir. 2001) 237 F.3d 556.....12-13

*California Restaurant Management Systems v. City of San Diego*,  
(2011) 195 Cal.App.4th 1581.....5

*Cervantes v. City of San Diego*,  
(9th Cir. 1993) 5 F.3d 1273.....6, 7

*Clifford v. Am. Drug Stores*,  
(Aug. 22, 2005) 2005 Cal. App. Unpub. LEXIS 7518.....8

*Collier v. City of Pasadena*,  
(1983) 142 Cal.App.3d 920.....7

*Conley v. Roman Catholic Archbishop*,  
(2000) 85 Cal.App.4th 1129.....13

*Downs v. Department of Water & Power*,  
(1997) 58 Cal.App.4th 1093.....5

*Elkins v. Derby*,  
(1974) 12 Cal.3d 410.....6, 7

*Flait v. North American Watch Corp.*,  
(1992) 3 Cal.App.4th 467.....13

*Hopkins v. Kedzierski*,  
(2014) 225 Cal. App. 4th 736.....6

*Marcario v. Cty. of Orange*,  
(2007) 155 Cal. App. 4th 397.....6-7

*McCoy v. Pacific Maritime Assn.*,  
(2013) 216 Cal.App.4th 283.....10

*McDonald v. Antelope Valley Community College Dist.*,  
(2008) 45 Cal.4th 88.....5, 6

1	<i>Mills v. Forestex Co.</i> , (2003) 108 Cal.App.4th 625.....	6
2		
3	<i>Turner v. Anheuser-Busch, Inc.</i> , (1994) 7 Cal.4th 1238.....	12
4		
5	<i>United Airlines, Inc. v. Evans</i> , (1977) 431 U.S. 553.....	8
6		
7	<i>Wysinger v. Automobile Club of Southern California</i> , (2007) 157 Cal.App.4th 413.....	11
8		
9	<i>Yanowitz v. L'Oreal</i> , (2005) 36 Cal.4th 1028.....	9, 10, 11
10	<b><u>Statutes</u></b>	
11	Cal. Gov. Code § 12940(a).....	10
12	Cal. Gov. Code § 12940(h).....	10
13	Cal. Gov. Code § 12960(d).....	1, 5
14	Cal. Lab. Code § 3600(a).....	13
15	Cal. Lab. Code § 3602(a).....	13
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 Plaintiff JAY BROME (hereinafter "Plaintiff"), hereby submits the following  
2 Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary  
3 Judgment or in the Alternative Summary Adjudication ("Motion"). For the reasons set forth  
4 below, the Motion should be denied.

5 **I. INTRODUCTION**

6 Ordinarily, a plaintiff cannot recover for acts occurring more than one year before the  
7 filing of the DFEH complaint. (Cal. Gov. Code, § 12960, subd. (d)) The parties disagree about  
8 the date that triggered the running of this limitations period. Defendant maintains there are three  
9 possible trigger dates: (1) 2003, when Plaintiff filed his first DFEH complaint, (2) 2010, when  
10 he reported further acts of discrimination to his Sergeant, or (3) January 2015, when he went out  
11 on medical leave. Plaintiff contends that the trigger date is the date of his constructive discharge  
12 is February 2016.

13 It is undisputed that in January 2015 Plaintiff was forced out of the workplace due to  
14 stress related to harassment and discrimination he faced in the workplace. Over the next several  
15 months Brome requested reasonable accommodations related to his disability and informed his  
16 supervisors of the harassment he faced and how it was affecting him. At the time of his January  
17 2015 leave, Plaintiff also filed a worker's compensation claim related to sexual orientation  
18 harassment and discrimination he faced in the workplace. Later that month, Plaintiff's police  
19 officer powers were removed. Thereafter, in October, 2015 CHP threatened to terminate  
20 Plaintiff while he was out on disability leave. As a result, Plaintiff formally retired on February  
21 29, 2016. On September 15, 2016, Brome filed his charge of retaliation, harassment and  
22 discrimination with the DFEH and received a right-to-sue.

23 This case is rather atypical, because the Defendant employer does not deny Plaintiff's  
24 factual allegations supporting his claims for the discrimination, harassment, and retaliation he  
25  
26  
27  
28

1 suffered in the workplace. At trial, Plaintiff will introduce medical and eyewitness testimony  
2 regarding the harassment he experienced in the workplace, the fact that his safety was placed in  
3 jeopardy because homophobic fellow officers refused to back him up, and CHP's refusal to  
4 consider Brome for promotions as a result of his sexual orientation disabled him from continued  
5 employment with CHP and forced him to take a paid disability leave.

