Appendix A: 9th (Ninth) Circuit Court

Memorandum on 3/18/2019

United States Court of Appeals, Ninth Circuit.

ALFRED LAM; PAULA LEIATO, Plaintiffs-Appellants,
v.
CITY AND COUNTY OF SAN FRANCISCO; et al.,
Defendants-Appellees.

Nos. 16-15596, 16-16559, No. 17-15208.

Submitted March 14, 2019[**].

Filed March 18, 2019.

Appeal from the United States District Court for the Northern District of California; D.C. Nos. **4:10-cv-04641-PJH,** 4:08-cv-04702-PJH, Phyllis J. Hamilton, Chief Judge, Presiding.

Before: WALLACE, FARRIS, and TROTT, Circuit Judges.

NOT FOR PUBLICATION

MEMORANDUM[*]

In these appeals, Alfred Lam and Paula Leiato appeal pro se from the district court's summary judgment in their action alleging employment discrimination; from the district court's award of costs to the defendants; and from the district court's denial of their motion to reconsider a prior summary judgment. We affirm in part and dismiss in part.

In Appeal No. 16-15596, Lam and Leaito appeal from the district court's summary judgment. We have jurisdiction under 28 U.S.C. § 1291. We review de novo, *Vasquez v. County of Los Angeles*, 349 F.3d 634, 639 (9th Cir. 2003), and we affirm.

The district court properly granted summary judgment on Lam's and Leiato's discrimination claims because Lam and Leiato failed to raise a genuine dispute of material fact as to whether defendants took adverse action against plaintiffs, and whether defendants had legitimate, non-discriminatory motives for their actions. *Id.*at 640-42 (providing framework for analyzing discrimination claims). Lam and Leiato's contentions that the district court ignored relevant evidence or was biased against them are unsupported by the record. *See, e.g.,* Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1474 (9th Cir. 1992) (district court's failure to refer to declaration and exhibits in summary judgment order was harmless where plaintiff failed to argue how consideration of declaration would have changed result reached by district court).

The district court properly concluded that Lam and Leiato, as pro se litigants, lacked the authority to represent a class. *See* C.E. Pope Equity Trust v. United States, 818 F.2d 696, 697 (9th Cir. 1987) ("Although a non-attorney may appear in propria persona in his own behalf, that privilege is personal to him. . . . He has no authority to appear as an attorney for others than himself."). To the extent Lam and Leiato contend that reversal is required due to alleged ineffective assistance of counsel, this contention is without merit. *See, e.g.,* Nicholson v. Rushen, 767 F.2d 1426, 1427 (9th Cir. 1985) (plaintiff is a civil case has no right to effective assistance of counsel). We reject Lam and Leiato's remaining arguments as unsupported by the record.

The district court did not abuse its discretion in awarding costs to defendants because Lam and Leiato failed to establish why the defendants were not entitled to costs. *See* Save Our Valley v. Sound Transit, 335 F.3d 932,

944-45 n.12 (stating standard of review and burden of proof).

In Appeal No. 16-16559, Lam and Leiato appeal the district court's order denying their second motion to reconsider the district court's costs award. We dismiss this appeal because it was not timely filed. *See* Fed. R. App. Proc. 4(a)(1)(A), 26(a)(1); *United States v. Sadler*, 480 F.3d 932, 937 (9th Cir. 2007) (untimely civil appeals must be dismissed for lack of jurisdiction).

In Appeal No. 17-15208, Lam and Leiato appeal the district court's order denying their motion for relief under Federal Rules of Civil Procedure 59(b), (e), 60(b), and 60(d)(3) as "untimely and meritless". We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse of discretion. *School Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993) (Rule 59(e) and Rule 60(b)). We affirm.

The district court correctly exercised its discretion in denying Lam and Leiato's motion. The district court properly determined that all of the twenty-two alleged questionable grounds for relief were untimely because their motion was filed more than four years after the entry of judgment.

APPEAL NOS. 16-15596 and 17-15208 **AFFIRMED**.

APPEAL NO. 16-16559 DISMISSED.

[**] Lam and Leiato's request for oral argument is denied, because the panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appendix B: U.S. District Court's Motion of Summary Judgment and dismissed case on 3/7/2016

United States District Court, N.D. California.

Case No. 10-cv-4641-PJH.
March 7, 2016.

ALFRED LAM, et al., Plaintiffs,
v.
THE CITY & COUNTY OF SAN FRANCISCO, et al., Defendants.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

PHYLLIS J. HAMILTON, District Judge.

Defendants' motion for summary judgment came on for hearing before this court on January 13, 2016. Plaintiff Alfred Lam appeared in pro per, and plaintiff Paula Leiato appeared through counsel Albert Boasberg. Defendants appeared through their counsel, Boris Reznikov. Having read the papers filed in conjunction with the motion and carefully considered the arguments and the relevant legal authority, and good cause appearing, the court hereby rules as follows.

BACKGROUND

This is the second suit brought by this group of plaintiffs for alleged workplace discrimination. Plaintiffs Alfred Lam and Paula Leiato ("plaintiffs") are employed by San Francisco's Juvenile Probation Department ("JPD"), and bring suit against the City and County of San Francisco ("CCSF") and various individual defendants[1](referred to collectively as "defendants") for alleged violations of section 1983, section 1981, Title VII, and the California Fair Employment and Housing Act ("FEHA"). Plaintiffs identify as Asian Pacific Americans ("APAs"), and argue that they were

discriminated against, especially as compared to African American employees.

In October 2008, the same plaintiffs[2] filed a case very similar to the one that is now before the court. See Lam et al. v. City and County of San Francisco, C 08-4702 PJH ("Lam I"). In Lam I, the plaintiffs filed suit against CCSF and ten individual employees (many of whom are also defendants in this case) for alleged violations of section 1983, section 1981, Title VII, and FEHA. Plaintiffs' allegations centered around alleged racial discrimination, harassment, and retaliation by their superiors at JPD. Some of the Lam I claims were dismissed on a Rule 12(b)(6) motion, and summary judgment was granted as to the remaining claims in April 2012.

While Lam I was pending, the plaintiffs filed the present suit ("Lam II"). Specifically, in October 2010, plaintiffs filed suit alleging the same causes of action as in Lam I (alleged violations of §§ 1981 and 1983, Title VII, and FEHA) against CCSF and individual employees. While the causes of action are nearly identical as those in Lam I, the plaintiffs framed Lam II as focused on discrimination in the promotion of employees to "acting supervisor" positions, as opposed to Lam I's focus on discrimination with respect to disciplinary decisions. See Dkt. 61 at 17 (hearing transcript where plaintiffs' counsel stated that "We don't want to re-litigate an issue. We don't want a second bite at the apple. What we want to do is to be able to present the evidence that we have concerning promotional manipulation for the purposes of denying promotions.").

In June 2011, eight months after the filing of Lam II, the plaintiffs sought to file a supplemental complaint in Lam I, claiming that supplementation would capture the allegations made by Lam II, such that Lam II could be dismissed if the motion to supplement was granted. The court denied the motion to supplement, finding that the

plaintiffs had not been diligent in seeking leave to supplement, and that supplementation would unduly delay the close of discovery in Lam I. The plaintiffs then sought to consolidate Lam I and Lam II only two days before discovery was set to close in Lam I. The court denied the motion to consolidate, viewing the consolidation attempt as "as a means of achieving what plaintiffs could not achieve by way of their motion to supplement." Lam I, Dkt. 182.

As mentioned above, summary judgment was ultimately granted in Lam I, and after that, defendants sought to dismiss this case based on the res judicata effect of Lam I. The court granted the motion only in part, finding that any allegations that preceded the filing of the last operative complaint in Lam I (February 22, 2010) were barred, as they either were raised or could have been raised in Lam I. The court further found that one post-February 2010 allegation (a denial of a request for leave made by plaintiff Leiato in July 2010) was also litigated in Lam I, and thus was barred.

Accordingly, the remaining allegations in this case are limited to alleged conduct that occurred after February 22, 2010, minus the July 2010 denial of plaintiff Leiato's request for leave. Looking only at that time period, the operative third amended complaint ("TAC") alleges the following with respect to plaintiff Lam:

> (1) In or around March 2010, plaintiff Lam alleges that he "requested vacation time in a timely manner," but the request was "ignored and delayed without justification" until it was "finally approved in July 2011, just several days before the planned vacation" (TAC, ¶ 39),
>
> (2) In or around March 2010, plaintiff Lam alleges that he was "denied

promotion or opportunity for promotion" (TAC, ¶ 40),

(3) On or about July 27, 2010, plaintiff Lam alleges that he was given "a `poor' or `negative' work appraisal on his annual performance evaluation without justification" (TAC, ¶ 41),

(4) On or about September 29, 2010, plaintiff Lam alleges that he was given a "written notice of `inattention to duty' without merit or justification" (TAC, ¶ 42),

(5) On or about November 9, 2010, plaintiff Lam alleges that he left his workstation due to the "strong odor of sewage," yet was "issued a written reprimand" for "alleged tardiness that day in reporting to his assigned post" (TAC, ¶ 43),

(6) On or around January 2011, plaintiff Lam alleges that he "submitted a medical advisory to JPD recommending modified duty due to persistent eye irritation," yet was "arbitrarily denied accommodation," and was instead "refused work" and "sent home without cause or justification" between January 15, 2011 and January 23, 2011" (TAC, ¶ 44-45),

(7) On or about January 27, 2011, plaintiff Lam alleges that he was "denied participation in a scheduled annual shift bidding process without justification or cause (TAC, ¶ 46),

(8) On or about May 14, 2011, plaintiff Lam alleges that he was

"given a written reprimand and placed on `sick leave restriction' without justification and merit" (TAC, ¶ 47), and

(9) On or around December 15, 2011, plaintiff Lam alleges that he expressed interest in an acting supervisor position, but did not receive one. TAC, pp 52. Plaintiff also generally alleges that "throughout his career at the JPD, Lam repeatedly and continually asked to be assigned to acting supervisory positions," but "never received such an assignment or appointment." TAC, ¶ 48.

With respect to plaintiff Leiato, the TAC makes the following allegations post February 22, 2010 (excepting the July 2010 allegations mentioned above):

(1) On or around March 2010, plaintiff Leiato alleges that she was "denied promotion despite nearly fifteen years of experience" (TAC, ¶ 67),

(2) On or around November 2010, plaintiff Leiato alleges that she "submitted competent medical certification to request leave for a doctor's appointment," but was "arbitrarily denied leave and pay and thereafter charged with `misuse of sick time' and being AWOL for her November 24, 2010 medical appointment that she notified her superiors of" (TAC, ¶ 70),

(3) During some unspecified time period, plaintiff Leiato alleges that she has "routinely been assigned to work with two on-call staff," which "makes it harder to perform her job responsibilities, prolonging the time it takes and putting her in danger" (TAC, ¶ 71),

(4) Throughout her career, including in March 2010, September 2011, October 2011, December 2011, January 2012, and February 2012, plaintiff Leiato alleges that she "continually asked to be assigned to acting supervisory positions," but "never received such an assignment or appointment" (TAC, ¶¶ 72-80).

Although it does not appear in the TAC, defendants' motion references an additional allegation by Leiato — namely, that in March 2011, she "served a three-day suspension for abandoning her post on July 20, 2010." Dkt. 178 at 12. Because this allegation arises out of the July 2010 denial of leave, and because allegations relating to the July 2010 denial of leave are barred from this action under res judicata principles, the court finds that any allegations relating to the March 2011 suspension are similarly barred under principles of res judicata. Moreover, as mentioned above, no allegations regarding a March 2011 suspension appear in the operative complaint.

Based on the above allegations, plaintiffs assert six causes of action: (1) violation of the equal protection clause of the Fourteenth Amendment under 42 U.S.C. § 1983, against defendant CCSF, (2) violation of 42 U.S.C. § 1981 based on disparate treatment due to race and national origin, asserted against all defendants, (3) violation of Title VII based on disparate treatment due to race and national

origin, asserted against CCSF, (4) violation of Title VII based on harassment and a hostile work environment due to race and national origin, asserted against CCSF, (5) violation of Title VII based on retaliation, asserted against CCSF, and (6) violation of Cal. Gov't Code § 12940 based on failure to prevent unlawful discrimination and harassment, asserted against CCSF.

