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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

DAVID DERR,

Plaintiff and Appellant,

v.

KERN COUNTY FIRE DEPARTMENT et al.,

Defendants and Respondents.

F064539

(Super. Ct. No. CV272247)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. William D. Palmer, Judge.

Shegerian & Associates, Carney R. Shegerian and Astineh Arakelian for Plaintiff and Appellant.

Theresa A. Goldner, County Counsel, and Marshall S. Fontes, Deputy County Counsel, for Defendants and Respondents.

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This is an appeal from a judgment of dismissal entered when the court sustained, without leave to amend, defendants' demurrer to plaintiff's fifth amended complaint. Upon review under the proper standards for demurrers and when properly construed in light of the earlier versions of the complaint, we conclude the first and third causes of action, for discrimination and retaliation, are fatally flawed. Plaintiff has, however, sufficiently stated a cause of action for harassment, and the trial court erred in sustaining the demurrer as to the second cause of action. Accordingly, we affirm in part and reverse in part.

STANDARD OF REVIEW

On appeal from dismissal after an order sustaining a demurrer, we review the order de novo, exercising our independent judgment about whether the complaint states a cause of action as a matter of law. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) "On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]" (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) Where allegations in the operative complaint conflict with allegations of fact in earlier complaints, however, and the plaintiff fails to provide an explanation for the change, the reviewing court may "read into the amended complaint the allegations of the superseded complaint." (*Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 384 (*Owens*); see also *Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 425-426 & fn. 3.)

FACTS AND PROCEDURAL HISTORY

Plaintiff David Derr was a firefighter employed by defendant Kern County Fire Department (the department), presumably (but not explicitly alleged to be) a department of defendant Kern County (the county). Defendant James Rummell (Rummell) is alleged to be a captain in the department and plaintiff's supervisor. Plaintiff filed suit against Rummell, the department, the county, and others in July 2010. The complaint alleged discrimination, harassment and retaliation claims based on plaintiff's medical condition, and discrimination, harassment and retaliation claims based on his daughter's sexual orientation and adverse actions taken against plaintiff because of his association with her¹. The harassment causes of action were alleged against Rummell and other individual defendants, as well as the governmental defendants; the discrimination and retaliation claims were against the county and the department only.

Defendants' demurrer to plaintiff's second amended complaint was subsequently sustained without leave to amend as to the disability causes of action and certain individual defendants were dismissed from the case. Plaintiff filed two further amended complaints against the county, the department and Rummell, alleging only claims based on sexual orientation. The court sustained demurrers to those two amended complaints with leave to amend. Thereafter, plaintiff filed the fifth amended complaint. The court

¹ Plaintiff references these as "**Sexual Orientation by Association**" claims. Defendants do not contest, for purposes of this appeal, that plaintiff would be protected under the Fair Employment and Housing Act (the Act), Government Code section 12900 et seq. (All further section references are to the Government Code except as noted.) The scope and requirements for causes of action based on the protected status of another person are not before us in this appeal, and we assume for purposes of the appeal that plaintiff has alleged or could allege the necessary elements for that aspect of the case. (See § 12926, subd. (m); Cal. Code Regs., tit. 2, § 7287.9, subd. (a) ["It is unlawful for an employer ... to ... harass, or intimidate any ... employee because the employer ... disapproves generally of the ... employee's association with individuals because they are in a category enumerated in the Act."].)

sustained defendants' demurrer to that complaint without leave to amend and granted judgment for the county, the department and Rummell.

The allegations in the fifth amended complaint, coupled with conflicting allegations from prior complaints for which plaintiff has failed to provide an explanation for the change (*Owens* allegations), are as follows.

Plaintiff was employed by defendants as a firefighter for 29 years and “[a]t all times ... performed his duties in an exemplary manner.” During the first year Rummell and plaintiff worked the same shift (“A shift at Station 76”), Rummell expressed his “condemnation of homosexuals.” Plaintiff responded that he was offended by the remarks as he had “family members who [were] gay.”

