

# CLIENT NEWS BRIEF

## Industrial Disability Retirement May Still Be Considered a Constructive Discharge

On January 28, 2020, the California Court of Appeal for the First Appellate District revived a former California Highway Patrol (CHP) officer's claims that he was forced to quit because he is openly gay. In *Brome v. California Highway Patrol*, the Court of Appeal held that a workers' compensation claim could extend the statute of limitations for filing a complaint of discrimination and that an industrial disability retirement could still be considered a constructive discharge in violation of California anti-discrimination laws.

### Background

Throughout his nearly 20-year tenure with the CHP, Officer Brome complained that he suffered discrimination and harassment from fellow officers based on his sexual orientation. From 2008 through 2014, Brome complained to his superiors that he was frequently subjected to derogatory comments and that other officers routinely refused to provide Brome with backup assistance during enforcement stops. Brome's superiors investigated his complaints and disciplined at least one officer related to the failure to provide backup assistance. Despite the actions of the employer, Brome alleged that the harassment and discrimination continued, causing him extreme stress and anxiety.

In January 2015, Brome went on medical leave and filed a workers' compensation claim due to his work-related stress. After his workers' compensation claim was resolved in his favor in October 2015, he applied for and received an industrial disability retirement effective February 2016.

In September 2016 – over a year after he first went on medical leave – Brome filed a complaint with the Department of Fair Employment and Housing (FEH), and a lawsuit alleging sexual orientation discrimination and harassment, failure to prevent harassment, and retaliation. The trial court dismissed the case on statute of limitations grounds because it was not filed within one year of the challenged actions, as required by the Department of Fair Employment and Housing Act's (FEHA) provisions in effect at that time. The trial court also rejected Brome's constructive discharge theory, finding that Brome failed to establish that the working conditions were sufficiently intolerable to cause him to quit.

As of January 1, 2020, the one year statute of limitation to file with the Department of Fair Employment and Housing was extended to three years. See *Complainants Now Have 3 Years to File Charge of Employment Discrimination*, Lozano Smith Client News Brief Number 79 for December, 2019, available at [http://www.lozanosmith.com/news-clientnewsbriefdetail.php?news\\_id=2952](http://www.lozanosmith.com/news-clientnewsbriefdetail.php?news_id=2952)

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The Court of Appeal reversed the trial court's decision on three grounds. First the court reversed the trial court's finding regarding the statute of limitations. The court found that Brome's discrimination/harassment claims could be tolled while his workers' compensation claim was pending. This finding hinged in part on whether a jury could reasonably conclude that the worker's compensation claim constituted notice to the CHP that Brome also had potential discrimination claims. The court held that it was reasonable to conclude CHP received such notice, because the CHP necessarily considered the cause of Brome's work-related stress in order to investigate his worker's compensation claim.

Second, the Court of Appeal also found that Brome's claims may include allegations of wrongful conduct occurring before the statute of limitations period under the continuing violation doctrine. The continuing violation doctrine allows claims regarding conduct alleged to have occurred prior to the limitations period to move forward if a jury could find:

1. discriminatory/harassing conduct that occurred before the limitation period are "sufficiently similar in kind" to those occurring during the limitation period,
2. the acts occurred with reasonable frequency, and
3. the problems had not "gained permanence" before the limitations period – i.e., that the CHP's actions did not make it clear that further efforts at informal resolution without litigation would be futile.

Finally, the Court of Appeal disagreed with the trial court's conclusions that Brome could not prove that his February 2016 disability retirement was a constructive discharge (i.e., forced quitting). A constructive discharge claim requires an employee to show that the "working conditions were so intolerable or aggravated that a reasonable employee would be forced to resign and that the employer either created or knowingly permitted those conditions." The appellate court found, "the accumulation of discriminatory treatment over time can amount to intolerable working conditions." Furthermore, the court determined Brome presented sufficient evidence to conclude that the CHP knowingly permitted the intolerable conditions and, due to his workers' compensation claim, should have known that a reasonable employee in Brome's position would resign.

The Court of Appeal returned the case to the trial court in order to make a final determination as to CHP's liability.

## Takeaways

The ruling in Brome highlights recent legislation that extends the statute of limitations on Fair Employment and Housing Act claims from one to three years. Further, employers should be aware that a workers' compensation claim – particularly a stress-related claim – could signal the presence of discriminatory conduct. Receipt of such a claim can constitute notice of discrimination or a hostile working environment. This ruling also highlights the importance for employers to consider and address any subsequent discrimination/harassment claims that may be raised even after the initial claims have been resolved and disciplinary action taken.

If you have any questions about FEHA claims or workplace harassment/discrimination claims in general, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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