Defendants now move for summary judgment as to all claims.

DISCUSSION

A. Legal Standard

A party may move for summary judgment on a "claim or defense" or "part of . . . a claim or defense." Fed. R. Civ. P. 56(a). Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Id.

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Material facts are those that might affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id.

Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007). On an issue where the nonmoving

party will bear the burden of proof at trial, the moving party may carry its initial burden of production by submitting admissible "evidence negating an essential element of the nonmoving party's case," or by showing, "after suitable discovery," that the "nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial." Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099, 1105-06 (9th Cir. 2000); see also Celotex, 477 U.S. at 324-25 (moving party can prevail merely by pointing out to the district court that there is an absence of evidence to support the nonmoving party's case).

When the moving party has carried its burden, the nonmoving party must respond with specific facts, supported by admissible evidence, showing a genuine issue for trial. Fed. R. Civ. P. 56(c), (e). But allegedly disputed facts must be material — the existence of only "some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." Anderson, 477 U.S. at 247-48.

When deciding a summary judgment motion, a court must view the evidence in the light most favorable to the nonmoving party and draw all justifiable inferences in its favor. Id. at 255; Hunt v. City of Los Angeles, 638 F.3d 703, 709 (9th Cir. 2011). B. Legal Analysis

As an initial matter, defendants argue that plaintiffs' failure to meet the administrative exhaustion requirement warrants summary judgment as to a number of their claims. Defendants point to plaintiff Lam's October 2010 charge, in which he mentioned only the alleged denial of a promotion, and not any alleged retaliation or harassment. Defendants also point to plaintiff Leiato's 2010 charge in which she alleged discrimination and retaliation based on an incident occurring in 2007. However, defendants fail to acknowledge a key aspect of this case — the fact that Lam

I was already pending at the time of all of the alleged conduct, and that plaintiffs originally sought to supplement the Lam I complaint with the allegations that are now at issue in this case. In Lam I, the court denied the motion to supplement as untimely, but it appears undisputed that, if the motion had been timely brought, plaintiffs would have been permitted to supplement the Lam I complaint without needing to file a new administrative charge. When the motion to supplement was denied, it was unclear whether plaintiffs were then required to file a new administrative charge. While exhaustion may indeed have been required, defendants have not provided authority for imposing such a requirement in a situation such as this. And, as the party seeking summary judgment, it is defendants' burden to make such a showing. Having failed to do so, the court is left with no basis to impose an exhaustion requirement for conduct that occurred during the pendency of Lam I. The court will instead address plaintiffs' claims on the merits.

The bulk of the parties' briefs relates to the third cause of action, for disparate treatment based on race and national origin under Title VII. To establish a prima facie case of disparate treatment discrimination under Title VII, plaintiff must show (1) that he/she belongs to a protected class, (2) was performing according to his/her employer's legitimate expectations, (3) suffered an adverse employment action, and (4) that other employees with qualifications similar to his/her own were treated more favorably, or that the employer had a discriminatory motive. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Guz v. Bechtel Nat'l, Inc., 24 Cal. 4th 317 (2000). This is only a minimal evidentiary burden, and a plaintiff need only give rise to an inference of unlawful discrimination. See St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). Second, if the employee produces sufficient evidence to establish a prima facie case, the burden shifts to the employer-defendant to articulate a "legitimate non-discriminatory reason" for the adverse employment action.

See Lyons v. England, 307 F.3d 1092, 1112 (9th Cir. 2002). Finally, if the employer is able to articulate a legitimate, non-discriminatory reason for its action, this dispels the inference of discrimination raised by plaintiff's prima facie case, leaving the employee with the ultimate burden of persuading the trier of fact that defendant intentionally discriminated against the employee. A plaintiff employee may satisfy this burden by proving that the legitimate reasons offered by defendant were factually untrue, thereby creating an inference that those reasons were merely a pretext for discrimination. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142 (2000).

The primary allegation of plaintiff Lam is that he was "denied promotion or opportunity for promotion, likely due to his race, national origin, and previous complaints against CCSF and JPD." TAC, ¶ 40. Plaintiff Lam alleges that this denial of promotion occurred in March 2010, though he separately alleges that he was also denied appointment to "acting" supervisory positions throughout his career at JPD. See, e.g., TAC, ¶¶ 48-52. Plaintiff Lam alleges that "[a]ssignment to these `acting' positions is used by defendants as a de-facto requirement to receive a full time, permanent supervisory position." Id., ¶ 48. However, most of plaintiff Lam's allegations regarding an acting position arise out of conduct that occurred before February 2010, and thus are barred by res judicata. The only post-February 2010 allegation is that "[o]n or around December 15, 2011, Lam informed supervisor Alardo that he was interested in an 8318 or 8322 acting position," but "never received such an assignment or appointment, instead plaintiff's non-APA counterparts received the additional pay and opportunities for promotion requested by plaintiff." Id., ¶ 52.

In its motion, defendant CCSF argues that the March 2010 promotions were made based on responses to a job announcement that was posted in September 2009. Dkt.

178 at 3. Applicants were invited to take a job-related examination, and those whose scores made them eligible were placed on a list from which promotions were made. Defendant CCSF emphasizes that plaintiff Lam did not apply for this set of promotions, and was thus ineligible.

In his opposition, plaintiff Lam appears not to challenge the fact that he did not apply for a promotion, but he argues that "it was generally known throughout the Department that Lam and Leiato did inquire several times about being considered for any promotions," and that "neither plaintiff ever was made apprised of the process and no one was willing to guide them through whatever corporate `hoops' the plaintiffs had to jump through to be considered for promotion." Dkt. 182 at 8.

Even if plaintiff Lam is correct that his supervisors did not help him apply for a promotion, the fact remains that he did not apply, and thus was ineligible for a promotion in March 2010. This fact alone precludes plaintiff Lam from establishing a prima facie case of discrimination as to the March 2010 promotion. See, e.g., Ratti v. City and County of San Francisco, 1992 WL 281386 (N.D. Cal. 1992) ("[A]pplication to the positon is a necessary element of raising a claim for discrimination by disparate treatment."). For that reason, plaintiff Lam has not shown that he suffered an adverse action by not receiving a promotion in March 2010. Moreover, plaintiff Lam has not shown that defendant acted with a discriminatory motive, or that other similarly situated employees were treated more favorably. For those reasons, the court finds that any alleged denial of promotion in March 2010 is not actionable as part of plaintiff Lam's Title VII discrimination claim.

However, aside from the alleged denial of promotion in March 2010, plaintiff Lam also alleges that he was denied an acting supervisory position in December 2011. There is no evidence that acting supervisory positions were subject

to the same application and examination process as were permanent promotions, so the fact that plaintiff Lam did not formally apply for an acting supervisory position is not relevant. CCSF argues that Lam "never asked Director Powell for an appointment," but Lam does allege that he asked his supervisor (Alardo) for an appointment, and given the apparent lack of any formal procedure for requesting acting supervisory appointments, the court has no basis to draw a significant distinction between Lam asking his direct supervisor and asking the JPD director. In the absence of any other evidence regarding the procedure for receiving an acting supervisory appointment, the court finds that plaintiff Lam has raised at least a triable issue as to whether he suffered an adverse action when he was denied an appointment to an acting supervisory position.

However, in order to establish a prima facie case of discrimination, plaintiff Lam must also present evidence that other employees with qualifications similar to his own were treated more favorably, or that the employer had a discriminatory motive. In the complaint, plaintiff Lam does allege that plaintiff's "non-APA counterparts received the additional pay and opportunities for promotion requested by plaintiff," but at this stage of the case, more than mere allegations are required. Plaintiff Lam must provide evidence showing that similarly situated non-APA employees were in fact treated more favorably.

In his opposition brief, plaintiff Lam provides more specifics than he did in the complaint, arguing that "[i]n June 2013, at least ten (10) of `permanent position' of counselor #8320 were appointed or promoted, the majority of which were African Americans," and that "[i]n December 2014, four (4) of the only `acting supervisors' or `special assignment positions' all African Americans . . . were promoted to `permanent supervisor position.'" Dkt. 182 at 3. However, these allegations relate only to the promotion to permanent positions, not to the appointment to acting positions. Thus,

even if these allegations were supported with evidence, they would not be relevant to plaintiff Lam's claim that the failure to appoint him to an acting position constituted discrimination.

Not only does plaintiff Lam fail to provide evidence of non-APAs being appointed to acting positions, but defendant CCSF actually presents evidence that two of the employees appointed to acting positions during the relevant time period were in fact Asian American (Dennis Woo and Scott Kato). See Dkt. 187-1, Ex. C at 238:11-19, 247:11-13; see also Dkt. 178-5, ¶ 25.

Based on plaintiff's lack of evidence that defendant CCSF acted with a discriminatory motive in failing to appoint him to an acting supervisory position or other evidence that similarly situated employees were treated more favorably, and based on CCSF's evidence that two Asian-American employees were appointed to acting positions, the court finds that plaintiff Lam has not established a prima facie case of discrimination as to the failure to appoint him to an acting supervisory position in December 2011.

However, even if plaintiff Lam were able to establish a prima facie case, defendant CCSF has presented a legitimate, non-discriminatory reason for any alleged adverse action — namely, that more qualified candidates would have been appointed over plaintiff Lam. See Dkt. 178-5, ¶¶ 24-26. The JPD director stated in a declaration that, even if plaintiff Lam had asked her for an appointment to an acting position, she would not have appointed him because of "performance issues" such as his "propensity to agitate the youth detainees, for example, by having inappropriate conversations with them," the fact that he "did not have the respect of his peers," the fact that he "demonstrated poor judgment with respect to decisions that had safety implications," and that he "repeatedly failed to adhere to department protocols." Id., ¶ 26.

In the opposition brief, plaintiff Lam responds by arguing that his "performance was very good and he exhibited qualities and work ethics that many other similarly situated employees did not exhibit." Dkt. 182 at 11. Plaintiff Lam further argues that "CCSF's `blanket' statement that there were more qualified candidates is quite nebulous because they fail to indicate whom is more qualified." Id.

The court agrees that, if CCSF had merely stated that there were more qualified candidates, that would be too "nebulous" to constitute a legitimate, non-discriminatory reason. However, CCSF provided a declaration setting forth specific performance issues, and plaintiff Lam does not provide evidence showing that the stated performance issues were not factually accurate, or that they were offered as a pretext for discrimination.

For all of the above reasons, the court finds that any alleged denial of appointment of plaintiff Lam to an acting supervisory positon in December 2011 is not actionable as part of plaintiff Lam's Title VII discrimination claim.

The second adverse action alleged by plaintiff Lam is that, in March 2010, he "requested vacation time in a timely manner," but the request was "ignored and delayed without justification." TAC, ¶ 39. While plaintiff Lam admits that the request was "finally approved in July 2011," he argues that the approval occurred just a few days before his planned vacation, resulting in "unnecessary financial burden and changes of itinerary with family members." Id.

Defendant CCSF argues that, because plaintiff Lam's vacation request was ultimately approved, it cannot constitute an "adverse action." Defendant argues that an adverse action must be a "materially adverse change in terms or conditions of employment because of an employer's actions," and "must be more than a mere inconvenience." Dkt. 178 at 15 (citing Nguyen v. Superior

Court, 2015 WL 3322088 (N.D. Cal. Jan. 23, 2015)) (emphasis added by defendant). Defendant CCSF argues that any impact on plaintiff Lam was personal, not professional, as shown by his own allegations in the TAC.

In his opposition, plaintiff Lam concedes that his request was ultimately approved, but argues that the delay caused "aggravation and stress" to Lam, and that it "likely affected Lam's position and standing as an employee" and that Lam was "probably then exposed to very negative light surrounding his employment situation which only made Lam to be left out of other benefits of employment like promotions, overtime opportunities, better work site choices, etc." Dkt. 182 at 9.