Approximately one year “after the first time Rummell made anti-gay remarks in plaintiff’s hearing, Rummell stated, after watching a news report on gay issues, that people [became] homosexual either by being ‘led in that direction’ or as a result of childhood traumas that ‘twist’ them.” Plaintiff told Rummell that he was misinformed and that plaintiff “did not want to hear any more such commentary.” He once again informed Rummell that he had family members who were gay.

Plaintiff told a coworker that his daughter was gay, but that he did not want Rummell to know. Rummell apparently found out.

In October 2008, plaintiff had a “‘No on 8’” sign in his yard (referring to an initiative measure on the November 4, 2008, ballot, limiting “marriage” to opposite-sex couples (see *Strauss v. Horton* (2009) 46 Cal.4th 364, 385)), and a “corresponding bumper sticker on his car.” On October 25, 2008, Rummell told plaintiff someone had tried to give him a bumper sticker supporting Proposition 8 but he had refused it “because he worked with a man who had a gay daughter.” Rummell then “yelled at [plaintiff], ‘But you didn’t show me the same respect!’” Plaintiff responded that “he had never intentionally disrespected Rummell, but that his first loyalty was to his children.”

Plaintiff alleges that, because he never drove to work, “Rummell would have had to go past [plaintiff’s] house” to see the bumper sticker and yard sign.

On November 1, 2008, plaintiff “forwarded a few amusing e-mails” to a mailing list composed of “friends, family members, and co-workers, including Rummell and his wife.” On November 3, 2008, “plaintiff received an offensive anti-gay e-mail” from Mrs. Rummell. The e-mail “accused [plaintiff’s] ‘embrace’ of homosexuality as a ‘blatant opposition to the commands of God’” and accused plaintiff of standing “‘with fist in [God’s] face’” and “‘mocking His plan for marriage.’” The e-mail cited to a specific Bible verse and then used several strong adjectives vilifying homosexuality.

On Election Day, November 4, 2008, plaintiff discovered that Mrs. Rummell had sent to him, and everyone on his November 1st, e-mail list (including his children and members of his church), two more offensive e-mails. The first e-mail stated, “[T]he reason that God is smiling is that he just crapped all over those who mock His word! Now, go have yourself a great day and remember to check your shoulder occasionally!” The second e-mail cited a Bible verse and read, “‘It would be better to be thrown into the sea with a millstone hung around your neck than to cause one of those little ones to fall into sin.’” Plaintiff alleged that “Rummell was asked if he agreed with his wife’s hate e-mail, and Rummell said that he did. It was clear to plaintiff that Rummell adopted the hateful statements written by his wife.”² “Extremely distraught by this, plaintiff returned to the station, gathered his things, and told Rummell that he was going home because he was too upset to stay at work.”

Sometime after the Election Day e-mails, plaintiff asked a firefighter from a different shift if he would exchange shifts. The coworker agreed as “he knew of

² In his original complaint, and in the first two amended complaints, plaintiff alleges that he returned to work, “where [] Rummell insisted that he knew nothing about his wife’s e-mails. [Plaintiff] asked Rummell if he agreed with his wife, and Rummell said that he did. [Plaintiff] left the station.”

Rummell's history of anti-gay e-mails and remarks about [plaintiff] and his family." Plaintiff went to the fire chief, Brent Moon, told him about the e-mails and his confrontation with Rummell, and Moon agreed to the shift change.³

In the third, fourth and fifth amended complaints, plaintiff alleges Rummell had a long history in the department of his crew members leaving his crew and switching shifts. Plaintiff's shift change greatly embarrassed and angered Rummell and Rummell continued to harass plaintiff at work. In the fifth amended complaint, plaintiff alleges Rummell did this by "continuingly going out of his way to target and single out [plaintiff], calling him in front of other people despite his knowledge that [plaintiff] was trying to avoid him, staring at him, sarcastically smiling at him, and making sarcastic comments to [plaintiff] on an almost daily basis." (*Sic.*) "Every time the fire fighters' shift changed, Rummell would make statements in front of other people like 'Hello!' and 'Morning, Dave!' in a sarcastic tone and try to talk to plaintiff as if nothing had ever happened." Plaintiff alleged that his captain and fire chief "were well aware of plaintiff's situation with Rummell," but did not take "any corrective step at this point."