6 CHP argues that Brome should not have an opportunity to present these facts to a jury  
7 because he waited too long to bring his claims for discrimination, harassment, and retaliation.  
8 As set forth below, the Motion must be denied on several grounds: (1) adverse action occurred  
9 within the charging period, (2) Plaintiff's pursuit of workers compensation equitably tolls the  
10 charging period, and (3) the hostile work environment was a continuing violation that continued  
11 through Plaintiff's constructive discharge in January of 2016.

12  
13 **II. STATEMENT OF FACTS**

14 Plaintiff was hired as an officer of the CHP in 1996. (Complaint, ¶ 6, UMF 1, 5) During  
15 his career, between 1996 and 2016, Plaintiff claims to have suffered from a campaign of terror  
16 because his sexual orientation and his complaints of harassment. The misconduct he specifies  
17 includes, among other things, CHP officers referring to him as derogatory names because of his  
18 sexual orientation (UMF ## 2, 7), CHP officers making fun of him because of his sexual  
19 orientation (UMF ## 4, 6, 8, 9, 10, 11, 12, 16, 23, 29, 41, 43, 44), CHP officers threatening to  
20 kill him because of his sexual orientation (Complaint, ¶ 19 , UMF 3), CHP officers referring to  
21 Brome as a “fag” (UMF ## 19, 20, 86), CHP officers refusing to back Brome up while he  
22 worked in the field because of his complaints of retaliation and his sexual orientation (Complaint  
23 ¶¶ 18, 87, 89, 91, UMF ## 22, 25, 30, 31, 38, 45, 46, 47, 48, 49, 50, 53, ), and officers defacing  
24 his property as a result of his complaints of harassment. (UMF # 27)

1 Plaintiff's superiors ratified the actions of his fellow officers by: failing to respond to  
2 Brome's complaints, (Complaint ¶ 91, UMF ## 13, 51, 54), setting Brome up for falsified  
3 investigations after he complained of harassment (UMF # 15), failing to consider Brome for  
4 promotional opportunities and trainings (UMF ## 17, 56), asking Brome which CHP officers he  
5 thought were gay (UMF # 32), excluding Brome from the office blood drive due to his sexual  
6 orientation (UMF 55), and refusing to order his fellow officers to back him up. (Complaint ¶ 91,  
7 UMF ## 13, 58)

9 In January of 1999, the department issued a Memorandum of Findings stating that an  
10 investigation uncovered evidence that Brome was subjected to incidents of inappropriate acts of  
11 insensitivity and retaliation. (UMF # 19) After receiving these findings, Plaintiff began to  
12 transfer to other CHP offices throughout Northern California to avoid harassment and inherently  
13 dangerous job assignments because CHP officers refused to back him up. (PAUMF #1).

15 Brome's first transfer was to CHP's Contra Costa's Office. (Complaint ¶¶ 52, 54, UMF  
16 ## 26, 28) Again, CHP Officers in the Contra Costa Office refused to back Brome up on calls  
17 based upon his sexual orientation and previous protected activity. (Complaint ¶¶ 55, 62, UMF  
18 ## 30, 31) To make matters worse, Brome's supervisor sexually harassed Plaintiff. (Complaint  
19 ¶¶ 56-61, UMF # 32) Plaintiff informed his supervisors about the harassing conduct he faced at  
20 the Contra Costa office. (Complaint ¶ 64, UMF ## 33-35).

22 Between May 2004 and October 2004 Brome was out of work on leave due to the hostile  
23 work environment he had to endure while at CHP. (Complaint ¶¶ 75, 79, UMF # 36) Upon  
24 returning form stress leave, CHP Officers in the Contra Costa Office again refused to back  
25 Brome up on calls based upon his sexual orientation and previous protected activity. (Complaint  
26 ¶¶ 81, 83, UMF # 38, PAUMF # 2)