The court finds that plaintiff Lam has not presented sufficient evidence that the delayed approval of his vacation request affected his employment, as opposed to affecting him as an individual. Plaintiff's opposition relies on speculation that the delay "likely affected" his standing as an employee. And to the extent that plaintiff Lam alleges that he was "left out of other benefits of employment like promotions, overtime opportunities, better work site choices, etc.," those alleged adverse actions may be independently actionable, but they do not suffice to show that the delayed vacation approval was itself an adverse action.

Moreover, the court also finds that plaintiff Lam has not presented sufficient evidence to create a triable issue of fact as to whether the delayed approval of his vacation request was based on defendant's discriminatory motive, or evidence that other similarly situated employees were treated more favorably. Plaintiff Lam does not allege (let alone provide evidence) that any other employee's vacation request was approved despite an outstanding training requirement, nor does he provide evidence that the

individual(s) responsible for delaying his vacation request were motivated by an intent to discriminate.

However, even if plaintiff Lam were able to establish a prima facie case of discrimination, defendant CCSF has presented evidence of a legitimate non-discriminatory reason for the alleged adverse action. Specifically, CCSF argues that it had a policy requiring employees to complete all required training before any vacation request could be approved, and at the time of plaintiff Lam's vacation request, he had just bid into an assignment in the Admissions Office, which required additional training. Dkt. 178-5, ¶¶ 4-8.

This evidence of CCSF's training policy shifts the burden back to plaintiff Lam to show that the "legitimate reasons offered by defendant were factually untrue, thereby creating an inference that those reasons were merely a pretext for discrimination." Plaintiff Lam has not presented any such evidence. While he does argue that his vacation request was used "as a bargaining chip or tool to make Lam better conform to [defendants'] corporate culture," he does not argue that the policy evidence is factually untrue, nor does he present any other evidence showing that the stated reason was pretextual.

For all of the above reasons, the court finds that the March 2010 delayed vacation approval is not actionable as part of plaintiff Lam's Title VII discrimination claim.

The third adverse action alleged by plaintiff Lam is his July 2010 performance review, which he describes as "poor" and "negative." TAC, ¶ 41. Along with its motion, defendant CCSF submitted a copy of the review itself, which shows that plaintiff Lam was graded on a point scale of 1 to 9 — with 1 to 3 meaning "did not meet expectations," 4 to 6 meaning "met expectations," and 7 to 9 meaning "exceeded expectations." See Dkt. 178-5, Ex. 4. The

review shows that plaintiff received a "met expectations" rating of 4. Id.

Defendant CCSF argues that the review was not actually negative, and points to plaintiff Lam's own deposition testimony stating that the review was "okay." Dkt. 178-1, Ex. A at 147:7-12. CCSF further argues that, even if the review were objectively negative, it would not constitute an adverse action because negative job reviews are not considered adverse actions unless there are immediate consequences to the terms and conditions of one's employment.

As a general matter, the court finds that defendant overreaches when it argues that an average (or slightly below average) performance review cannot constitute an adverse action. Even though plaintiff Lam's performance review was not wholly negative, it still could constitute an adverse action if it were undeservedly low. Lam alleges that his work performance was actually "better than satisfactory," and if he had presented evidence to support that assertion, he could have created a triable issue of fact as to whether the review was an adverse action. However, plaintiff Lam has not presented such evidence, and the court thus finds no triable issue of fact on that issue.

Moreover, even putting aside the adverse action issue, plaintiff has also failed to raise a triable issue regarding another element of his prima facie case — whether other employees with qualifications and work performance similar to his own were treated more favorably, or that the employer had a discriminatory motive. While plaintiff Lam asserts that "many employees out of Lam's protected class received better performance evaluations for doing much less work in both quantity and quality," he does not provide evidence to support that assertion. Accordingly, the court finds that plaintiff Lam has failed to adequately establish a

prima facie case of discrimination as to the July 2010 performance review.

The fourth adverse action alleged by plaintiff Lam is the "inattention to duty" notice issued in September 2010. The complaint contains very few facts regarding this incident, alleging only that "[o]n or about September 29, 2010, CCSF/JPD employees Lewis and Powell issued Lam a written notice of `inattention to duty' without merit or justification." TAC, ¶ 42.

In its motion, defendant CCSF argues that "there are no Department records indicating that Lam received any type of notice on or about this date for this reason." Dkt. 178 at 6. CCSF also explains that JPD uses three types of notices to manage employee performance: (1) letters of counseling, (2) records of discussion, and (3) admonishments or written reprimands. According to CCSF, only the third type of notice is considered disciplinary, as the first two are "written reminders" that are "aimed at improving performance," and records of those two types of notices are generally not maintained.

In his opposition brief, plaintiff Lam notes the lack of records, and argues that CCSF either "has very poor record keeping procedures or CCSF intentionally destroyed the evidence to make Lam's case less significant." Dkt. 182 at 9-10. Plaintiff Lam further suggests that "the latter is more likely where the document was destroyed along with all references to it in correspondence and emails." Id. at 10.

However, plaintiff Lam provides no support for his suggestion that defendant CCSF destroyed relevant evidence, nor does he provide testimony from any other employee who witnessed the alleged incident. In fact, even plaintiff Lam's own recollection of the event appears to be hazy. In his deposition, he was asked "Do you recall what this allegation is about?" and answered "I'm not sure. It was

very minor. There is no basis to that." Dkt. 178-1, Ex. A at 177:11-13.

Based on the lack of clear allegations — let alone evidence — relating to the alleged "inattention to duty" notice issued in September 2010, the court finds that plaintiff Lam cannot establish a prima facie case of discrimination as to this incident. Because there is no evidence, the court cannot find a triable issue as to whether any notice constituted an adverse action, nor can the court find a triable issue as to any discriminatory motive or evidence that other similarly situated employees were treated more favorably.

The fifth adverse action alleged by plaintiff Lam is a November 2010 written notice for leaving his post. In the complaint, plaintiff Lam alleges that he "smelled a strong odor of sewage" that was "so foul that some CCSF employees even refused to report to their posts or requested to leave early in order to avoid exposure to toxic fumes." TAC, ¶ 43. Plaintiff Lam alleges that he "made a complaint to his union and asked the union official to report the condition to CAL-OSHA." Id. Lam then alleges that he was "issued a written reprimand" for "alleged tardiness that day in reporting to his assigned post." Id. However, Lam maintains that "he was not tardy to his post," and further alleges that "several non-APA employees who were tardy or left early that day did not suffer any negative consequences, including Thomasson, Bill, Smith, Sullivan, Burns, and Nelson." Id.

Defendant CCSF makes a number of arguments in response. First, it suggests that the written notice was not actually an adverse action, because it "is not disciplinary in nature" and carries "no tangible consequences." However, the court is unconvinced by this argument. The fact that CCSF creates a written record of the notice (even if it was a non-disciplinary "record of discussion" rather than a disciplinary "reprimand") suggests that there could be

some consequences — otherwise there would be no reason for CCSF to document the discussion.

However, plaintiff Lam does fail to establish a different element of a prima facie discrimination case — namely, whether defendant acted with a discriminatory motive, or evidence that other similarly situated employees were treated more favorably. While plaintiff Lam does provide names of employees who were allegedly treated more favorably, more than mere names are required at this point in the case. In order to avoid summary judgment, plaintiff Lam must provide evidence that other employees were treated more favorably — for instance, testimony from other employees supporting Lam's allegations. Because no such evidence has been provided, the court finds that plaintiff Lam has failed to establish a prima facie case of discrimination as to the November 2010 written notice.

Plaintiffs do submit a chart purporting to show "steps of progressive disciplinary action taken by SFJPD." See Dkt. 185, Ex. 4. The chart categorizes various employees by race, and then lists the alleged conduct that they participated in and the disciplinary action that they received. While this chart demonstrates that plaintiffs are attempting to meet their burden to show that APAs were disciplined more harshly than their non-APA counterparts, it falls short in a number of ways. First, and most importantly, the chart does not allow for an apples-to-apples comparison of similarly situated employees. Instead, the chart simply lists 97 incidents of disciplinary action, without any attempt to show that employees who engaged in similar conduct were disciplined differently. The second, related shortcoming of the chart is that it does not tie the listed incidents to the alleged adverse actions that plaintiffs suffered. In other words, for this chart to meet plaintiffs' evidentiary burden, it would need to highlight incidents where non-APA employees engaged in the same conduct as did plaintiffs, but were disciplined less harshly.

Third and finally, the chart contains no references to underlying evidence (such as disciplinary records and/or employee testimony), nor was the chart attached to a declaration of a person attesting to have personal knowledge of the matters described. Overall, the court finds that these deficiencies prevent the chart from serving as the type of evidence that would meet plaintiffs' burden as to the fourth prong of a prima facie discrimination case for this and any other alleged adverse action.

Even if plaintiff Lam were able to establish a prima facie case of discrimination based on the November 2010 written notice, defendant CCSF has presented a legitimate, non-discriminatory reason for the notice. Specifically, CCSF argues that JPD has a policy requiring employees to arrive to work on time, and to promptly report to their assigned work post and relieve the employee working on that assignment before them. If an employee does not promptly relieve the previous employee, that previous employee may be required to incur overtime while he waits. Indeed, CCSF presents evidence that one of its employees incurred overtime on November 9, 2010, with the reason for the overtime requested listed as "Lam relieved late." See Dkt. 178-5, ¶ 13.

Plaintiff Lam does not challenge the truth of CCSF's proffered legitimate non-discriminatory reason, but instead argues that "[w]hen it comes to budgets and overtime provisioning, these types of `reminders' are far from friendly," and that "[t]he monetary aspect alone is sufficient to make CCSF's action against Lam an adverse employment action." Dkt. 182 at 10. Lam further argues that "[m]anagement looks poorly upon employees who create or abuse overtime because it makes their `bottom line' less impressive." Id.

While plaintiff Lam may take issue with CCSF's focus on the "bottom line," his arguments actually support the

proposition that CCSF was motivated by financial reasons, rather than discriminatory reasons. For that reason, plaintiff Lam has not presented evidence that would create an inference that CCSF's stated reasons for the November 2010 written notice were "merely a pretext for discrimination," and thus, the court finds that the incident is not actionable as part of plaintiff Lam's Title VII discrimination claim.

The sixth adverse action alleged by plaintiff Lam relates to his workers' compensation claim filed in January 2011 based on the irritation of his eye. In the complaint, he alleges that he "submitted a valid medical advisory" that recommended "modified duty due to persistent eye irritation." TAC, ¶ 44. Specifically, plaintiff Lam alleges that he needed accommodation with respect to only one out of 20 available posts — the central control, which entailed "prolonged exposure to flashing security panel lights and multiple monitors." Id. However, Lam alleges that he was "arbitrarily denied accommodation," even as "other non-APA employees have been accommodated even for light duty." Id. Lam further alleges that he was "refused work and sent home without cause or justification" between January 15, 2011 and January 23, 2011, and that those absences were taken out of his sick days. Id., ¶ 45.

In its motion, defendant CCSF argues that there was no adverse action, because placing Lam on a nine-day medical leave did not materially change the terms and conditions of his employment. CCSF also explains that it is JPD's practice to pay employees out of sick leave while their workers' compensation claims are pending. If and when coverage is granted, the sick leave is replenished. CCSF further points out that plaintiff Lam originally filed a workers' compensation claim, then voluntarily withdrew it.

Defendant CCSF also points out that, after plaintiff Lam returned to work on January 24, 2011, his only medical

restriction was to take a 15-minute break every two hours, which was already provided to all JPD employees. JPD informed plaintiff Lam that he could make a reasonable accommodation request if he wished, but he chose not to, finding that it "wasn't necessary" since he was already being provided with a break every two hours.

The court finds that plaintiff Lam has not been entirely clear about what constituted the alleged adverse action — whether it was the denial of his requested accommodation, or the use of his sick days to cover the missed workdays, or both. In his opposition, plaintiff Lam appears to offer a new theory of what constituted the adverse action, arguing that "CCSF fails to acknowledge that they put Lam right back in the same environment that caused his eye irritation in the first place," and that "[t]o the reasonable person, it would appear that CCSF JPD was trying to exacerbate Lam's injuries without regard to any consequences it may have had to Lam's future physical and mental health." Dkt. 182 at 10.