In mid-December 2008, plaintiff began to see a therapist through the department's Employee Assistance Program (EAP). He started "to feel better as a result of the counseling," but "after only three sessions the EAP cut off the counseling sessions." The EAP "informed plaintiff that no further treatment [w]as available and advised him to 'suck it up.'" Plaintiff complained to Captain Louis Monterosso. Monterosso said it was clear that Rummell had "victimized" plaintiff and that the department had failed to

³ In the fourth amended complaint, plaintiff alleged he "complained to the Fire Department but nothing was done." As a result, plaintiff sought out the coworker to arrange the shift exchange. In the earlier complaints, and in the fifth amended complaint, this allegation is absent. In the earlier complaints, plaintiff alleged Moon met with plaintiff at plaintiff's home and told plaintiff he did not know what the department could do, since Mrs. Rummell was not an employee. Plaintiff then requested the shift change, and Moon agreed.

take action. Monterosso said he would file a workers' compensation claim for plaintiff and sent plaintiff home. (Plaintiff alleges that his physical symptoms from the stress included insomnia, headaches, anxiety, chronic diarrhea and cramping, but that "plaintiff was still able to perform his job in an exemplary manner at that time.") Shortly thereafter, the county's risk management department told plaintiff "he was not eligible to work until he saw one of the County's doctors."

Plaintiff saw Dr. Irene Sanchez on January 26, 2009; "she told him that the emotional toll on him was 100% job-connected." She prescribed medication and "told plaintiff that he could not go back to work until he felt better." Plaintiff was then required to see a county psychiatrist, but was told that it would be about a month before an appointment was available.

In the meantime, Moon investigated the situation. He received opinions from Rummell and another firefighter that "plaintiff's emotional distress was the result of plaintiff's problems at home and had nothing to do with the personal attacks by the Rummell family." Moon concluded this was the case, and made a report to risk management.

In early February 2009, Rummell approached the new captain on plaintiff's shift and "falsely informed [him] that plaintiff had a severe drinking problem." The captain "responded that this was a serious matter and that Rummell could be liable for creating a hostile work environment." (No further context or details of this conversation are alleged.)

In plaintiff's interview with risk management on February 20, 2009, the representative raised plaintiff's personal problems as a possible cause of his illness, but plaintiff "explained that those things were in the past and that his distress resulted directly from Rummell's harassment" of him. At some point, apparently during this period, Moon again came to plaintiff's home. Plaintiff again complained about harassment by Rummell; plaintiff also requested that his sick leave be reinstated since he had not been

off work voluntarily but, instead, because of Monterosso's and Sanchez's instructions. During this interview, Moon told plaintiff that in his (Moon's) own religious views, homosexuality is wrong and a sin, and he "did not want to be involved in the situation."

In February 2009, the county denied plaintiff's workers' compensation claim and our record does not indicate that plaintiff sought review of that denial.

Plaintiff contacted Sanchez and asked her to release him to return to work, "as otherwise he would be forced to go off payroll, although he had left work at Monterosso's instruction to address the emotional issues caused by defendants."

Plaintiff returned to work on February 21, 2009. On February 22, 2009, plaintiff's supervisor told plaintiff to come in late and leave early so that plaintiff could avoid seeing Rummell at shift changes.

Rummell's "conduct continued" after plaintiff's return to work: even though they now worked different shifts, Rummell "would purposely stay in the fire station well into plaintiff's shift in order to run into plaintiff"; in particular, Rummell "would still stare [plaintiff] down, comment on him, sarcastically wave and say 'morning Dave,' to [plaintiff], and go out of his way to target [plaintiff] and intimidate him." In addition, Rummell continued to make "condescending and harsh anti-gay comments to plaintiff," "going out of his way to walk by plaintiff and come within his personal space. Plaintiff continually complained to [his fire chief] about Rummell's continued and escalating behavior toward plaintiff, but to no avail."⁴ On one occasion in March 2009 Rummell