1 Again in fear for his safety because he was not receiving backup in inherently dangerous  
2 situations, Brome requested a transfer to Solano County. (UMF #40, PAUMF # 3) When  
3 Brome reported to Solano County one of the Sergeants he reported to was Sgt. Hekker. Hekker  
4 testified that when Brome arrived in Solano County he was aware that Officer Brome had  
5 previously made complaints about sexual harassment. (PAUMF # 4 ) Hekker further testified  
6 that he was aware that officers at Solano County were refusing to back Plaintiff up, because of  
7 his sexual orientation. (PAUMF #5) Hekker confirmed at his deposition that many of the types  
8 of calls Brome was not backed up on were high risk situations. (PAUMF #6) Brome was falsely  
9 accused by a fellow Officer Nathan White, of sexually harassing male officers in the locker  
10 room. (PAUMF # 7)

11  
12 Over Brome's last seven years of employment at the CHP Solano office, his life was  
13 continually put in jeopardy because officers refused to back him up. (PAUMF # 8) Towards the  
14 end of his career the stress became overwhelming as Brome constantly believed his life was in  
15 danger because his fellow officers refused to back him up in the field. (PAUMF # 9)  
16  
17 Eventually, Brome attempted to get off the streets and applied for a Court Officer position  
18 (Complaint ¶ 93, UMF # 56). In retaliation for his complaints, Brome was passed over for the  
19 position for a less qualified heterosexual CHP officer.

20  
21 In January 2015, Plaintiff's doctor took him off work, and he went on leave due to the  
22 hostile work environment he endured. From January, 2015 through October, 2015, CHP  
23 leadership understood that Brome was making a complaint of harassment based on his sexual  
24 orientation. (PAUMF ## 23-30)

25  
26 On October 7, 2015, Brome was advised that the CHP intended to apply for industrial  
27 disability retirement on his behalf. (UMF # 62) Brome showed the letter to his representative at  
28 the Highway Patrolman's Association who informed Brome that the letter was inappropriate and



1 that the CHP's intent was to terminate him, and terminate all of his Workers' Compensation  
2 benefits. (PAUMF # 10) On December 7, 2015, Brome informed the CHP he would be retiring.

3 Brome described his tenure at the CHP as follows:

4 **As I moved from office to office and the problems weren't corrected and**  
5 **management refused to do anything about it, then it became unbearable mentally**  
6 **so that I was isolating myself, I was in fear. I was in fear of my life because I**  
7 **wasn't getting backup. I was afraid to do my job because I knew if I would stop**  
8 **somebody or there was an incident that I wouldn't get the backup. And at the**  
9 **end I was suicidal.**

10 (PAUMF # 11)

11 Brome's retirement became official on February 29, 2016. On July 26, 2016, Brome filed  
12 his Government Claim. (UMF # 73) On September 15, 2016, Mr. Brome obtained a DFEH  
13 right to sue. On September 16, 2016, Brome filed the instant action.

### 14 **III. LAW AND ARGUMENT**

#### 15 **A. PLAINTIFF'S FEHA CLAIMS ARE NOT TIME-BARRED**

16 Government Code Section 12960 provides that an employee bringing an FEHA claim  
17 must exhaust the administrative remedy by filing an administrative complaint with the DFEH  
18 within one year after the alleged unlawful action occurred. (Cal. Gov. Code § 12960, subd. (d).  
19 This one-year period is subject to equitable tolling under various circumstances.

##### 20 **1. Equitable Tolling**

21 Equitable tolling permits a plaintiff who has a choice of legal remedies to pursue one  
22 remedy without simultaneously pursuing another remedy. (*McDonald v. Antelope Valley*  
23 *Community College Dist.* (2008) 45 Cal.4th 88, 99–100 (*McDonald*); *California Restaurant*  
24 *Management Systems v. City of San Diego* (2011) 195 Cal.App.4th 1581, 1593–1594.) The  
25 doctrine relieves the plaintiff claiming employment discrimination from the hardship of pursuing  
26 duplicate and possibly unnecessary procedures to enforce the same rights or obtain the same  
27 relief. (*Downs v. Department of Water & Power* (1997) 58 Cal.App.4th 1093, 1100.) A  
28

1 defendant is not prejudiced if during the statutory period it receives notice of a claim sufficiently  
2 similar, even if not identical, to the one advanced in the subsequent action and is able to  
3 investigate and gather evidence to "fairly defend" itself in that action. (*McDonald, supra*, 45  
4 Cal.4th at p. 102, fn. 2.)