The court will address each of these possible adverse actions in turn. First, to the extent plaintiff Lam alleged that he suffered an adverse action when he was "arbitrarily denied accommodation," he has not provided sufficient allegations — let alone evidence — for the court to determine whether such denial actually was an adverse action. Specifically, plaintiff Lam does not make clear what specific accommodation he requested. Moreover, defendant CCSF correctly argues that an employee is not entitled to pick his own form of accommodation. See, e.g., Queen v. Hard Rock Hotel and Casino, 2011 WL 6753011 (D. Nev. Dec. 22, 2011). However, even if this was an adverse action, plaintiff Lam has not provided evidence that other similarly situated employees were treated more favorably. To be clear, the complaint alleges that to be the case, and even provides names of specific employees whose accommodations were provided, but at this stage of

the case, plaintiff needs more than allegations — he needs evidence. Finally, even if plaintiff Lam could establish a prima facie case of discrimination as to the alleged denial of accommodation, defendant CCSF provides a declaration stating that JPD's staffing needs made temporary assignment to another post impracticable, necessitating that plaintiff Lam be sent home if he was unable to work at his assigned station. Dkt. 178-5, ¶ 10. Plaintiff Lam has not provided evidence showing that CCSF's stated legitimate, non-discriminatory reason was merely a pretext for discrimination. Accordingly, the alleged denial of accommodation is not actionable.

Second, to the extent that plaintiff Lam claims that the use of his sick days was an adverse action, the argument fails because Lam was given the option of filing a workers' compensation claim, which he did, and then voluntarily withdrew. Thus, the use of plaintiff Lam's sick days was the result of his own actions, not any adverse action on the part of CCSF. Moreover, plaintiff Lam does not allege (let alone provide evidence) that other similarly situated employees were treated differently with regard to the use of sick days for medical leave. Thus, plaintiff Lam cannot establish a prima facie case of discrimination with respect to the use of his sick days. Finally, as before, defendant CCSF has provided a legitimate, non-discriminatory reason for the use of sick days, pointing to a JPD policy of using sick days while a workers' compensation claim is pending. Plaintiff Lam has not provided any basis for finding that stated reason to be a pretext for discrimination, and thus, the use of plaintiff Lam's sick days is not actionable.

Third, to the extent that plaintiff Lam alleges that his placement back in the same work post was an adverse action, the court first notes that this theory was not pled in any of the complaints filed in this case. Moreover, the fact that plaintiff Lam specifically chose not to make a further request for accommodation because it "wasn't necessary"

now precludes him from arguing that the placement was an adverse action. Accordingly, the court finds that plaintiff Lam's reassignment to his work post after returning from medical leave is not actionable.

Overall, for the above reasons, the court finds that none of the events surrounding plaintiff Lam's medical restrictions and medical leave are actionable as part of his Title VII discrimination claim.

The seventh adverse action alleged by plaintiff Lam is that "[o]n or about January 27, 2011, Lam was denied participation in a scheduled annual shift bidding process without justification or cause." TAC, ¶ 46.

In its motion, defendant CCSF argues that the shift bid was indeed originally scheduled for January 27, 2011, but did not actually occur until April 7, 2011, at which time plaintiff Lam actually did participate. However, if it had occurred in January, CCSF concedes that plaintiff Lam would not have been eligible, because in order to be eligible for a shift bid, an employee must be medically cleared to work at least seven days prior to the bid. Because, as discussed above, plaintiff Lam was on medical leave through January 23, 2011, he was not eligible to participate in a shift bid on January 27, 2011.

In his opposition, plaintiff Lam admits that he participated in the April 2011 shift bid, but claims that CCSF "does not acknowledge the hurdles they presented to Lam in making this participation," nor does it "discuss the shift bid processes prior to and subsequent to the April 2011 shift bid." While plaintiff Lam may be correct on those points, they are irrelevant to determining whether he suffered an adverse action by being "denied participation" in the January 2011 shift bid. And because plaintiff Lam actually did participate in the rescheduled shift bid, the court finds no triable issue as to whether plaintiff Lam suffered an

adverse action. The court also notes that plaintiff Lam has presented no evidence of a discriminatory motive or of other similarly situated employees being treated more favorably. Thus, the shift bid-related allegations are not actionable as part of plaintiff Lam's Title VII discrimination claim.

The eighth adverse action alleged by plaintiff Lam is that "[o]n or about May 14, 2011, Lam was given a written reprimand and placed on `sick leave restriction' without justification and merit." TAC, ¶ 47.

In its motion, defendant CCSF explains that employees are given 12 sick days for every rolling one-year period, and after those days are used, employees must provide a doctor's note after returning to work. JPD's policy was to issue a written notice of placement on "sick leave restriction," but such notice did not constitute a disciplinary action.

Defendant CCSF then acknowledges that plaintiff Lam was placed on sick leave restriction in May 2011, and points out that many of the 12 sick days already used by Lam were the result of his January 2011 medical leave. As mentioned above, Lam chose not to pursue his workers' compensation claim, and as a result, his sick days were never replenished.

The court previously found that "the use of plaintiff Lam's sick days was the result of his own actions, not any adverse action on the part of CCSF," and the same rationale applies here. Lam's placement on sick leave was the result of his own decision not to pursue his workers' compensation claim, and thus cannot constitute an adverse action. Moreover, plaintiff Lam has not provided evidence of a discriminatory motive or of other similarly situated employees being treated more favorably, so he has failed to establish a prima facie case of discrimination. Finally,

even if he was able to establish a prima facie case, defendant CCSF has presented a legitimate, non-discriminatory reason for the sick leave restriction, presenting evidence that this was a department-wide policy used to monitor and manage sick leave abuse. Plaintiff Lam has not provided any reason to believe that the policy was a pretext for discrimination, and thus, the court finds that the May 2011 sick leave restriction is not actionable as part of plaintiff Lam's Title VII discrimination claim.

Having addressed all of the adverse actions alleged as part of plaintiff Lam's third cause of action for discrimination under Title VII, and having found none of them to be actionable, the finds that defendants' motion for summary judgment must be GRANTED as to the third cause of action as asserted by plaintiff Lam.

Turning to plaintiff Leiato's claims, her first alleged adverse action is similar to plaintiff Lam's — she alleges that "[o]n or around March 2010, Leiato was denied promotion despite nearly fifteen (15) years of experience, likely due to her race, gender, national origin, and previous complaints against JPD and CCSF." TAC, ¶ 67. And like plaintiff Lam, Leiato also alleges that "[t]hroughout her career at the JPD, Leiato repeatedly and continually asked to be assigned to acting supervisory positions," and specifically points to instances in March 2010, September or October 2011, December 2011, January 2012, and February 2012 when she asked to be appointed to such a position. Id., ¶¶ 72-80.

The analysis for plaintiff Leiato's "failure to promote" allegations is similar to that for plaintiff's Lam's "failure to promote" allegations, as set forth above. With respect to the March 2010 promotions, plaintiff Leiato appears not to challenge the fact that she did not actually apply for the promotion or take the job-related examination, instead arguing that "it was generally known throughout the Department that Lam and Leiato did inquire several times

about being considered for any promotions," and that "neither plaintiff ever was made apprised of the process and no one was willing to guide them through whatever corporate `hoops' the plaintiffs had to jump through to be considered for promotion." Dkt. 182 at 8.

Even if plaintiff Leiato is correct that her supervisors did not help her apply for a promotion, the fact remains that she did not apply, and thus was ineligible for a promotion in March 2010. This fact alone precludes plaintiff Leiato from establishing a prima facie case of discrimination as to the March 2010 promotion. See, e.g., Ratti v. City and County of San Francisco, 1992 WL 281386 (N.D. Cal. 1992) ("[A]pplication to the positon is a necessary element of raising a claim for discrimination by disparate treatment."). For that reason, plaintiff Leiato has not shown that she suffered an adverse action by not receiving a promotion in March 2010. Moreover, plaintiff Leiato has not shown that defendant acted with a discriminatory motive, or that other similarly situated employees were treated more favorably. For those reasons, the court finds that any alleged denial of promotion in March 2010 is not actionable as part of plaintiff Leiato's Title VII discrimination claim.

However, like plaintiff Lam, plaintiff Leiato also alleges that she was denied an acting supervisory position. And as the court found with respect to plaintiff Lam, because there is no evidence of the procedure for requesting appointments to acting supervisory positions, the court finds that plaintiff Leiato has raised at least a triable issue as to whether she suffered an adverse action when she was denied an appointment to an acting supervisory position.

However, in order to establish a prima facie case of discrimination, plaintiff Leiato must also present evidence that other employees with qualifications similar to her own were treated more favorably, or that the employer had a discriminatory motive. In the complaint, plaintiff Leiato does

allege that plaintiff's "non-APA counterparts received the additional pay and opportunities for promotion requested by plaintiff," but at this stage of the case, more than mere allegations are required. Plaintiff Leiato must provide evidence showing that similarly situated non-APA employees were in fact treated more favorably.

As mentioned above, in the opposition brief, plaintiffs provide more specifics, but they relate only to the promotion to permanent positions, not to the appointment to acting positions. See Dkt. 182 at 3. And as also mentioned above, defendant CCSF presents evidence that two Asian-Americans (Dennis Woo and Scott Kato) were appointed to acting positions during the relevant time period. See Dkt. 187-1, Ex. C at 238:11-19, 247:11-13; see also Dkt. 178-5, ¶ 25.

Based on plaintiff Leiato's lack of evidence that defendant CCSF acted with a discriminatory motive in failing to appoint her to an acting supervisory position or other evidence that similarly situated employees were treated more favorably, and based on CCSF's evidence that two Asian-American employees were in fact appointed to acting positions, the court finds that plaintiff Leiato has not established a prima facie case of discrimination as to the failure to appoint her to an acting supervisory position.

However, even if plaintiff Leiato were able to establish a prima facie case, defendant CCSF has presented a legitimate, non-discriminatory reason for any alleged adverse action — namely, that more qualified candidates would have been appointed over her. See Dkt. 178-5, ¶ 36. The JPD director (Toni Ratcliff-Powell) acknowledges that plaintiff Leiato had been told that she could be recommended for an acting position "if she were able to remedy her chronic absenteeism and excessive use of sick leave, as well as avoid altercations that led to disciplinary issues," but that "Leiato did not rectify such issues during

[Ratcliff-Powell's] tenure as director." Id. Moreover, Ratcliff-Powell states that, even if Leiato had been able to rectify those issues, other candidates were still more qualified because "they did not have performance problems similar to Leiato's," such as her "refus[al] to work in certain parts of her assigned unit," her refusal to conduct room searches, and the fact that she was on sick leave restriction during Ratcliff-Powell's entire tenure from 2008 through 2013. Id.

In the opposition brief, plaintiff Leiato argues that "CCSF's `blanket' statement that there were more qualified candidates is quite nebulous because they fail to indicate whom is more qualified." Dkt. 182 at 14. The court agrees that, if CCSF had merely stated that there were more qualified candidates,that would be too "nebulous" to constitute a legitimate, non-discriminatory reason. However, CCSF provided a declaration setting forth specific performance issues, and plaintiff Leiato does not provide evidence showing that the stated performance issues were not factually accurate, or that they were offered as a pretext for discrimination.

For all of the above reasons, the court finds that any alleged denial of appointment of plaintiff Leiato to an acting supervisory positon is not actionable as part of her Title VII discrimination claim.

The second adverse action alleged by plaintiff Leiato is that "[o]n or around November 2010, Leiato submitted competent medical certification to request leave for a doctor's appointment," but was "arbitrarily denied leave and pay and thereafter charged with `misuse of sick time' and being AWOL for her November 24, 2010 medical appointment that she notified her supervisors of." TAC, ¶ 70.

