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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ROBERT BISHOP, Plaintiff and Appellant, v. WYNDHAM WORLDWIDE CORPORATION et al., Defendants and Respondents.	A122517 (San Francisco County Super. Ct. No. 462609)
ROBERT BISHOP, Plaintiff and Appellant, v. WYNDHAM WORLDWIDE CORPORATION et al., Defendants and Respondents.	A123449 (San Francisco County Super. Ct. No. 462609)

INTRODUCTION

Robert Bishop sued his former employer and supervisor under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.),[1] claiming his termination in 2006 followed a long period of harassment, and discrimination against Arabs and Muslims. Bishop himself is not an Arab, but a white male. He therefore asserts his FEHA claims based on discrimination, harassment and retaliation because he

[1] All undesignated statutory references are to the Government Code.

"associated" with his Arab co-workers. (§§ 12926, subd. (m), 12940, subds. (a) & (h).) Bishop also alleged that he ultimately suffered psychological problems stemming from stress at work, went on medical leave under California's Moore-Brown-Roberti Family Rights Act (CFRA) (§ 12945.2), and was later terminated and not rehired, allegedly due to, among other things, disability discrimination (§ 12940, subd. (a) and retaliation for having taken CFRA leave.

All of Bishop's various claims—which also included wrongful discharge, intentional infliction of emotion distress, and contractual theories—were resolved against him, in part by summary adjudication (and summary judgment in favor of one defendant), in part by directed verdict, and in part by jury trial. In the first of two consolidated cases (No. A122517), Bishop appeals from those judgments. In the second appeal (No. A123449), he challenges the court's postjudgment order awarding costs of more than $50,000 to defendants.

We conclude that Bishop had no viable claim for associational discrimination under FEHA, but certain factual theories underlying his claims of CFRA retaliation and disability discrimination were improperly resolved by summary adjudication. Based on these conclusions, we reverse the judgment as to those two causes of action, as well as the wrongful discharge claim, and remand the case for a new trial. We also reverse the order granting defendants costs, and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. OVERVIEW

Bishop's attorneys believed his disability leave "always was the heart of the case," and they "were going to have some problems" with their "associational discrimination" theory. Nevertheless, they placed at the center of the dispute Carter Lee, a sales force supervisor at Trendwest Resorts, Inc. (Trendwest), who managed to use offensive language to and about a wide range of groups protected under the FEHA, including Arabs and Syrians , Palestinians , Muslims, African-Americans, Puerto Ricans, Indians, women, gays, and seniors.

Never mind that Bishop is none of the above. Having identified a villain, plaintiff's attorneys trumped up a thin theory of "associational discrimination" in a transparent attempt to put before a jury every one of Lee's offensive remarks and demeaning actions. In the process they not only burdened the court with improbable claims of "associational discrimination," but disserved their client by burying his real claims of disability discrimination and CFRA retaliation within reams of paper filled with highly prejudicial, racially charged—but essentially irrelevant—muckraking.

The result was a zealous defense, followed by an understandable judicial cutback on both the claims Bishop was allowed to assert and the evidence he was allowed to present. The trouble is, the court trimmed so much out of Bishop's case that he did not get a fair jury evaluation of the factual and legal disputes surrounding the loss of his job.

We recite the facts more or less chronologically, although a number of issues were resolved by summary adjudication, and therefore much of the following evidence never reached the jury. With respect to matters resolved by summary adjudication and directed verdict, we view the facts most favorably to Bishop. (*Baker v. American Horticulture Supply, Inc.* (2010) 186 Cal.App.4th 1059, 1072; *The Fifth Day, LLC v. Bolotin* (2009) 172 Cal.App.4th 939, 946.) We will explain in the course of our opinion how the various issues were disposed of and what evidence was, and was not, submitted to the jury.

II. BISHOP'S NORTHERN CALIFORNIA PERIOD

A. Bishop's history with Trendwest

Trendwest is a seller of timeshares in vacation resorts.[2] Bishop worked at Trendwest in sales and management capacities both in northern and southern California

[2] Cendant Corporation (Cendant) bought Trendwest in 2002, and the following year formed Cendant Timeshare Resort Group (CTRG), a wholly-owned subsidiary consisting of both Trendwest and Fairfield Resorts, Inc.. From August 2003 until May 2006, Cendant was the ultimate parent company of CTRG, and CTRG, the parent company of Trendwest. In May 2006, CTRG's name changed to Wyndham Vacation Ownership, Inc. (WVO) and a new corporate entity, Wyndham Worldwide Corporation (Wyndham), became its parent. Thus, Wyndham is the successor to Cendant, but Cendant was the corporate entity during Bishop's employment.

from 1997 until 2003, when he went to work for another timeshare company in southern California.