⁴ No allegation of "harsh anti-gay comments" appeared in the previous complaints. In the original complaint, for example, it is alleged that Rummell "would say hello and try to talk to plaintiff as if nothing had ever happened." Plaintiff alleges he rebuffed Rummell and asked him not to try "to make small talk." By the fourth amended complaint, the allegation had changed somewhat, so as to include a claim that Rummell made his contact with plaintiff "unavoidable" in "a blatant attempt to antagonize plaintiff in the work setting." Whatever ramifications this delay in alleging this detail may have with respect to plaintiff's credibility, at this point we elect not to disregard the new allegation. After the trial court sustained the demurrer to plaintiff's disability-based

issued an order during shift change that ignored plaintiff's years of experience and thereby demeaned him. On May 3, 2009, Rummell, while in an official vehicle, made an obscene gesture toward plaintiff when plaintiff was walking through town. Later that same day, Rummell saw plaintiff again and "proceed[ed] to smile and wave at plaintiff in an exaggerated, sarcastic, and antagonizing manner." The next day, plaintiff complained to a supervisor, who told plaintiff to look in the fire station's official log book. There, Rummell had reported that plaintiff had made the obscene gesture to him and that plaintiff spat on the ground in front of Rummell's official car. Plaintiff disputed this entry, but his supervisors "did not take any action to delete Rummell's false entry from the log book or to investigate Rummell's version of events."

In June 2009, plaintiff was transferred to a different fire station, away from Rummell. He and Rummell were called to fire headquarters where they had separate but simultaneous meetings with deputy fire chiefs. After plaintiff detailed his complaints about Rummell to a deputy chief, she left the room. When she returned she informed plaintiff that he would be returned to his original fire station and Rummell would be transferred to a different location. Plaintiff told the deputy chief he not only wanted Rummell "to leave him and his family alone," but that, in addition, he wanted his sick leave restored so that he would have time available to resolve his remaining medical issues.⁵ The deputy chief said she "would see what she could do." Plaintiff's leave balances, however, were never restored.

causes of action, the nature and emphasis of plaintiff's case changed and the factual issues in the remaining causes of action began to focus more on Rummell's conduct. (See *Deveny v. Entropin, Inc.*, *supra*, 139 Cal.App.4th at pp. 425-426 & fn. 3.) With respect to all the relevant allegations of the complaint, we accept them as true for purposes of this appeal, but at later stages of the case, plaintiff will have the burden of proving these facts.

⁵ In the second, third and fourth amended complaints (but not in the first two complaints), plaintiff alleges he "had hoped to receive a cash balance of his unused sick days and vacation days upon retirement, as was the policy at the Fire Department. [He]

There were no further incidents with Rummell or plaintiff's superiors. In early July 2009, plaintiff's condition was diagnosed as ulcerative colitis and plaintiff began "a six-week treatment plan, which consisted of regular high doses of steroids." The steroids caused side effects of "severe anxiety, insomnia, and emotional distress" that prevented plaintiff from working. "Because he did not have enough sick time to stay off work until his symptoms were resolved, plaintiff found himself forced to retire on or about July 26, 2009 because to stay on would have subjected him to intolerable working conditions caused by defendants' harassing, discriminatory, and retaliatory conduct." "Had his medical leave not been exhausted by his forced leave, plaintiff would have had enough sick days to cover the ulcerative colitis treatment, and plaintiff believes that in that case he would still be working today." After plaintiff terminated his employment, Rummell contacted some of plaintiff's friends to turn them against plaintiff.⁶

DISCUSSION

As previously stated, plaintiff's first and third causes of action, for discrimination and retaliation, are alleged only against the county and the department. Those two causes of action are similar to one another, in that both require, as relevant here, that plaintiff was subjected to adverse employment action. (See § 12940, subd. (a) [discrimination]; *id.*, subd. (h) [retaliation].) For a harassment claim, different considerations apply. (*Id.*, subd. (j)(1) ["[l]oss of tangible job benefits shall not be necessary in order to establish harassment"]; *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706.⁷) We first discuss

requested that the Fire Department reinstate his sick leave." Moon informed him that his request was denied.

⁶ The only particular instance of such contact alleged in the fifth amended complaint is a contact with a retired fire captain. Rummell asked why the captain was friends with plaintiff when plaintiff was "a liberal."