Interestingly, in its motion, defendant CCSF does not challenge plaintiff Leiato's failure to establish a prima facie

case of discrimination, even though it appears that Leiato has failed to provide evidence of a discriminatory motive, or of similarly situated employees being treated more favorably. Because CCSF did not raise the issue, the court will not rely on the apparent failure to establish a prima facie case, and will instead evaluate CCSF's proffered legitimate, non-discriminatory reason for denying Leiato leave.

In its motion, CCSF points out that the day for which Leiato requested leave was the day before Thanksgiving, a day that "many others had already asked for and obtained approval for vacation," such that "the Hall could not absorb any more absences." See Dkt. 178-5, ¶ 27. Moreover, CCSF also attaches contemporaneous notes from Leitao's supervisor which shows that the denial of leave was conditional, and that Leiato could have had the day off if she "provided proof of medical necessity" in advance, which she did not do. Dkt. 178-5, Ex. 18. When Leiato ultimately did not come to work on November 24, she was issued a written reprimand. Dkt. 178-5, ¶ 29.

Plaintiff Leiato does not appear to address this proffered legitimate, non-discriminatory reason in her opposition brief. In fact, it appears that the November 2010 denial of leave is not mentioned at all. Leiato does mention one instance where she "took a day off without approval," but she states that she needed the day off for a "family event," which suggests that it is referring to the July 2010 denial of leave that was already alleged in Lam I (and thus barred from this suit under principles of res judicata). Thus, in the absence of any evidence that undermines CCSF's stated reason for the discipline, the court finds that the denial of plaintiff Leiato's request for leave in November 2010 is not actionable as part of her Title VII discrimination claim.

The third adverse action alleged by Leiato is that she has "routinely been assigned to work with two on-call staff,

where the common practice is 2:1 permanent to on-call ratio." TAC, ¶ 70. Leiato alleges that "[t]his work assignment makes it harder to perform her job responsibilities, prolonging the time it takes and putting her in danger." Id.

In its motion, defendant CCSF notes that, at her deposition, plaintiff Leiato could not provide information about any specific incidents when she was assigned to work with on-call staff, nor could she state when the alleged incidents occurred. CCSF also points out that the court addressed an identical allegation in Lam I, and while they were alleged in the context of a harassment claim (rather than a discrimination claim), the court ultimately held that "[n]either [Leiato's] assignment to work with two newly hired on-call counselors, nor the refusal of Leiato's request to leave work two hours early, constitute any material change or alteration in the terms of plaintiff's employment, such that an adverse employment action has been stated." Lam I, 868 F.Supp.2d 928, 950 (N.D. Cal. 2012). The court's previous finding applies with equal force here, and thus, plaintiff Leiato is unable to establish a prima facie case of discrimination. Moreover, plaintiff Leiato's inability to provide dates on which she was assigned to work with on-call staff prevents the court from being able to make a determination as to whether this allegation is barred by res judicata. For all of those reasons, the court finds that any allegations regarding plaintiff Leiato's alleged assignment to work with on-call staff are not actionable as part of her Title VII discrimination claim.

Having addressed all of the adverse actions alleged as part of plaintiff Lam's third cause of action for discrimination under Title VII, and having found none of them to be actionable, the finds that defendants' motion for summary judgment must be GRANTED as to the third cause of action as asserted by plaintiff Leiato.

Turning back to the first and second causes of action, brought under section 1983 and 1981 respectively. In Lam I, the court noted that "when analyzing claims of disparate treatment in employment under § 1981 or § 1983, a district court is guided by Title VII analysis." Lam I, 868 F.Supp.2d at 951 (citing St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 n. 1 (1993); Surrell v. California Water Serv. Co., 518 F.3d 1097, 1103, (9th Cir. 2008); Mustafa v. Clark County Sch. Dist., 157 F.3d 1169, 1180 (9th Cir.1998); Lowe v. City of Monrovia, 775 F.2d 998, 1010-11 (9th Cir. 1985)).

Starting with the section 1983 claim, the court extensively addressed this legal standard in Lam I:

> To state a claim under section 1983 for a violation of the Equal Protection Clause, a plaintiff "must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class," and that plaintiff was treated differently from persons similarly situated. See Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir.1998); Lee v. City of Los Angeles, 250 F.3d 668 (9th Cir. 2001); see also Washington v. Davis, 426 U.S. 229, 239-40 (1976). As the parties here note, a plaintiff may satisfy this showing by alleging four separate elements: (1) that the plaintiff was treated differently from others similarly situated; (2) this unequal treatment was based on an impermissible classification; (3) that the defendant acted with discriminatory intent in

> applying this classification; and (4) the plaintiff suffered injury as a result of the discriminatory classification. See, e.g., Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979); see also T.A. ex rel. Amador v. McSwain Union Elementary Sch. Dist., 2009 WL 1748793 (E.D. Cal. 2009).

Lam I, 868 F.Supp.2d at 951.

The court's analysis in Lam I also applies with equal force in this case:

> Ultimately, the same deficiencies that preclude a finding that triable issues of material fact exist in connection with plaintiffs' Title VII claims, exist with respect to plaintiffs' section 1983 claim. Namely, and for all the reasons highlighted in connection with the court's discussion of plaintiffs' Title VII claims, plaintiffs' evidence fails to demonstrate that plaintiffs — each of them — were treated differently from others similarly situated, based on an impermissible classification. In other words, plaintiffs' evidence fails to raise a triable issue as to the existence of a discriminatory "purpose" in the actions taken by plaintiffs' JPD supervisors. As such, plaintiffs do not prevail in establishing a triable issue as to their section 1983 claims.

> Moreover, to establish municipal liability of the City under section 1983, plaintiffs must show: (1) that they possessed a constitutional right of which they were deprived; (2) that the municipality had a policy; (3) that this policy amounts to deliberate indifference to the plaintiffs' constitutional rights; and (4) that the policy is the moving force behind the constitutional violation. Plumeau v. Sch. Dist. #40 County of Yamhill, 130 F.3d 432, 438 (9th Cir. 1997). There can be no municipal liability without an underlying constitutional violation. See Scott v. Henrich, 39 F.3d 912, 916 (9th Cir. 1994).
>
> Here, because plaintiffs fail to establish the existence of triable issues with respect to any equal protection violation that underlies their section 1983 claims, they also fail to establish the first of the elements necessary for liability against the City — i.e., a "constitutional violation."

Lam I, 868 F.Supp.2d at 951-52.

Accordingly, the court finds that summary judgment must be GRANTED as to plaintiffs' first cause of action brought under section 1983.

Turning to the section 1981 claim, the Ninth Circuit has held that "[a]nalysis of an employment discrimination claim under § 1981 follows the same legal principles as those applicable in a Title VII disparate treatment case," and that "[b]oth require proof of discriminatory treatment and the

same set of facts can give rise to both claims." Fonseca v. Sysco Food Services of Arizona, Inc., 374 F.3d 840, 850 (9th Cir. 2004). Applying that standard, based on both plaintiffs' failure to establish a viable Title VII discrimination claim (including their specific failure to present evidence of discriminatory intent), the court finds that summary judgment must also be GRANTED as to both plaintiffs' second cause of action under section 1981.

Next, the court will address plaintiffs' fourth cause of action, for Title VII harassment and hostile work environment based on race and national origin. To prevail on a hostile workplace claim premised on race, a plaintiff must show: (1) that he was subjected to verbal or physical conduct of a racial nature; (2) that the conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive work environment. See Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir.1995). The more outrageous the conduct, the less frequent must it occur to make a workplace hostile. See Ellison v. Brady, 924 F.2d 872, 878 (9th Cir.1991). To determine whether conduct is sufficiently severe or pervasive to violate Title VII, the court looks at all surrounding circumstances, including frequency, severity, whether the alleged conduct is threatening or humiliating, or merely an offensive utterance, and whether it interferes with an employee's work performance. See, e.g., Vasquez v. City of Los Angeles, 349 F.3d 634, 649 (9th Cir. 2004). Finally, the allegations of a racially hostile workplace must be assessed from the perspective of a reasonable person belonging to the same racial or ethnic group as the plaintiff. See Nat'l Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 116 (2002); McGinest v. GTE Service Corp., 360 F.3d 1103, 1115 (9th Cir. 2004).

Both plaintiffs fail to present evidence regarding prongs (1) and (3) — namely, that they were subjected to verbal or

physical conduct of a racial nature, or that the conduct was sufficiently severe or pervasive to alter the conditions of employment. As mentioned repeatedly throughout the discussion of plaintiffs' Title VII discrimination claim, plaintiffs fail to present evidence that any conduct to which they were subjected was based on their race or national origin. Nor does the sporadic nature of the alleged conduct meet the "severe or pervasive" standard required for a harassment claim. Accordingly, defendants' motion for summary judgment is GRANTED as to the fourth cause of action for harassment and hostile work environment under Title VII.

Next, the court will address plaintiffs' fifth cause of action, for retaliation under Title VII. Generally, in order to make out a prima facie case of retaliation, a plaintiff must establish "that [he or she] acted to protect [his or her] Title VII rights, that an adverse employment action was thereafter taken against [him or her], and that a causal link exists between those two events." See Steiner v. Showboat Operating Co., 25 F.3d 1459, 1465 (9th Cir.1994).

In the complaint, plaintiffs allege that they "have alleged instances of racial discrimination in the workplace, reported these allegations to their superiors, and filed relevant complaints with administrative agencies." TAC, ¶ 128. Plaintiffs further allege that, as a result, "defendant subjected plaintiff to adverse employment actions, including but not limited to harassment, reassignment, suspension and discharge," and that "[t]hese adverse actions were meant to dissuade plaintiffs, or any other reasonable employees from making or supporting charges of racial discrimination and were causally connected to plaintiffs' protected activities and conduct." Id.

For the reasons discussed above, the court finds that plaintiffs have failed to raise triable issues of fact as to whether they suffered an adverse action for the majority of

their allegations. And even more importantly, plaintiffs have failed to establish a causal nexus between any alleged protected activity and any specific adverse action that they allegedly suffered. For those reasons, defendants' motion for summary judgment must be GRANTED as to the fifth cause of action.

Finally, plaintiffs' sixth cause of action iss brought under California Government Code § 12940 for failure to prevent unlawful discrimination and harassment. Generally, it is an unlawful employment practice under FEHA for an employer to "fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." See Trujillo v. North Co. Transit Distr., 63 Cal. App. 4th 280, 289 (1998).

California law under FEHA mirrors federal law under Title VII. Thus, and since plaintiffs have not established discrimination or harassment in the first instance — for the foregoing reasons — plaintiffs' claim for failure to prevent or investigate such discrimination, fails at the outset. See Trujillo, 63 Cal. App. 4th at 289; Tritchler v. County of Lake, 358 F.3d 1150, 1155 (9th Cir. 2004); Cook v. Lindsay Olive Growers, 911 F.2d 233 (9th Cir.1990) (citing Mixon v. FEHC, 192 Cal. App. 33d 1306 (1987) for the proposition that Title VII law applies to FEHA claims). Acccordingly, defendants' motion for summary judgment is GRANTED as to plaintiffs' sixth cause of action.

CONCLUSION

Defendants' motion for summary judgment is GRANTED as to all of the claims asserted by plaintiffs. The Clerk is directed too close the file.

IT IS SO ORDERED.

[1] The individual defendants are Timothy Diestel, Dennis Doyle, Charles Lewis, Toni Ratcliff-Powell, John Radogno, Tamara Ratcliff, Mildred Singh, Robert Taylor, and Barry Young.

[2] In addition to plaintiffs Lam and Leiato, this suit was originally filed by plaintiffs Gregory Chin and Frank Chen. Plaintiffs Chin and Chen have since been dismissed from this suit.

Appendix C: U.S. District Court Denying Motion for Reconsideration on 7/18/2016

United States District Court, N.D. California.

Case No. 10-cv-4641-PJH.
July 22, 2015.

ALFRED LAM, et al., Plaintiffs,
v.
THE CITY & COUNTY OF SAN FRANCISCO, et al., Defendants.

ORDER DENYING MOTION FOR RECONSIDERATION

PHYLLIS J. HAMILTON, District Judge.