In May 2004, Tamer Mamou, a Syrian-born Muslim , then Trendwest's project director in Walnut Creek, together with Kevin Fiore, vice president of sales for northern California, recruited Bishop to come back to work for Trendwest in northern California as interim project director of the struggling San Francisco office, making him the top sales manager in that office. Bishop soon came under Lee's supervision when Lee was promoted from a Trendwest sales office in Washington state to become regional sales director for northern California in June 2004, reporting to Fiore. Mamou had also applied for the position for which Lee was hired, and there was a palpable animosity between them.

B. Carter Lee's alleged bigotry

There is plenty of evidence that Lee was an aggressive manager who had a particular animosity toward Syrians and other Arabs. Bishop presented evidence that Lee referred to Arabs as "sand niggers" and "camel jockeys," as well as making derogatory comments about other groups based on race, ethnicity, gender, and sexual orientation. Former co-workers also called Lee "macho" and "offensive." Lee denies ever making any racist or otherwise bigoted comments and claims he "never called anybody any names," but numerous former Trendwest employees confirm Bishop's allegations, including threats by Lee and other managers to "bust" the "Syrian regime" or "Arab regime" in northern California. While many of these witnesses also were engaged in litigation against Trendwest,[3] at least three (Kristine Sevy, Betty Jo McCormick, and Dmitriy Tsibulskiy) have no such involvement as far as we can discern. Even Trendwest's human resources (HR) manager in northern California called Lee a "racist and sexist," and Fiore agreed that some people found Lee "abrasive."

[3] In September 2005, ten former Trendwest employees (the *Wiley* plaintiffs), including Ayman Damlakhi, Steve Alberti, Bijan Mirzadegan, and Victoria Li, filed suit in Contra Costa County against Trendwest, Lee and others, alleging discrimination based on age, race, disability, taking medical leave, gender, and religion.

Not surprisingly, Bishop claims that Lee was hostile toward him from their first meeting, in which Lee said, "I could put a contract on a dog's ass, let him run around this showroom, and he would get more deals [than] you!" Lee told Bishop he was "the only one in the company that has a bigger ego" than Lee's. Lee also said he knew how much money Fiore had promised Bishop to recruit him, and Lee would "never, ever have paid" him that much.

Bishop attributes Lee's animosity to Bishop's friendship with Mamou and another Syrian co-worker, Ayman Damlakhi. Bishop had worked with Damlakhi at another timeshare sales company before he joined Trendwest. They had been friends ever since, and both were hired to work at Trendwest under Mamou's supervision at about the same time.

The strongest evidence Bishop can muster for his associational claim is that at another meeting shortly after he arrived in northern California, Lee demanded to know, if Mamou were "gone," whether Bishop would stay at Trendwest or go with Mamou. Bishop told Lee, "I'm with you," although he now claims he said that only because he was afraid of losing his job. During that meeting Lee also asked him about his friendship with Damlakhi. Lee filed a declaration in support of summary adjudication denying that he perceived Bishop to be a close associate of Arabs or Muslims.

On June 23, 2004, just a month after Bishop came onboard in northern California, Trendwest fired Mamou. Damlakhi was also terminated in October 2004, Bishop insinuates, because he, too, was Syrian.[4] Bishop alleges this was part of an ethnic purging of the company.

Mamou filed a FEHA suit alleging he had been terminated based on his national origin, which eventually resulted in a published appellate opinion: *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686. In defense, Trendwest claimed Mamou was terminated in the midst of a dispute over stock options and because he was planning to

[4] Lee claimed he played no role in either Mamou's termination or Damlakhi's. Fiore, however, testified that Lee provided significant input for Damlakhi's termination.

open a competing business in the resale market for timeshares. (*Id.* at pp. 697-705, fn. 14, & 716.) Bishop had the misfortune to join the northern California region just as this imbroglio was unfolding. (*Id.* at pp. 697-705.) Although Mamou's case was originally resolved against him on summary judgment (and defense counsel told Bishop's jury it was "dismissed"), the Sixth District later reversed. (*Id.* at p. 691.)