5 Equitable tolling "is a rule of procedure adopted by the courts" (*Mills v. Forestex Co.*  
6 (2003) 108 Cal.App.4th 625, 650) that is "designed to prevent unjust and technical forfeitures of  
7 the right to a trial on the merits ... ." [Citation.]" (*McDonald v. Antelope Valley Community*  
8 *College Dist.* (2008) 45 Ca1.4th 88, 99.) Where applicable, the doctrine will 'suspend or extend  
9 a statute of limitations as necessary to ensure fundamental practicality and fairness.' [Citation.]"  
10 (*Id.*, at p. 99.)

11  
12 In *Elkins v. Derby* (1974) 12 Cal.3d 410, 414 (*Elkins*), the Supreme Court held that the  
13 doctrine of equitable tolling may apply to toll the statute of limitations on a claim during the  
14 period in which a plaintiff pursues another remedy for the harm that the plaintiff suffered. In the  
15 wake of *Elkins*, the California Supreme Court has stated that in order to prove the applicability of  
16 the equitable tolling doctrine, a party must establish "three elements: 'timely notice, and lack of  
17 prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff.'  
18 [Citations.]" (*McDonald, supra*, 45 Ca1.4th at p. 102.) *Cervantes v. City of San Diego*, 5 F.3d  
19 1273, 1275 (9th Cir. 1993) The Supreme Court has instructed that "courts ... have, and should,  
20 'liberally appl[y] tolling rules or their functional equivalents to situations in which the plaintiff  
21 has satisfied the notification purpose of a limitations statute.' [Citation.]" (*McDonald, supra*, 45  
22 Cal.4th at p. 102.)

23  
24  
25 It is undisputed that in January 2015, Brome filed a workers' compensation claim. (UMF  
26 ## 59, 66) The filing of his workers compensation claim tolled the statute of limitations. *See*  
27 *Hopkins v. Kedzierski*, (2014) 225 Cal. App. 4Th 736, 751-52 and *Marcario v. Cty. of Orange*,  
28

1 (2007) 155 Cal. App. 4th 397, 408. Accordingly, Brome satisfied the first prong by timely filing  
2 a workers compensation claim in January 2015 alleging a disability resulting from the workplace  
3 harassment that he faced. Moreover, defendant CHP was sufficiently notified of the context of  
4 the claim and involvement of the specific CHP employees who harassed Plaintiff and/or failed to  
5 backup up Plaintiff because of his sexual orientation. (PAUMF ##12, 23-30)

6 Plaintiff satisfies the second requirement in that there is no evidence of prejudice to CHP.  
7 The second prong focuses on the similarity of the two claims. *Cervantes*, 5 F.3d at 1275. The  
8 crux of both plaintiffs workers' compensation claim and his lawsuit are allegations of sexual  
9 orientation harassment and retaliation. The same defendant is involved with both claims. The  
10 two claims are "at least so similar that the defendant's investigation of the first claim [would] put  
11 him in a position to fairly defend the second." *Id.* at 1276 (*quoting Collier v. City of Pasadena*,  
12 142 Cal.App.3d at 925). In short, the workers' compensation claim presented defendants with  
13 ample opportunity to identify evidence which might be needed to defend against Plaintiffs  
14 lawsuit. *Id.* Significantly, what is missing from CHP's moving papers is any suggestion it would  
15 be prejudiced by the application of equitable tolling in this case; nor is there any basis to infer  
16 that "the fundamental purpose of the limitations statute, which is to insure timely notice to an  
17 adverse party so that he can assemble a defense when the facts are still fresh" (*Elkins v. Derby*,  
18 *supra*, 12 Cal.3d at p. 412), would be undermined.  
19  
20  
21

22 Plaintiff satisfies the third prong by timely filing his FEHA complaint within one year of  
23 his workers' compensation. Moreover, there is no evidence of bad faith or unreasonable conduct  
24 in filing the instant action. Accordingly, the doctrine of equitable tolling should be applied in  
25 the instant action.

## 26 **2. Continuing Violation Doctrine**

27 As stated above, FEHA claims must be brought within these prescribed periods, but  
28

1 where alleged misconduct forms a pattern of behavior, the continuing violation doctrine applies.  
2 Essentially, the continuing violation doctrine comes into play when an employee raises a claim  
3 based on conduct that occurred in part outside the limitations period. In such cases, two  
4 questions are potentially raised.