Before the court is plaintiffs' motion for reconsideration of the order denying plaintiffs' motion to stay proceedings pending appeal. In the motion for reconsideration, plaintiffs address the four factors governing the issuance of a stay, which were set forth in the court's previous order. See Dkt. 127 (citing Golden Gate Restaurant Ass'n v. City and County of San Francisco, 512 F.3d 1112, 1115 (9th Cir. 2008)). Specifically, those four factors are (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits, (2) whether the applicant will be irreparably injured absent a stay, (3) whether issuance of a stay will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies.

In their motion for reconsideration, plaintiffs do provide newly-cited case law that bears on the merits of their appeal. Specifically, whereas plaintiffs had previously provided no support for their argument that the statute of limitations for section 1981, 1983, and 1991[1] claims had been legislatively extended from two years to four years, they now cite a case that lends support to their position, at least as to the section 1981 claim. Johnson v. Lucent

Technologies Inc., 653 F.3d 1000, 1008 (9th Cir. 2011). While this case certainly bolsters their appeal, the court still finds that plaintiffs have fallen short of a "strong showing that [they] are likely to succeed on the merits," because plaintiffs failed to provide a proposed amended complaint along with their motion for leave to file a fourth amended complaint, as required by Civil Local Rule 10-1. Indeed, by not submitting a proposed amended complaint or even summarizing the newly-proposed allegations, the court had no way of determining whether amendment would be futile or otherwise improper under Federal Rule of Civil Procedure 15. Even more importantly, it appears that the Ninth Circuit lacks jurisdiction over plaintiffs' appeal, as this court's order denying leave to file a fourth amended complaint was not a final, appealable order. Thus, despite the new citation to Johnson v. Lucent, the court still finds that plaintiffs have not made a sufficient showing of likelihood of success on the merits.

Further, even if the court were to find that plaintiffs had shown a likelihood of success on the merits, it still finds that the lack of any irreparable injury warrants against a stay. As the court previously held, "[t]he only `injury' that would result from denial of a stay would be the requirement of plaintiffs' participation in the discovery process, hardly an `injury' (given that they filed this suit) nor `irreparable.'" See Dkt. 127 at 2.

In their reconsideration motion, plaintiffs assert that they "will be irreparably injured due to the financial, psychological, and emotion[al] impacts the decision would entail." Dkt. 129 at 5-6. This argument does not address the question of how plaintiffs would be harmed absent a stay, and addresses only the impact of an adverse decision on the merits of their motion to amend the complaint. As mentioned above, absent a stay, the only "injury" that would result is the requirement that plaintiffs participate in the

discovery process. That does not constitute "irreparable injury."

Accordingly, the court DENIES plaintiffs' motion for reconsideration.

IT IS SO ORDERED.

[1] The court assumes that the reference to "section 1991" claims was in error, as section 42 U.S.S. § 1991 governs fees for persons appointed to execute process.

Appendix D: 9th (Ninth) Circuit Motion for Reconsideration Decision on 4/19/2019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALFRED LAM; PAULA LEIATO,
Plaintiffs - Appellants,
V.
CITY AND COUNTY OF SAN FRANCISCO;
et al.,
Defendants - Appellees.

April 19, 2019

No. 16-15596
D.C. No. 4:10-cv-04641-PJH
Northern District of California, Oakland

ORDER

Before: WALLACE, FARRIS, and TROTT, Circuit Judges,

Appellants' motion for reconsideration is DENIED.

No further motions will be entertained in this closed case.

Appendix E: U.S. District Court Order Denying Motion for Leave to Amend Complaint on 5/11/2015

United States District Court, N.D. California.

May 11, 2015.

ALFRED LAM, et al., Plaintiffs,
v.
CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants.

No. C 10-4641 PJH.

ORDER DENYING MOTION FOR LEAVE TO AMEND COMPLAINT

PHYLLIS J. HAMILTON, District Judge.

Before the court is plaintiffs' motion for leave to file a fourth amended complaint. Plaintiffs have actually filed two separate versions of their motion, and while there are slight differences between the two documents, they are substantially the same in substance, and they seek the same relief. See Dkt. 106, 111.

In each motion, plaintiffs argue that they are entitled to amend their complaint under Rule 15 because (1) "the court failed to follow the correct statute of limitations governing the underlying action," and (2) "opposing counsels intentionally or negligently failed to direct the court to the correct statute of limitations." See Dkt. 106 at 5-6; Dkt. 111 at 4. Plaintiffs argue that they need to file an amended complaint to present "facts showing the statute of limitations of section 1981, 1983, and 1991 have been legislatively extended from two years to four years." Dkt. 106 at 8-9.

Although the above-quoted portions of plaintiffs' motion suggest that plaintiffs seek to add only allegations that

were previously held to be time-barred, other portions of plaintiffs' motion indicate that plaintiffs also seek to pursue new theories of relief. Whereas the first four versions of plaintiffs' complaint asserted only claims based on race and national origin discrimination, plaintiffs now also argue that "age is a factor of denying or not appointing APA [Asian Pacific Americans] employees" and "religious affiliation is a factor of denying or not promoting APA employees." Dkt. 106 at 8. The motion also makes a vague reference to alleged gender discrimination. Dkt. 106 at 8. Thus, it appears that plaintiffs seek to add not only allegations that were previously found time-barred, but also allegations related to new theories of discrimination.

Defendant's opposition brief raises a number of objections to plaintiffs' request to amend the complaint. As a general matter, defendant points out that plaintiffs have not submitted a proposed amended complaint, even though Civil Local Rule 10-1 requires that "[a]ny party filing or moving to file an amended pleading must reproduce the entire proposed pleading." The court agrees that plaintiffs' failure to provide a proposed fourth amended complaint is fatal to their current motion, as it leaves the court with no way to determine whether plaintiffs' proposed amendments are allowable. For that reason alone, plaintiffs' motion must be denied. However, the court also finds it useful to address the specific arguments raised by plaintiffs, to avoid any future need to re-address issues that have already been decided.

As to the statute of limitations issue, defendant argues that plaintiffs "cite no case law to support that the statute of limitations of section 1983 or 1981 claims[1] has changed since the court's previous order."

Indeed, the court finds that plaintiffs provide no support for the argument that the statute of limitations for section

1981/1983 claims has been "legislatively extended." The Ninth Circuit has repeatedly held that California's statute of limitations for personal injury claims applies to federal civil rights claims under sections 1981 and 1983. See, e.g., Johnson v. California, 207 F.3d 650, 653 (9th Cir. 2000); Taylor v. Regents of University of California, 993 F.2d 710, 711 (9th Cir. 1993). California's statute of limitations for personal injury claims is two years. Cal. Code Civ. Proc. § 335.1.

Moreover, the court's previous dismissal order was based not only on statute of limitations grounds, but on res judicata grounds. Here, some background is necessary.

This suit is the second discrimination suit filed by plaintiffs. The first, referred to as "Lam I," was filed on October 10, 2008, and was based on alleged race and national origin discrimination by defendant City and County of San Francisco. See Case No. 08-4702. On October 14, 2010, while Lam I was pending, plaintiffs filed the current suit, referred to as "Lam II." Like Lam I, Lam II also arises out of alleged race and national origin discrimination by defendant.

On April 13, 2012, the court granted summary judgment in favor of defendant in Lam I. Shortly thereafter, on May 1, 2012, defendant filed a motion to dismiss the complaint in this case, making two arguments: (1) that principles of res judicata barred the re-litigation of claims that were raised or could have been raised in Lam I, and (2) that the applicable statute of limitations barred claims arising before October 14, 2008 (two years before Lam II was filed).

The court granted in part and denied in part defendant's motion to dismiss on June 8, 2012. See Dkt. 49. By now arguing that "the court failed to follow the correct statute of limitations," it appears that plaintiffs are challenging that

June 8, 2012 order by filing this motion. Indeed, plaintiffs argue in their motion that "the summary judgment[2] by this court on 6/8/2012 was based upon reversible errors." Dkt. 106 at 9.

As defendant notes, plaintiffs are essentially seeking reconsideration of the court's June 2012 order. While the untimeliness of this request would provide a sufficient basis for its denial, the merits of the request also provide basis for denial. Plaintiffs overlook the fact that the court's dismissal was primarily based on res judicata, which operates independently from any statute of limitations bar. In fact, the court expressly held that the statute of limitations was ultimately "of no consequence, given the other limitations imposed by the court." Dkt. 49 at 2.

Specifically, in its previous order, the court first found that plaintiffs' claims under section 1981 and 1983 were time-barred to the extent that they were based on conduct occurring before October 14, 2008 (two years before Lam II's filing). However, the court then found that any allegations that either were raised or could have been raised in Lam I were subject to res judicata. The court used the date of the last-filed complaint in Lam I as the dividing line to determine whether claims "could have been raised" in Lam I, and thus, found that any claims arising out of "conduct occurring prior to . . . February 22, 2010" were barred by res judicata. Dkt. 49 at 2. Thus, while the statute of limitations bars any conduct occurring before October 14, 2008, the res judicata bar provides an even stronger restriction, barring conduct occurring before February 22, 2010. The res judicata bar renders plaintiffs' statute of limitations argument moot. Plaintiffs' motion for leave to amend is DENIED, as any amendment to add conduct occurring before February 22, 2010 would be futile.

As mentioned above, plaintiffs also seek to add allegations relating to alleged age, gender, and religious discrimination. However, aside from the mere mention of these theories of relief, plaintiffs' motion contains no explanation of the alleged conduct underlying these theories. Plaintiffs provide no details regarding the alleged age/gender/religious discrimination — no description of the conduct, no dates, and no identification of the individuals who committed or who suffered the discrimination. For that reason, the court cannot determine whether the proposed allegations are futile, prejudicial, and/or the product of undue delay. In response to defendant's opposition, plaintiffs submitted a "supplemental brief" along with over 200 pages of exhibits, arguing that those exhibits "provide more than adequate information concerning the need of plaintiffs to submit the [fourth] amended complaint." Dkt. 113 at 2. However, plaintiffs cannot avoid the requirement to submit a proposed amended complaint by simply attaching hundreds of pages of exhibits and asking the court to sift through them looking for facts that might support a viable discrimination claim. Thus, to the extent that plaintiffs' motion seeks to add allegations regarding age/gender/religious discrimination, within the appropriate time frame from February 22, 2010 to the present, it is DENIED for failure to specify the factual allegations underlying such claims and to provide a proposed amended complaint.

Plaintiffs' motion also raises two arguments unconnected to their statute of limitations argument or their age/gender/religious discrimination argument. First, plaintiffs argue that "newly discovered evidence has arisen since the initial filing on October 14, 2010." To the extent that plaintiffs seek to add after-arising facts, they essentially seek to supplement, not to amend, the complaint. Regardless of the form of plaintiffs' request, the court finds that plaintiffs have not adequately described

the allegations that they seek to add to the complaint. Plaintiffs make a general reference to "systematic, ongoing, and continuous discrimination," but do not provide any specific facts. Thus, for the same reason as above, the court finds that plaintiffs' request to supplement their complaint with "new" facts that have not been provided must be DENIED.

Finally, without much explanation, plaintiffs argue that "recertification of a class action in the underlying action is necessary, due to the possibility of new victims coming forward, inconsistent judgments, judicial economy, and having plaintiffs too numerous to ascertain at the time of filing."

Given that a class has never been certified in this case, there is no way that the court could "recertify" a class. Instead, it appears that plaintiffs seek to amend their complaint to re-add class allegations. Plaintiffs' original complaint in this case, which was filed in pro per on October 14, 2010, was brought as a putative class action. However, after the court issued an order to show cause based on plaintiffs' failure to prosecute, plaintiffs retained an attorney, and on July 26, 2011, plaintiffs' counsel filed a first amended complaint, which did not assert any claims on behalf of a putative class. Plaintiffs' counsel then filed second and third amended complaints, neither of which contained class claims.