C. Lee's comments about and treatment of employees on disability leave

The second prong of Bishop's lawsuit alleges disability discrimination under FEHA and retaliation for taking CFRA-protected medical leave. Mamou likewise alleged in his FEHA lawsuit that he was fired in part for his refusal to comply with management's demand that he terminate or otherwise retaliate against Trendwest employees who had taken medical leave. (*Mamou, supra*, 165 Cal.App.4th at pp. 691, 696-697, 699-701, 713-714.)

Numerous witnesses filed declarations—and a few testified at trial—about a meeting in Walnut Creek on June 10, 2004, in which Lee told a group of employees that anyone out on medical leave would be terminated or would have no future with Trendwest. Lee admitted saying at the June 10 meeting that one employee out on leave had an "entitlement mentality" or "entitlement attitude," as well as saying that anyone coming off medical leave would not be promoted "immediately" or "right away," and might be terminated.

Attendees at the meeting said Lee also asked all project directors to submit a list of their employees on medical leave whom they suspected of "misusing the system." Lee claimed at trial, however, that he had retracted his remarks during the June 10 meeting after Mamou pointed out there would be no way to distinguish valid leaves from fake leaves. No one else at the meeting confirmed such a retraction, however, and Lee never mentioned such a retraction during the summary adjudication proceedings; on the contrary, he said he was not remorseful for his comments in the Walnut Creek meeting and was "angry that [he] was being reprimanded at all."

Lee claims that before he arrived in northern California, Mamou threatened to have the sales force walk out when Lee took over as regional sales director. When Lee

arrived in northern California, he was alarmed at the number of employees who were out on medical leave and was "suspicious" about the legitimacy of some leaves. Lee believed Mamou was encouraging employees to take fake medical leave, but he had no proof. Mamou, of course, denies these accusations.

Set against this backdrop, defendants claim that Lee's remarks about medical leave were intended only to apply to those who *abused* their CFRA rights. However, some employees at the meeting said Lee drew no distinction between "fake" and legitimate leave in his comments.

Mamou testified at Bishop's trial that a few days later, on June 14, 2004, Lee instructed him not to allow one employee who was out of work in a wheelchair to return to his job in Walnut Creek, where he lived, even though that office was hiring. Lee told Mamou to tell the wheelchair-bound man to apply at the San Francisco office if he wanted to return to Trendwest. Mamou refused to carry out this order, and Lee found someone else to do it.[5] Mamou complained to upper management and was fired ten days later.

Bijan Mirzadegan, who is half Iranian, was assistant sales manager in the Walnut Creek office, but was out on leave for wrist surgery when the June 10 meeting took place. He heard about Lee's remarks from co-workers, so he called Lee to find out if he still had a job. Lee told Mirzadegan on the phone that he planned to "hunt everybody down that [was] out on disability" and make sure all those who took phony disability leave were fired. When Mirzadegan asked how he would know whose leave was legitimate and whose was fake, Lee said he "had a nose for these things."

Mirzadegan testified at Bishop's trial that Lee then told him his job in Walnut Creek was gone, but if Mirzadegan were willing to come off medical leave earlier than his doctor advised, Lee would make him project director of the San Francisco office.

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[5] Damlakhi filed a declaration in opposition to defendants' motion for summary adjudication, saying that in early 2004 Fiore had ordered him to fire an employee who was out on medical leave, even though Damlakhi told him he had visited the woman in the hospital and knew she was sick. This evidence was not presented at trial.

Mirzadegan agreed, and came back to work with his wrist in a cast, only to have someone else appointed project director. Lee smirked while introducing him to his new boss. In December 2004, Mirzadegan was fired.

Lee contradicted Mirzadegan's version of their conversation, denying that he ever threatened to "hunt down" those who took fake disability leave. Lee also denied promising Mirzadegan a project director job if he came off medical leave early. He said Mirzadegan called him *before* the June 10 meeting and offered to come off disability leave and postpone his wrist surgery if Lee would make him project director in San Francisco. Lee apparently regarded this as a sign that Mirzadegan was abusing the medical leave system, admitting he had "suspicions" about the legitimacy of Mirzadegan's leave.