⁷ As we will discuss below, for a successful work place harassment claim, plaintiff must show that the conduct complained of was "severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as

the discrimination and retaliation claims together, and then turn to the harassment cause of action.

Plaintiff contends he has alleged adverse employment action in the discrimination and retaliation causes of action because “he was forced to retire, given that he had ‘no choice’ in response to defendants’ actions, and this resulted in the constructive termination of his employment.” (Fn. omitted.) Because of Rummell’s treatment of him, plaintiff alleges, he “developed emotional and physical conditions that became severely exacerbated, to the point that he could no longer return to such intolerable working conditions and was forced to retire.”⁸ Plaintiff’s theory fails. First, it directly conflicts with the facts alleged in the fifth amended complaint: Plaintiff specifically alleges that a few weeks prior to his retirement, the department had acted to resolve his working-conditions complaint by transferring Rummell to a different fire station. Plaintiff also alleges that “he would still be working today” if the county had restored to him the sick leave he had taken earlier in 2009.⁹ Thus, under the allegations of the complaint, the working conditions, per se, were no longer “intolerable” at the time he retired, even if they previously had been. Second, there was a prior administrative determination by the

hostile or abusive to employees because of their [protected status].” (See, e.g., *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 278-279 (*Lyle*), italics omitted.)

⁸ Lesser losses of opportunities or benefits can also constitute “adverse employment action” (see *Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1053-1054) but plaintiff does not allege any such action in the present case.

⁹ Because plaintiff alleges his medical condition was not permanent, and would have resolved after a few weeks of treatment, the present case is unlike *Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1314, upon which plaintiff relies. In *Colores* the plaintiff alleged that the harassment had been designed to, and did in fact, worsen her medical condition to the point that she was forced to retire. (*Id.* at pp. 1301, 1302.) In the present case, plaintiff simply ran out of compensated sick leave and decided his best alternative was to retire.

county that, as alleged in the complaint, plaintiff was not eligible for workers' compensation benefits for his time off earlier in 2009, and the inference from the fifth amended complaint is that the reason for denial of benefits was that plaintiff's medical condition was not job-related. Plaintiff does not contend the county or the department applied the standards for workers' compensation or sick leave in a discriminatory or retaliatory manner. (*Reno v. Baird* (1998) 18 Cal.4th 640, 646-647 [actions by management in applying ordinary rules and making ordinary business decisions do not constitute harassment under the Act, even though the discriminatory application of such rules can support a cause of action for discrimination or retaliation].)

Plaintiff did not sufficiently allege he was subjected to adverse employment action because of his association with his daughter. The fifth amended complaint, viewed most favorably to plaintiff, shows that the county and the department remedied plaintiff's uncomfortable working conditions prior to his voluntary termination of employment. It also shows that the county's application of its workers' compensation and sick leave policies were not discriminatory or retaliatory. The trial court correctly sustained the demurrer to the first and third causes of action.

The harassment cause of action presents different issues. We emphasize that at this stage of the case we deem true all facts properly alleged in the operative complaint, and we do not speculate about any difficulty plaintiff may have in carrying his burden of proof of those facts. Accordingly, the issue presented is whether the fifth amended complaint alleges a course of conduct "sufficiently severe or pervasive to create a working environment a reasonable person would find hostile or abusive." (*Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367, 1377 (*Jones*); see also *Lyle, supra*, 38 Cal.4th at p. 284.) We must look at all the circumstances, including the frequency and severity of the harassing conduct. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462.) "[H]arassment focuses on situations in which the *social environment* of the workplace becomes intolerable because the harassment

(whether verbal, physical, or visual) communicates an offensive message to the harassed employee.” (*Roby v. McKesson Corp.*, *supra*, 47 Cal.4th at p. 706.¹⁰)

The fifth amended complaint adequately meets this standard. (See generally *Miller v. Department of Corrections*, *supra*, 36 Cal.4th at pp. 460-466.) It alleges that plaintiff’s supervisor, Rummell, made or adopted statements that criticized homosexuals and impliedly criticized plaintiff for having and supporting a homosexual daughter. It adequately alleges that Rummell harassed plaintiff by continually greeting him sarcastically and by making condescending and “anti-gay” remarks to him. Even after plaintiff had arranged to change shifts to avoid Rummell, Rummell went out of his way to create opportunities to interact with plaintiff. Additionally, it alleges, Rummell made untrue statements about plaintiff’s mental condition, about a drinking problem, and about aggressive behavior outside the work environment, all, inferentially, for the purpose of punishing plaintiff for having or producing a homosexual child. Such behavior by Rummell continued, it alleges, after it was made clear to him that the conduct was unwelcome and should be avoided.