Having abandoned their class claims in July 2011, plaintiffs cannot revive them now, particularly given that plaintiffs are proceeding without counsel and unrepresented plaintiffs may not represent a class. See, e.g., C.E. Pope Equity Trust v. United States, 818 F.2d 696, 697 (9th Cir. 1987) (holding that a pro se litigant may not appear as an attorney for others); Russell v. United States, 308 F.2d 78, 79 (9th Cir. 1962) ("A litigant

appearing in propria persona has no authority to represent anyone other than himself").

IT IS SO ORDERED.

[1] Defendant includes a footnote explaining that plaintiffs' reference to a "section 1991" was likely an error, since 42 U.S.C. § 1991 relates to fees for service of process. The court similarly finds that plaintiff's reference was likely made in error.

[2] Presumably, plaintiffs intended to refer to this court's dismissal order, even though they used the term "summary judgment."

Appendix F: "Protected Activities" by Petitioners between January 1, 2010 to December 31, 2012.

"Protected Activities" by Petitioners between January 1, 2010 to December 31, 2012.

"It shall be an unlawful employment practice for an employer to *discriminate against* any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. §2000e-3(a) (emphasis added).

The respondents are in possession of all the following "protected activities" of written reports or complaints provided by petitioners either to the district court and ninth circuit. However, the district court denied petitioners the right to "amend the following protected activities on or about May 11, 2015 [see Appendix E] as follows: **(1)** On or about January 12, 2010, petitioner Lam filed a memo to San Francisco Ethics Commission to resolve respondents' employees unethical conduct; **(2)** On or about February 12, 2010, Lam filed a grievance to respondents included the Mayor of San Francisco regarding on-going discrimination by Director Toni Radcliff-Powell in petitioners' worksite; **(3)** On or about March 3, 2010 and September 3, 2010, Lam submitted a memo to respondents relevant agencies regarding requesting an "investigative order" of promotion based nepotism of Toni Radcliff-Powell, who promoted her sister Tamara Ratcliff; **(4)** In May, 2010, Lam complained of harassment and retaliation in delaying approval of his request for vacation, which Lam requested on March 6, 2010, but was later

approved on May 27, 2010; **(5)** On or about March 10, 2010 and June 6, 2010, Lam submitted a "budget saving idea" to respondents' proper agencies regarding a "suggestion to save City & County of San Francisco an amount of ten million dollars over a next three year period; **(6)** On or about March 16, 2010, Lam submitted a memo to respondents' proper agencies and commission regarding respondents' agents of "mistreatment and neglect of minor youths inside petitioners' worksite of SF Juvenile Hall; **(7)** On or about April 6, 2010, Lam submitted a memo regarding his employer violating the SEIU union contract of adversely altering working conditions; **(8)** On or about April 19, 2010, Lam filed an amended charge of discrimination, harassment, intimidation, and retaliation to CA Dept of Fair Employment and Housing against respondents; **(9)** On or about May 22, 2010, Lam submitted a memo to respondents' proper agencies including Gavin Newsom regarding on-going discrimination, harassment, intimidation, and retaliation and employee's misconduct; **(10)** On or about May 25, 2010, Lam filed a complaint to CA-OSHA regarding an unsafe workplace environment in one of the posted positions inside petitioners' worksite; **(11)** On or about June 4, 2010, Lam filed a written report to respondents' agent William Siffermann, Chief of SF Probation Department regarding an unsafe work environment issue of Toni Radcliff-Powell having a firearm in her office, which is located inside the SF Juvenile Hall facility although it is prohibited; **(12)** On or about June 4, 2010, Lam submitted a memo to Mayor of San Francisco regarding on-going discrimination, harassment, intimidation, and retaliation inside petitioners' worksite; **(13)** On or about July 27, 2010, Lam filed

written complaint of unfair treatment rising to a level constituting retaliation regarding poor work evaluations by his supervisors Singh and Radcliff-Powell; **(14)** On or about August 6, 2010, Lam filed new "charges of discrimination, harassment, intimidation, and retaliation" to EEOC; **(15)** On or about September 2, 2010, Lam filed complaint to respondents regarding systematic and continuous racial discrimination, harassment, intimidation and retaliation against APA employees in the area of hiring and promotion; **(16)** On or about September 3, 2010, Lam submitted a memo to respondents' agent William Siffermann, regarding the investigation of his supervisors Recinos and Ratcliff, who were alleged of misconduct; **(17)** On or about October 7, 2010, Lam filed an additional complaint to EEOC regarding on-going retaliation and harassment; **(18)** On or about October 14, 2010, petitioners Lam and Leiato and two other APA co-workers filed the current case to U.S. District Court; **(19)** On or about October 25, 2010, on behalf of minor youths inside SF Juvenile Hall, Lam filed a legal action in U.S. District Court CV10-04838 regarding respondents' concealing, covering-up and protecting those employees committing "use of excessive force and sexual misconduct" inside petitioners' worksite. All previous complaints to respondents' proper agencies were ignored including the Mayor and District Attorney of San Francisco; **(20)** On or about November 9, 2010, Lam complained to his supervisors Lewis and Ratcliff-Powell regarding the worksite "soaking with smell of human feces". Upon being ignored by the above supervisors, Lam assisted his on-site union rep to contact CA-OSHA and file the complaint; **(21)** On or about November 30, 2010, Lam submitted a report to respondents' proper

agencies or agents regarding "unhealthy and potential hazardous work environment" and retaliating against their employees' whom have a duty to report such incidents as Mandatory Reporters under California statutes; **(22)** On or about December 30, 2010, Lam submitted a memo to respondents' agents including Siffermann, William Johnston, Magee, Houston, Ratcliff-Powell and Doyle regarding unfair treatment in violation of FMLA accommodation provision and retaliating against those whom report such violations; **(23)** On or about January 7, 2011, Lam joined with other APA co-workers filing a complaint to their employer regarding on-going discrimination, harassment, intimidation, and retaliation against APA and other employees' misconduct inside the worksite; **(24)** On or about March 4, 2011, Lam filed a union grievance regarding an "invalid and unsafe work assignment" to respondents'; **(25)** On or about March 10, 2011, Lam filed a SEIU grievance against respondents regarding "compulsory sick leave" in denying Lam the opportunity to come to work between 1/14-1/23, 2011; **(26)** On or about December 24, 2011, Lam made a verbal complaint against his supervisor Fleck regarding unfair treatment in demanding Lam to provide a medical note for calling-in sick, even though Lam was not on "sick leave restriction"; **(27)** On or about December 30, 2011, Lam filed a complaint to respondents' proper agencies of the Ethics Commission and City controller's Office regarding his supervisor Ratcliff-Powell in violation of the employer's "code of ethics"; **(28)** On or about February 11, 2012, Lam filed a grievance of "sick leave restriction" on behalf of a SEIU chapter member; **(29)** On or about March 30, 2012, to his employer regarding suggestion to improve tardiness and prevent fraud;

(30) On April, 2012, Lam filed grievance on behalf of affected SEIU chapter member regarding of unfair practice of "sick leave pay"; **(31)** On or about May 13, 2012, Lam filed a complaint to CA. Dept of Labor regarding supervisors Recino and Ratcliff-Powell denying earned pay for an hour to three APA employees including Lam; **(32)** On or about August 6, 2012, Lam filed a complaint to his employer and agents of a prejudiced and negative "performance work evaluation" without merit or justification from his supervisors Fleck and Ratcliff-Powell; **(33)** In December, 2009, petitioner Leiato was scheduled to appear at a respondents' proper agency of the Civil Service Commission regarding complaining about and opposing respondents' unlawful employment practices via her testimony. Retaliation occurred further because she testified, assisted in, or participated with, in any manner, an investigation, proceeding, or hearing; **(34)** On or about August 11, 2010, Leiato filed a "good faith" bona fide report and complaint to respondents' agent against her supervisors Ratcliff-Powell and Taylor whom knowingly subjected her to an "unsafe and unhealthy work environment" for denying her request of "emergency medical leave" on July 20, 2010; **(35)** On or about August 27, 2010, petitioner Leiato filed a complaint of discrimination, harassment, intimidation, and retaliation against her supervisors Ratcliff-Powell and Taylor; **(36)** On or about September 2, 2010, Leiato filed a grievance in a timely manner against respondents including her supervisors Ratcliff-Powell and Taylor for ignoring her request of investigating a complaint of discrimination, harassment, intimidation, and retaliation; **(37)** On or about September 27, 2010, Leiato filed a complaint with the EEOC in a timely

manner; **(38)** On or about June 20, 2011, Leiato filed an "amended complaint" to EEOC against respondents' supervisors for "continuous and on-going" discrimination, harassment, intimidation, and retaliation. Almost all the above protected activities by petitioners were either ignored nor given a response by respondents and their agents. However, these are instances where adverse employment actions were taken by respondents and their agents against the petitioners which show the respondents knew, or should have known, about the issues complained of.

APPENDIX G

Equal Employment Opportunity Commission Enforcement Guidance

1999 WL 33305874 (E.E.O.C. Guidance)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ENFORCEMENT GUIDANCE

ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS

June 18, 1999

Number 915.002

1. SUBJECT: Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors

2. PURPOSE: This document provides guidance regarding employer liability for harassment by supervisors based on sex, race, color, religion, national origin, age, disability, or protected activity.

3. EFFECTIVE DATE: Upon receipt.

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. ORIGINATOR: Title VII/EPA/ADEA Division, Office of Legal Counsel.

6. INSTRUCTIONS: File after Section 615 of Volume II of the Compliance Manual.

Ida L. Castro, Chairwoman

I. Introduction

In *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), the Supreme Court made clear that employers are subject to vicarious liability for unlawful harassment by supervisors. The standard of liability set forth in these decisions is premised on two principles: 1) an employer is responsible for the acts of its supervisors, and 2) employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment. In order to accommodate these principles, the Court held that an employer is always liable for a supervisor's harassment if it culminates in a tangible employment action. However, if it does not, the employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements:

(a) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and

(b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

While the *Faragher* and *Ellerth* decisions addressed sexual harassment, the Court's analysis drew upon standards set forth in cases involving harassment on other protected bases. Moreover, the Commission has always taken the position that the

same basic standards apply to all types of prohibited harassment.[1] Thus, the standard of liability set forth in the decisions applies to all forms of unlawful harassment. (See section II, below.)

Harassment remains a pervasive problem in American workplaces. The number of harassment charges filed with the EEOC and state fair employment practices agencies has risen significantly in recent years. For example, the number of sexual harassment charges has increased from 6,883 in fiscal year 1991 to 15,618 in fiscal year 1998. The number of racial harassment charges rose from 4,910 to 9,908 charges in the same time period.

While the anti-discrimination statutes seek to remedy discrimination, their primary purpose is to prevent violations. The Supreme Court, in *Faragher* and *Ellerth*, relied on Commission guidance which has long advised employers to take all necessary steps to prevent harassment.[2] The new affirmative defense gives credit for such preventive efforts by an employer, thereby "implement[ing] clear statutory

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[1] *See, e.g.*, 29 C.F.R. § 1604.11 n. 1 ("The principles involved here continue to apply to race, color, religion or national origin."); EEOC Compliance Manual Section 615.11(a) (BNA 615:0025 ("Title VII law and agency principles will guide the determination of whether an employer is liable for age harassment by its supervisors, employees, or non-employees").

[2] *See* 1980 Guidelines at 29 C.F.R. § 1604.11(f) and Policy Guidance on Current Issues of Sexual Harassment, Section E, 8 FEP Manual 405:6699 (Mar. 19, 1990), *quoted in Faragher*, 118 S. Ct. at 2292.

policy and complement[ing] the Government's Title VII enforcement efforts."[3]

The question of liability arises only after there is a determination that unlawful harassment occurred. Harassment does not violate federal law unless it involves discriminatory treatment on the basis of race, color, sex, religion, national origin, age of 40 or older, disability, or protected activity under the anti-discrimination statutes. Furthermore, the anti-discrimination statutes are not a "general civility code."[4] Thus federal law does not prohibit simple teasing, offhand comments, or isolated incidents that are not "extremely serious."[5] Rather, the conduct must be "so objectively offensive as to alter the 'conditions' of the victim's employment."[6] The conditions of employment are altered only if the harassment culminated in a tangible employment action or was sufficiently severe or pervasive to create a hostile work environment.[7] Existing

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[3] *Faragher*, 118 S. Ct. at 2292.