In addition, Victoria Li, who supervised 65-year-old Boris Cood at Trendwest, testified that while Cood was off work for knee surgery, she heard Lee tell another employee to empty out Cood's desk because he was "not coming back." Bishop presented evidence in opposition to the summary adjudication moton that he disagreed with Lee about terminating Cood, whom Lee called an "old codger," but ultimately terminated Cood at Lee's insistence. The jury did not learn of Cood's termination.

Indeed, Bishop claims at least eight or nine named Trendwest employees were terminated, demoted, or denied promised promotions in the months after the Walnut Creek meeting, and in the wake of their having taken medical leave. With the exception of Mirzadegan, evidence of these other terminations was not allowed in the trial.

On July 24, 2004, Lee was reprimanded by Fiore in writing for various inappropriate comments, including those about employees out on medical leave. Still, Trendwest never made a public statement disavowing Lee's remarks. Both in the summary adjudication proceedings and at trial, Lee testified that he never again discussed employees out on disability leave after receiving the written reprimand.

Another matter upon which Lee was reprimanded pertained to one of Bishop's friends, Steve Alberti, with whom Bishop had worked for several years. Lee asked Bishop in a phone call who would be a good choice as project director in Walnut Creek,

and Bishop suggested Alberti. Alberti had taken a medical leave in April 2004 to undergo rehabilitation for alcoholism. Lee brushed aside Bishop's recommendation, calling Alberti a "fucking drunk." When Bishop told Lee that Alberti was a good friend, Lee responded that Bishop should "start choosing better friends."[6]

That night Bishop told Alberti about his conversation with Lee, and Alberti reported the incident to Fiore. The July 24 written reprimand criticized Lee for discussing Alberti's confidential medical issues "with Robert Bishop." The written reprimand was not before the law and motion judge when he ruled on the summary adjudication motion, but was attached to the motion for reconsideration. The jury also was not aware of the specific mention of Bishop in the reprimand, as it was redacted.

The parties stipulated at trial that Alberti was on disability leave in June 2004. Alberti filed a declaration in the summary adjudication proceeding saying he was demoted when he returned from disability leave, was ultimately terminated after approximately seven months on leave, and Trendwest refused to rehire him. Defendants moved in limine to exclude Alberti as a witness; he did not testify, and no testimony about his termination came before the jury.

At trial Lee denied making the "fucking drunk" remark, and instead told the jury that Bishop told *him* about Alberti's drinking problem. Lee admitted being "furious" with Bishop after Alberti reported the incident to Fiore. In the summary adjudication

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[6] Fiore's July 24 written reprimand also criticized Lee for remarks offensive to gays and lesbians, as well as "insensitive and inappropriate" comments about "other minority groups." Although the fact of the reprimand was before the court on the summary adjudication motion, the actual written reprimand—including the direct reference to Bishop—was not submitted until Bishop moved for reconsideration. The reprimand was admitted in a redacted form at trial. It appears that all references to Lee's racist and sexist statements were redacted, as were the references to Alberti.

The July 24 reprimand was neither the first nor last time Lee came to higher management's attention. An email dated June 25, 2004, from the CEO of WVO warned the HR director of WVO that Lee "probably need[ed] some immediate one on one training . . . before he blows himself and us up." By August 3, 2004, the same HR director recommended that Lee "go to sensitivity training (especially after the comment he made about women/minorities in sales management positions yesterday)."

filings, Lee admitted saying that Alberti would not be promoted after coming off medical leave, but that did not come out in the trial.

Lee also accused another employee of "fak[ing] a heart attack" when he suffered a panic attack during a meeting in which he confronted Lee.[7] This evidence came in through Lee's videotaped deposition.

D. The post-San Francisco period

In August 2004, Lee transferred Bishop to the Novato office, with a significant reduction in pay. In October 2004, Lee promoted Bishop to the Windsor office as co-project director, where he was very successful and later became sole project director.

In February 2005, Lee himself was promoted to southern California as regional vice president of sales. For the few remaining months of Bishop's tenure in Windsor, he was not supervised by Lee and had no contact with him.

III. BISHOP'S SOUTHERN CALIFORNIA PERIOD

A. Alleged harassment in Oceanside and demotion to San Diego

In mid 2005, after a brief telephone interview, Lee promoted Bishop to the position of project director of Trendwest's Oceanside office. Bishop started work there on July 23, 2005, and Lee once again had supervisory authority over him, although Bishop's immediate supervisor was Doug Park.