In *Jones*, *supra*, 152 Cal.App.4th 1367, an appeal arising from an order granting summary judgment for the defendants, the court was faced with a somewhat similar course of conduct, alleged to have been taken against the plaintiff because of her gender and her race. At her deposition, however, the plaintiff testified she did not know whether

¹⁰ The trial court sustained the demurrer to the fifth cause of action stating, in part, that the allegations did not “support a finding of pervasive such as was recognized by the Supreme Court in the [*Roby v.*] *McKesson [Corp.]* case.” (*Sic.*) *Roby v. McKesson Corp.*, *supra*, 47 Cal.4th 686, involved questions of allocation of damages when the portions of the supervisor’s conduct could be termed discrimination and portions were also harassment. (*Id.* at p. 710.) To the extent the court discussed the pervasiveness of the supervisor’s harassment of the plaintiff, the court stated “the evidence is ample to support the jury’s harassment verdict.” (*Ibid.*) Thus, *Roby* does not establish the minimum range of harassment that can make a workplace a “hostile work environment” within the terms of the Act.

the actions were taken because of her gender and her race, and most of the incidents were facially neutral, but were explained by the defendants as occurring for nondiscriminatory reasons. (*Id.* at pp. 1378-1379.)

Similarly, in *Lyle, supra*, 38 Cal.4th 264, another summary judgment appeal, the plaintiff alleged a course of highly offensive sexual banter in the workplace (the writers' room for the television show *Friends*). (See, e.g., *id.* at p. 276 & fn. 2.) The evidence on the summary judgment motion established that the comments were not directed at the plaintiff and for the most part were not directed at any individual, and were a part of the creative process in writing a television show that dealt largely in sexual situations and innuendo, about which the plaintiff had been warned in general terms prior to her hiring. (*Id.* at pp. 287-288.)

In the present case, at the demurrer stage, we do not know what evidence plaintiff may have, unlike the plaintiff in *Jones*, to prove the behavior was, in fact, motivated by bias against homosexuals. Nor do we know whether defendants may have evidence to establish that the offensive behavior did not occur or, as in *Lyle*, was not motivated by animus against a protected class of persons. At this stage, the operative pleading adequately alleges a substantial course of offensive conduct motivated by sexual-orientation bias, and plaintiff is entitled to proceed on his second cause of action for harassment.

It is apparent in our summary of the facts alleged in the fifth amended complaint that the county and the department took some steps to ameliorate Rummell's harassment of plaintiff. In the case of harassment by a coworker, we would be required to determine whether these steps were reasonable attempts to provide plaintiff with a workplace free from harassment. (See *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1040-1041.) In the case of harassment by a supervisor, however, the employer is strictly liable for the supervisor's conduct, and reasonable but unsuccessful attempts at ameliorization do not defeat a plaintiff's harassment cause of action. (*Id.* at

p. 1041.) Of particular importance in the rather unique facts alleged here, the department's action in ultimately transferring Rummell to a different station, thereby potentially resolving the harassment issue, may affect the damages to which plaintiff may be entitled, but it does not affect defendants' liability for the original harassment. (See *id.* at p. 1042.)

DISPOSITION

As to the first and third causes of action in the fifth amended complaint, the judgment is affirmed. As to the second cause of action, “**Harassment on the Basis of Sexual Orientation by Association in Violation of FEHA**,” the judgment is reversed. The order sustaining the demurrer to the fifth amended complaint is vacated insofar as it sustains the demurrer to that second cause of action, and the matter is reversed with directions to enter a new and different order overruling the demurrer to the second cause of action. The parties shall bear their own costs on appeal.

DETJEN, J.

WE CONCUR:

LEVY, Acting P.J.

CORNELL, J.