[4] *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998, 1002 (1998).

[5] *Faragher*, 118 S.Ct. at 2283. However, when isolated incidents that are not "extremely serious" come to the attention of management, appropriate corrective action should still be taken so that they do not escalate. See Section V(C)(1)(a), below.

[6] *Oncale*, 118 S. Ct. at 1003.

[7] Some previous Commission documents classified harassment as either "quid pro quo" or hostile environment. However, it is now more useful to distinguish between harassment that results in a tangible

Commission guidance on the standards for determining whether challenged conduct rises to the level of unlawful harassment remains in effect.

This document supersedes previous Commission guidance on the issue of vicarious liability for harassment by supervisors.[8] The Commission's long-standing guidance on employer liability for harassment by co-workers remains in effect -- an employer is liable if it knew or should have known of the misconduct, unless it can show that it took immediate and appropriate corrective action.[9] The standard is the same in the case of non-employees, but the employer's control over such individuals' misconduct is considered.[10]

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employment action and harassment that creates a hostile work environment, since that dichotomy determines whether the employer can raise the affirmative defense to vicarious liability. Guidance on the definition of "tangible employment action" appears in section IV(B), below.

[8] The guidance in this document applies to federal sector employers, as well as all other employers covered by the statutes enforced by the Commission.

[9] 29 C.F.R. § 1604.11(d).

[10] The Commission will rescind Subsection 1604.11(c) of the 1980 Guidelines on Sexual Harassment, 29 CFR § 1604.11(c). In addition, the following Commission guidance is no longer in effect: Subsection D of the 1990 Policy Statement on Current Issues in Sexual Harassment("Employer Liability for Harassment by Supervisors"), EEOC Compliance Manual (BNA) N:4050-58 (3/19/90); and EEOC Compliance Manual Section 615.3(c) (BNA) 6:15-0007 - 0008.

II. The Vicarious Liability Rule Applies to Unlawful Harassment on All Covered Bases

The rule in *Ellerth* and *Faragher* regarding vicarious liability applies to harassment by supervisors based on race, color, sex (whether or not of a sexual nature[11]), religion, national origin, protected activity,[12] age, or disability.[13] Thus,

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The remaining portions of the 1980 Guidelines, the 1990 Policy Statement, and Section 615 of the Compliance Manual remain in effect. Other Commission guidance on harassment also remains in effect, including the Enforcement Guidance on *Harris v. Forklift Sys., Inc.*, EEOC Compliance Manual (BNA) N:4071 (3/8/94) and the Policy Guidance on Employer Liability for Sexual Favoritism, EEOC Compliance Manual (BNA) N:5051 (3/19/90).

[11] Harassment that is targeted at an individual because of his or her sex violates Title VII even if it does not involve sexual comments or conduct. Thus, for example, frequent, derogatory remarks about women could constitute unlawful harassment even if the remarks are not sexual in nature. *See* 1990 Policy Guidance on Current Issues of Sexual Harassment, subsection C(4) ("sex-based harassment - that is, harassment not involving sexual activity or language - may also give rise to Title VII liability ... if it is 'sufficiently patterned or pervasive' and directed at employees because of their sex").

[12] "Protected activity" means opposition to discrimination or participation in proceedings covered by the anti-discrimination statutes. Harassment based on protected activity can constitute unlawful retaliation. *See* EEOC Compliance Manual Section 8 ("Retaliation") (BNA) 614:001 (May 20, 1998).

employers should establish anti-harassment policies and complaint procedures covering all forms of unlawful harassment.[14]

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[13] For cases applying *Ellerth* and *Faragher* to harassment on different bases, *see Hafford v. Seidner*, 167 F.3d 1074, 1080 (6th Cir. 1999) (religion and race); *Breeding v. Arthur J. Gallagher and Co.*, 164 F.3d 1151, 1158 (8th Cir. 1999) (age); *Allen v. Michigan Department of Corrections*, 165 F.3d 405, 411 (6th Cir. 1999) (race); *Richmond-Hopes v. City of Cleveland*, No. 97-3595, 1998 WL 808222 at *9 (6th Cir. Nov. 16, 1998) (unpublished) (retaliation); *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1270 (10th Cir. 1998) (race); *Gotfryd v. Book Covers, Inc.*, No. 97 C 7696, 1999 WL 20925 at *5 (N.D. Ill. Jan. 7, 1999) (national origin). *See also Wallin v. Minnesota Department of Corrections*, 153 F.3d 681, 687 (8th Cir. 1998) (assuming without deciding that ADA hostile environment claims are modeled after Title VII claims), *cert. denied*, 119 S. Ct. 1141 (1999).

[14] The majority's analysis in both *Faragher* and *Ellerth* drew upon the liability standards for harassment on other protected bases. It is therefore clear that the same standards apply. *See Faragher*, 118 S. Ct. at 2283 (in determining appropriate standard of liability for sexual harassment by supervisors, Court "drew upon cases recognizing liability for discriminatory harassment based on race and national origin"); *Ellerth*, 118 S. Ct. at 2268 (Court imported concept of "tangible employment action" in race, age and national origin discrimination cases for resolution of vicarious liability in sexual harassment cases). *See also* cases cited in n.13, above.

III. Who Qualifies as a Supervisor?

A. Harasser in Supervisory Chain of Command

An employer is subject to vicarious liability for unlawful harassment if the harassment was committed by "a supervisor with immediate (or successively higher) authority over the employee."[15] Thus, it is critical to determine whether the person who engaged in unlawful harassment had supervisory authority over the complainant.

The federal employment discrimination statutes do not contain or define the term "supervisor."[16] The statutes make employers liable for the discriminatory acts of their "agents,"[17] and supervisors are agents of their employers. However,

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[15] *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2293.

[16] Numerous statutes contain the word "supervisor," and some contain definitions of the term. *See, e.g.*, 12 U.S.C. § 1813(r) (definition of "State bank supervisor" in legislation regarding Federal Deposit Insurance Corporation); 29 U.S.C. § 152(11) (definition of "supervisor" in National Labor Relations Act); 42 U.S.C.. § 8262(2) (definition of "facility energy supervisor" in Federal Energy Initiative legislation). The definitions vary depending on the purpose and structure of each statute. The definition of the word "supervisor" under other statutes does not control, and is not affected by, the meaning of that term under the employment discrimination statutes.

[17] *See* 42 U.S.C. 2000e(a) (Title VII); 29 U.S.C. 630(b) (ADEA); and 42 U.S.C. §12111(5)(A) (ADA) (all defining "employer" as including any agent of the employer).

agency principles "may not be transferable in all their particulars" to the federal employment discrimination statutes.[18] The determination of whether an individual has sufficient authority to qualify as a "supervisor" for purposes of vicarious liability cannot be resolved by a purely mechanical application of agency law.[19] Rather, the purposes of the anti-discrimination statutes and the reasoning of the Supreme Court decisions on harassment must be considered.

The Supreme Court, in *Faragher* and *Ellerth*, reasoned that vicarious liability for supervisor harassment is appropriate because supervisors are aided in such misconduct by the authority that the employers delegated to them.[20] Therefore, that authority must be of a sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment. The determination as to whether a harasser had such authority is based on

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[18] *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986); *Faragher*, 118 S. Ct. at 2290 n.3; *Ellerth*, 118 S. Ct. at 2266.

[19] *See Faragher*, 118 S. Ct. at 2288 (analysis of vicarious liability "calls not for a mechanical application of indefinite and malleable factors set forth in the Restatement ... but rather an inquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor's employment ... ") and at 2290 n.3 (agency concepts must be adapted to the practical objectives of the anti-discrimination statutes).

[20] *Faragher*, 118 S. Ct. at 2290; *Ellerth*, 118 S. Ct. at 2269.

his or her job function rather than job title (e.g., "team leader") and must be based on the specific facts.

An individual qualifies as an employee's "supervisor" if:

a. the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or

b. the individual has authority to direct the employee's daily work activities.

1. Authority to Undertake or Recommend Tangible Employment Actions

An individual qualifies as an employee's "supervisor" if he or she is authorized to undertake tangible employment decisions affecting the employee. "Tangible employment decisions" are decisions that significantly change another employee's employment status. (For a detailed explanation of what constitutes a tangible employment action, see subsection IV(B), below.) Such actions include, but are not limited to, hiring, firing, promoting, demoting, and reassigning the employee. As the Supreme Court stated,"[t]angible employment actions fall within the special province of the supervisor."[21]

An individual whose job responsibilities include the authority to recommend tangible job decisions affecting an employee qualifies as his or her supervisor even if the individual does not have the

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[21] *Ellerth*, 118 S. Ct. at 2269.

final say. As the Supreme Court recognized in *Ellerth*, a tangible employment decision "may be subject to review by higher level supervisors."[22] As long as the individual's recommendation is given substantial weight by the final decisionmaker(s), that individual meets the definition of supervisor.

2. Authority to Direct Employee's Daily Work Activities

An individual who is authorized to direct another employee's day-to-day work activities qualifies as his or her supervisor even if that individual does not have the authority to undertake or recommend tangible job decisions. Such an individual's ability to commit harassment is enhanced by his or her authority to increase the employee's workload or assign undesirable tasks, and hence it is appropriate to consider such a person a "supervisor" when determining whether the employer is vicariously liable.

In *Faragher*, one of the harassers was authorized to hire, supervise, counsel, and discipline lifeguards, while the other harasser was responsible for making the lifeguards' daily work assignments and supervising their work and fitness training.[23] There was no question that the Court viewed them both as

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[22] *Ellerth*, 118 S. Ct. at 2269.

[23] *Faragher*, 118 S. Ct. at 2280. For a more detailed discussion of the harassers' job responsibilities, see *Faragher*, 864 F. Supp. 1552, 1563 (S.D. Fla. 1994).

"supervisors," even though one of them apparently lacked authority regarding tangible job decisions.[24]

An individual who is temporarily authorized to direct another employee's daily work activities qualifies as his or her "supervisor" during that time period. Accordingly, the employer would be subject to vicarious liability if that individual commits unlawful harassment of a subordinate while serving as his or her supervisor.

On the other hand, someone who merely relays other officials' instructions regarding work assignments and reports back to those officials does not have true supervisory authority. Furthermore, someone who directs only a limited number of tasks or assignments would not qualify as a "supervisor." For example, an individual whose delegated authority is confined to coordinating a work project of limited scope is not a "supervisor."

B. Harasser Outside Supervisory Chain of Command

In some circumstances, an employer may be subject to vicarious liability for harassment by a

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[24] *See Grozdanich v. Leisure Hills Health Center*, 25 F. Supp.2d 953, 973 (D. Minn. 1998) ("it is evident that the Supreme Court views the term "supervisor' as more expansive than as merely including those employees whose opinions are dispositive on hiring, firing, and promotion"; thus, "charge nurse" who had authority to control plaintiff's daily activities and recommend discipline qualified as "supervisor" and therefore rendered employer vicariously liable under Title VII for his harassment of plaintiff, subject to affirmative defense).

supervisor who does not have actual authority over the employee. Such a result is appropriate if the employee reasonably believed that the harasser had such power.[25] The employee might have such a belief because, for example, the chains of command are unclear. Alternatively, the employee might reasonably believe that a harasser with broad delegated powers has the ability to significantly influence employment decisions affecting him or her even if the harasser is outside the employee's chain of command.

If the harasser had no actual supervisory power over the employee, and the employee did not reasonably believe that the harasser had such authority, then the standard of liability for co-worker harassment applies.

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[25] See *Ellerth*, 118 S. Ct. at 2268 ("If, in the unusual case, it is alleged there is a false impression that the actor was a supervisor, when he in fact was not, the victim's mistaken conclusion must be a reasonable one."); *Llampallas v. Mini-Circuit Lab, Inc.*, 163 F.3d 1236, 1247 (11th Cir. 1998) ("Although the employer may argue that the employee had no actual authority to take the employment action against the plaintiff, apparent authority serves just as well to impute liability to the employer for the employee's action.").