Bishop claims Lee began harassing him within two weeks after he transferred to Oceanside. He made remarks that Bishop found offensive, but none were aimed at Arabs or those who associate with Arabs, and they were not otherwise of a bigoted nature. Rather, they were criticisms of Bishop's performance and his store's sales.

Bishop claims he performed well in Oceanside, consistently earning bonuses. Trendwest claims he did not meet sales objectives.[8] In any case, by late 2005 and

[7] Lee also called a female employee who was out on leave with heart problems a "sissy" and said she "needs to get her butt back in here or she [won't] have a job." This evidence was not allowed at trial.

[8] According to Bishop, a 10 percent closing rate was the norm throughout Trendwest, but his objectives were raised to as much as 14 percent due to higher costs of

continuing into January 2006, Bishop was being encouraged by Park to increase performance.

In late January 2006, Lee demoted Bishop to assistant manager in the smaller San Diego office, which meant Bishop lost stock options and made significantly less money. No evidence was allowed at trial concerning Bishop's pre-demotion job performance or the reason for his demotion to San Diego.

B. Bishop's medical leave

Bishop plunged into a deep depression or "mental breakdown." A psychiatrist diagnosed him with "[m]ajor depressive disorder" and "generalized anxiety disorder" related to work stress. She gave him antidepressants, referred him to a counselor, and temporarily excused him from work.

On February 24, 2006, a few weeks after starting work in San Diego, Bishop began an approved medical leave under the CFRA (§ 12945.2). Bishop was notified in early April that his medical leave had been approved and would expire on May 18. Trendwest stipulated to the validity of Bishop's medical leave.

From the time Bishop started his CFRA leave until he was terminated by Trendwest, he and Lee had no further direct contact. However, Lee knew Bishop had gone out on disability leave shortly after being demoted, and Lee believed Bishop had "misused the medical leave system" in doing so. Lee found it "highly suspicious that within days of being demoted, . . . [Bishop] went on medical leave."

C. McDowell's offer to hire Bishop as an upgrade sales representative in Indio

While Bishop was still on leave, Larry McDowell, a Trendwest sales manager who was putting together an upgrade sales team for a new office in Indio, offered Bishop a job as an upgrade sale representative in that office, and Bishop accepted. McDowell told Lee that he wanted Bishop to work in Indio, and Lee approved the plan. Lee acknowledged

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tours in Oceanside. He consistently met the 10 percent goal but was unable to achieve the increasingly higher goals set by his managers.

as much at trial, but in his declaration in summary adjudication he claimed that McDowell did not have authority to make a job offer to Bishop.

However, several witnesses, including Lee, testified at trial that McDowell had been delegated the task of putting together a sales team for Indio. The Indio office opened in July 2006, about six weeks after Bishop's leave expired, and several months after the office was originally scheduled to open. We shall discuss later in this opinion the issue of when the job offer was made, and how that might have affected a jury's assessment of Bishop's claims.

D. Bishop's administrative termination in May 2006

On May 15, 2006, James Massengill, HR information systems supervisor for Trendwest's parent company, WVO, based in Orlando, Florida, sent an automatically generated letter reminding Bishop that his approved medical leave would soon expire. The letter said Bishop would "need to be administratively terminated" if he did not return to work by the end of his leave period.[9] Trendwest never sent Bishop any later written notice that he had actually been terminated.

As of May 19, Bishop's doctor had not yet certified him to return to work. Trendwest persistently has claimed that Bishop was "automatically, administratively terminated" by Massengill effective May 19, 2006, based on a consistently applied company policy. However, the paperwork terminating Bishop was not processed until June 12, 2006, a delay for which Trendwest offers no explanation.

Bishop claims he called Ingrid Magana in Trendwest's regional HR department after receiving Massengill's letter. She told him not to worry; he just needed to get a note from his doctor saying that he was ready to return to work, turn it in to the office where he last worked, and then report to the Indio office. Magana did not recall any such

[9] Massengill's letter also informed Bishop that he could reapply if he were terminated. The letter did not specify a termination date, but Bishop knew his CFRA leave expired on May 18. The letter also informed Bishop that he could apply for an "accommodation" for a continuing disability, but did not specify that an extended leave could be a form of accommodation. (See *Hanson v. Lucky Stores* (1999) 74 Cal.App.4th 215, 226.)

conversation with Bishop. In fact, Magana did not work in HR at the time Bishop received Massengill's letter. She had transferred out of that department on April 24, 2006. Bishop acknowledged the phone call could have happened sometime before Magana transferred out of HR.