5 The first question is evidentiary: Are the alleged acts outside the limitations period  
6 admissible as relevant background evidence? (*See United Airlines, Inc. v. Evans* (1977) 431 U.S.  
7 553, 558.) The evidence of what occurred to Plaintiff during the prior years is absolutely  
8 admissible to demonstrate the work environment in which Plaintiff found himself. The second  
9 and more difficult question is remedial: Is an employer liable for actions that take place outside  
10 the limitations period if these actions are sufficiently linked to unlawful conduct within the  
11 limitations period?  
12

13 It is this second question that is at issue in this case and this issue must be resolved by the  
14 trier of fact. *See Clifford v. Am. Drug Stores* B 158635, 2005 Cal. App. Unpub. LEXIS 7518, at  
15 \*44 (Aug. 22, 2005) . In particular, the jury must decide whether the plaintiff has shown a  
16 pattern of discrimination and/or harassment, whether at least one anchoring event that constitutes  
17 actionable discriminatory or harassing conduct occurred within the statute of limitations period,  
18 and whether the plaintiff knew or reasonably should have known before that period that the work  
19 situation was pervasively hostile and unlikely to improve.  
20

21 As detailed in Plaintiff's complaint and deposition testimony, the jury in the instant action  
22 will hear a significant amount of uncontroverted evidence of sexual orientation harassment and  
23 hostile work environment that occurred over a number of years. Of particular concern is the  
24 testimony concerning CHP officers' refusal to back Brome up on calls during the last part of his  
25 career, repeatedly placing his life in danger. (PAUMF #13) The undisputed evidence is that this  
26  
27  
28

1 condition existed, unremediated, until Plaintiff's constructive discharge in January of 2016.

2 (PAUMF #14)

3 Specifically, evidence will be presented concerning the lack of a response to Brome's  
4 complaints of disparate treatment in the workplace, and hostile work environment allegations, on  
5 the basis of his sexual orientation. (PAUMF #15). Based on this evidence, the jury can  
6 determine that during the period of Brome's employment with CHP he had been subject to a  
7 hostile work environment an environment pervaded by harassment or abuse and that the resulting  
8 intimidation, humiliation, and stigmatization posed a formidable barrier to the plaintiffs full  
9 participation in the workplace. The jury can also determine that a reasonable person in the  
10 plaintiff's position would have left his job rather than remain in that environment, and further  
11 that the CHP caused and was therefore liable for the mental and emotional injuries about which  
12 the plaintiff and his doctor will testify at trial.

13  
14  
15 **B. PLAINTIFF SUFFERED ADVERSE EMPLOYMENT ACTION  
DURING THE LIMITATIONS PERIOD**

16 The CHP argues that Brome can not establish a prima facie case of FEHA discrimination,  
17 harassment, or retaliation because he did not suffer any adverse employment actions during the  
18 charging period. The term "adverse employment action" "does not appear in the language of the  
19 FEHA . . . but has become a familiar shorthand expression referring to the kind, nature, or degree  
20 of adverse action against an employee that will support a cause of action under a relevant  
21 provision of an employment discrimination statute." (*Yanowitz v. L'Oreal*, (2005) 36 Cal.4th  
22 1028, 1049.)

23  
24  
25 **1. Materiality Test**

26 In the absence of a statutory definition, the California Supreme Court has held that "the  
27 proper standard for defining an adverse employment action is the 'materiality' test, a standard that  
28 requires an employer's adverse action to materially affect the terms and conditions of

1 employment." *Id.* at 1036. The court must, however, take the totality of the circumstances into  
2 account, including the context of the plaintiff's workplace. *Id.* at 1052.

3 ' [T]he determination of whether a particular action or course of conduct rises to the level  
4 of actionable conduct should take into account the unique circumstances of the affected  
5 employee as well as the workplace context of the claim.' [Citation.] Such a determination 'is not,  
6 by its nature, susceptible to a mathematically precise test.' [Citation.] 'Minor or relatively trivial  
7 adverse actions or conduct by employers or fellow employees that, from an objective  
8 perspective, are reasonably likely to do no more than anger or upset an employee cannot properly  
9 be viewed as materially affecting the terms, conditions, or privileges of employment and are not  
10 actionable, but adverse treatment that is reasonably likely to impair a reasonable employee's job  
11 performance or prospects for advancement or promotion falls within the reach of the  
12 antidiscrimination provisions of sections 12940(a) and 12940(h).' [Citation.] FEHA not only  
13 protects against 'ultimate employment actions such as termination or demotion, **but also the**  
14 **entire spectrum of employment actions that are reasonably likely to adversely and materially**  
15 **affect an employee's job performance or opportunity for advancement ... .**'" (*emphasis added*)  
16 (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 298–299 [156 Cal. Rptr. 3d  
17 851]; see *Yanowitz*, *supra*, 36 Cal.4th at pp. 1052, 1054–1055.)