E. Bishop's ouster from the Indio training program

Whatever Bishop's status in the eyes of HR, both he and McDowell were operating under the belief that he was still employed by Trendwest during this period and could return to work when the Indio office opened. In mid to late May, before the new office opened, Bishop went to Oceanside to meet the Indio sales staff, and in late June went to the Indio office for further training.

On June 26, 2006, Bishop's doctor certified that Bishop was "stable to return to work." Bishop claims he gave the doctor's note to Joanne Kerns, regional director of administration, when he saw her in Indio later that day or the next, and she said she would deliver it to the San Diego office. Kerns denied receiving the doctor's note from Bishop.

When Laura Robbins, HR director for southern California, learned Bishop was going through training in Indio, she made an urgent call to Lee, leaving him a voice mail message that Bishop had been administratively terminated and should not be attending training. When Lee called her back, she told him Bishop might not be eligible to be rehired due to an earlier co-workers complaint about him, although it ultimately proved not to be an impediment to rehiring him.[10]

Lee called Jim Friedman, McDowell's supervisor in Indio, and told him Bishop had been terminated and should be told to call HR if he wanted to be rehired. Friedman did not testify. According to McDowell, however, Friedman passed that information on to McDowell, who notified Bishop. Bishop claims he was "booted . . . out" of the Indio office; his complaint alleged that McDowell told him that he was "not rehirable."

[10] Neither the nature of the complaint, nor even the fact of a complaint, was in evidence at trial. It was referred to as "something that might have affected Mr. Bishop's eligibility to be rehired."

Later that day, McDowell called Lee to see why Bishop could not attend training, since Lee had previously approved Bishop's placement in Indio. Lee told him that Bishop had exceeded his maximum medical leave and had been administratively terminated, and he would need to go through HR if he wanted to be rehired. McDowell could not recall whether Lee told him that Bishop was unlikely to be rehired. Lee, though, admitted telling McDowell that Bishop was "not likely to be rehired." He said if McDowell wanted Bishop in Indio, he was "going to have to go to bat for him" because Lee "was not a big fan of [Bishop's] by this point." Lee testified at trial, however, that he never told McDowell or Friedman they could not hire Bishop, and McDowell confirmed this.

Later that evening, June 28, 2006, Lee sent an email to Robbins saying that Bishop "was administratively terminated and for him to come to work he would have to be re-hired and that is NOT gonna happen!!" The email says he also told McDowell that Bishop was "not gonna" be rehired. The email was admitted at trial for a limited purpose.[11] Robbins responded that no one in HR had spoken to Bishop, but she did not check with Magana before making that statement.

F. Trendwest's failure to rehire Bishop

Bishop claims he called Robbins in HR after he was ousted from the Indio training class. She told him he had been administratively terminated and would have to reapply if he wanted to be rehired. He explained the circumstances, and she promised to look into the matter and call him back, but she never did. Robbins denied receiving any such phone call from Bishop, but Bishop's wife testified she was present and heard him call Robbins. Bishop said he also called Magana again and left her a message, but she did not return his call.

When Robbins and Magana failed to return his phone calls, Bishop concluded that Lee had caused him to lose his job.

[11] Because Bishop admittedly was not aware o f the email at the time, the jury was not allowed to consider Lee's email in deciding whether any attempt by Bishop to reapply would have been futile.

Trendwest presented evidence at summary adjudication that Lee would not have been "a decision-maker" and would have had "little or no role" in the rehiring decision. At trial, Lee, Robbins, Kent Keoppel, executive vice president of HR for WVO, and Kim Rimmasch, executive vice president of sales and marketing for WVO, all testified that Lee was not involved in rehiring. Rimmasch and Lee himself admitted, however, that Lee could have "input" on such a decision. Robbins also testified in her deposition that Lee could "make comments" on a rehiring decision but would not make the final decision.

In addition, both Bishop and Magana testified at trial that Lee could and sometimes did play a role in rehiring decisions. Angela Rockwood, a longtime Trendwest sales manager, also testified that Lee "had a thumb in everything in the region as well as in the sales offices" and was "very involved" in personnel issues in the 2006 period.