18  
19  
20  
21 When a plaintiff, like Brome in the instant action, alleges a series of actions that comprise  
22 a course of conduct, the Court does not need not examine each action individually. Instead, the  
23 Court must consider the totality of the circumstances to determine whether the plaintiff has  
24 suffered an adverse employment action. There is no requirement that an employer's  
25 discriminatory acts constitute one swift blow, rather than a series of subtle, yet damaging,  
26 injuries. Enforcing a requirement that each act separately constitute an adverse employment  
27  
28

1 action would subvert the purpose and intent of the statute. (See *Yanowitz, supra*, 36 Cal.4th at pp.  
2 1055–1056.)

3 It is undisputed that throughout his career at Brome was subject to a campaign of terror  
4 because his sexual orientation. The misconduct he specifies and which is undisputed includes,  
5 among other things, CHP officers referring to him as derogatory names because of his sexual  
6 orientation (UMF ## 2, 7), CHP officers making fun of him because of his sexual orientation  
7 (UMF ## 4, 6, 8, 9, 10, 11, 12, 16, 23, 29, 41, 43, 44), CHP officers threatening to kill him  
8 because of his sexual orientation (Complaint, ¶ 19, UMF # 3), CHP officers referring to Brome  
9 as a fag (UMF ## 19, 20, 86), CHP officers refusing to back Brome up while he worked in the  
10 field because of his complaints of retaliation and his sexual orientation (Complaint ¶¶ 18, 87, 89,  
11 91, UMF ## 22, 25, 30, 31, 38, 45, 46, 47, 48, 49, 50, 53), and officers defacing his property as a  
12 result of his complaints of harassment. (UMF # 27)

13  
14  
15 It is undisputed that Brome's superiors ratified the actions of his fellow officers by:  
16 failing to respond to Brome's complaints, (Complaint ¶ 91, UMF ## 13, 51, 54; PAUMF ## 14-  
17 30), setting Brome up for falsified investigations after he complained of harassment (UMF # 15),  
18 failing to consider Brome for promotional opportunities and trainings (UMF ## 17, 56), asking  
19 Brome which CHP officers he thought were gay (UMF # 32), excluding Brome from the office  
20 blood drive due to his sexual orientation (UMF # 55), and refusing to order his fellow officers to  
21 back him up. (Complaint ¶ 91, UMF ## 13, 58)

22  
23 Furthermore, it is undisputed that Brome twice took disability leave as a result of the  
24 hostile work environment in faced in the workplace. (UMF ## 36, 59 ) See *Wysinger v.*  
25 *Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424, [acts that caused  
26 employee "substantial psychological harm" can be part of "a pattern of conduct, the totality of  
27 which constitutes an adverse employment action"].) Taken together, this evidence could lead a  
28

1 reasonable trier of fact to conclude that Brome's employment had been materially and adversely  
2 affected.

### 3 **2. Constructive Discharge**

4 As a result of the campaign of terror Brome faced in the workplace he was forced to  
5 resign after the CHP threatened to revoke Brome's disability benefits. "Constructive discharge  
6 occurs when the employer's conduct effectively forces an employee to resign." (*Turner*  
7 *v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244. To prevail on a constructive discharge  
8 claim the employee must show the employer either intentionally created or knowingly permitted  
9 conditions that are intolerable under an objective standard. (*Id.*, at p. 1251.)  
10

11 It is undisputed that in January 2015, Plaintiff filed a worker's compensation claim  
12 related to the harassment he faced in the workplace. (UMF ## 59-60) It is undisputed that later  
13 that month on January 21, 2015, Plaintiff had all of his Peace Officer powers removed. (UMF #  
14 61) It is undisputed that on October 7, 2015, CHP threatened termination and advised Plaintiff of  
15 the Department's intent to apply for industrial disability retirement on his behalf. (UMF # 65)  
16 Brome testified that the effect of this action was to terminate his income and benefits. (PAUMF  
17 #16) It is undisputed that in December, 2015 Plaintiff applied for service retirement. (UMF ##  
18 68) Brome testified that he retired on February 29, 2016. (PAUMF # 17)  
19

20 At the very least, the deliberate threat of removal of Brome's compensation and  
21 termination raises a triable issue of material fact as to whether an objectively intolerable  
22 condition forced him to retire in order to receive retirement pay and benefits. (*See Brown v.*  
23 *Kinney Shoe Corp.* (5th Cir. 2001) 237 F.3d 556, 566; *quoting Brown v. Bunge Corp.* (5th Cir.  
24 2000) 207 F.3d 776, 782 ["In determining whether a reasonable employee would feel compelled  
25 to resign, we have considered the relevancy of the following events: [P] '(1) demotion; (2)  
26 reduction in salary; (3) reduction in job responsibilities; ... or (7) offers of early retirement [or  
27  
28



1 continued employment on terms less favorable than the employee's former status']."] Brome  
2 specifically testified that he believed this conduct was harassing. (PAUMF #18) Furthermore,  
3 the removal of his Peace Officer duties coupled with the removal of his compensation creates a  
4 constructive discharge. Based on the foregoing, a reasonable juror could determine that Brome  
5 was subject to a constructive discharge.

6 **C. PLAINTIFF'S INTENTIONAL INFLICTION CLAIM IS NOT SUBJECT**  
7 **TO SUMMARY ADJUDICATION.**

8 Workers' compensation is ordinarily the exclusive remedy of an employee who is injured  
9 while performing services growing out of and incidental to his or her employment. (Lab. Code,  
10 §§ 3602, subd. (a), 3600, subd. (a).) Sexual orientation discrimination and harassment is not a  
11 normal incident of employment; accordingly, a claim for damages under the FEHA is not barred  
12 by the exclusive remedy provisions of the workers' compensation act. (*Accardi v. Superior Court*  
13 (1993) 17 Cal.App.4th 341, 347; *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th  
14 467, 480 [The Legislature "did not intend that its objective of providing relief from civil rights  
15 violations would be defeated by the exclusive remedy provision of the workers' compensation  
16 act."].)

17  
18  
19 Furthermore, taking into consideration all of Brome's allegations of harassment, Brome  
20 has raised a triable issue of material fact about whether that conduct was so extreme as to exceed  
21 that which is usually tolerated in a civilized society. (*Conley v. Roman Catholic Archbishop*,  
22 (2000) 85 Cal.App.4th 1129, 1133.)

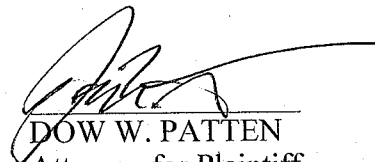
23 **IV. CONCLUSION**

24  
25 The undisputed facts demonstrate that Plaintiff suffered adverse action during the charging  
26 period, when his livelihood was threatened by the CHP. The undisputed facts demonstrate that the  
27 hostile work environment that Plaintiff suffered at the Solano office qualified as a continuing  
28 violation, that persisted until the date of his constructive discharge in January, 2016. The

1 undisputed facts demonstrate equitable tolling should apply because CHP had full notice of Plaintiff's  
2 claims in 2015 as Brome made clear that he was on leave and pursuing workers compensation due  
3 to the hostile work environment and harassment set forth in his January 2015 workers compensation  
4 claim. Plaintiff respectfully requests that the Motion be denied in its entirety.  
5  
6

7 Respectfully submitted, this 2<sup>nd</sup> day of March, 2018,

8 SMITH PATTEN

9  
10 

11 DOW W. PATTEN  
12 Attorney for Plaintiff  
13 JAY BROME  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**PROOF OF SERVICE**

I declare:

My business address is 888 S. Figueroa St., Suite 2030, Los Angeles, California 90017. I am over the age of 18 and am not a party to this action. I am familiar with the business practices at my place of business for collection and processing of mail. Mail collected and processed is deposited with the U.S. Postal Service that same day in the ordinary course of business.

On March 2, 2018, I caused to be served:

**PLAINTIFF JAY BROME'S MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION**

on the party(ies) listed below, addressed as follows:

Jennifer Stoecklein  
Deputy Attorney General  
1300 I Street, Suite 124  
P.O. Box 944255  
Sacramento, CA 94244-2550

\_\_\_\_ **By facsimile machine (FAX)** by personally transmitting a true copy thereof via an electronic facsimile machine between the hours of 9:00 a.m. and 5:00 p.m.

\_\_\_\_ **By first class mail** by depositing a sealed envelope in the United States mail at Oakland, California, with postage fully prepaid.

X **By hand-delivery** *overnight delivery*

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct.

Executed on March 2, 2018 at San Francisco, California.