Bishop, in any case, descended into a deeper depression. Bishop's psychiatrist discouraged him from returning to work in the timeshare business, and he thereafter attempted to start his own businesses, rather than returning to Trendwest or another timeshare sales company.

Meanwhile, Lee was again promoted, and by the time of trial was the vice president for front line sales, operating out of Las Vegas, Nevada.

IV. THE COMPLAINT

On April 13, 2007, Bishop filed a complaint with the DFEH, which resulted in issuance of a right-to-sue notice. On April 23, 2007, Bishop sued Trendwest and related entities, as well as Lee, for multiple causes of action under FEHA, CFRA, and common law: (1) discrimination under FEHA based on his medical condition (§ 12940, subd. (a)); (2) discrimination under FEHA based on his association with Syrian Muslims (§§ 12926, subd. (m), 12940, subd. (a)); (3) violation of the CFRA (§ 12945.2, subd. (a) & (c)(3)(C)), which includes an anti-retaliation provision (§ 12945.2, subd. (*l*)(1)); (4) wrongful termination in violation of public policy; (5) retaliation based on Bishop's opposition to Trendwest's unlawful employment practices (§ 12940, subd. (h));

(6) harassment based on Bishop's association with protected classes (§§ 12926, subd. (m), 12940, subd. (j)(1)); (7) intentional infliction of emotional distress; (8) breach of express or implied contract; and (9) breach of the implied covenant of good faith and fair dealing. The first through third, eighth and ninth causes of action were asserted against the corporate defendants only; the remaining claims were asserted against all defendants.

V. MOTIONS FOR SUMMARY JUDGMENT AND SUMMARY ADJUDICATION

On February 15, 2008, the defendants all moved for summary judgment or, in the alternative, summary adjudication on all claims. In addition, Wyndham moved for summary judgment because neither it nor Cendant, its predecessor corporation, had been Bishop's employer. On April 30, 2008, the court granted Wyndham summary judgment and summarily adjudicated Bishop's second and fourth through ninth causes of action in favor of all defendants.

With respect to the second and sixth causes of action—associational discrimination and harassment under FEHA—the court found Bishop had failed to make out a prima facie case because he presented "no evidence that the termination was due to [his] association with Syrian and Arab employees." Moreover, since Bishop had first filed his complaint with the DFEH on April 13, 2007, the FEHA statute of limitations precluded his raising any claims based on events that occurred more than one year prior to that date. (§ 12960, subd. (d).) Since all of the alleged acts of harassment and discrimination against Arabs occurred prior to April 13, 2006, his associational claims were time-barred.

The court also rejected Bishop's argument there was a continuing violation that excused his late filing, emphasizing that Lee's promotion of Bishop to project director in Oceanside in July 2005 effectively cut off any claim based on a "continuous course of

negative treatment."[12] The court also found no evidence to support a reasonable inference that Lee's anti-Arab bias was linked to his dislike of people who took medical leave. Therefore it summarily adjudicated the second and sixth causes of action in defendants' favor.

With respect to the first and third causes of action—FEHA disability discrimination and CFRA violation—the law and motion court identified three potential adverse employment actions within the one-year statutory period: (1) Bishop's administrative termination on May 19, 2006, when he failed to return from medical leave after 12 weeks; (2) the termination communicated to him by McDowell in late June or early July 2006, while he was in Indio training for what he thought was his new position; and (3) the failure to rehire him when he called Robbins and expressed interest in the job in Indio.

The court disposed of two of those factual theories by summary adjudication in favor of defendants. First, it ruled there was no factual dispute that Trendwest terminated Bishop in May 2006 pursuant to a "consistently applied" policy of "automatically, administratively" terminating employees who could not return from medical leave after 12 weeks. It further found "no evidence of Lee's involvement" in Bishop's May termination, and therefore any retaliatory animus Lee might have harbored based on his belief that Bishop was malingering could not have influenced the termination decision.

The court also summarily adjudicated in defendants' favor the second identified possible adverse action, namely Bishop's having been "cut from the Indio training program" in late June or early July 2006. The court did find "evidence of Lee's involvement," but "insufficient evidence to create a triable issue . . . [of] discriminatory intent."

[12] To counter this point, Bishop concocts a complicated theory that even the Oceanside promotion was part of Lee's campaign to cleanse the company of all Arabs and Arab sympathizers and to advance his own personal vendetta. We reject Bishop's theory as mere speculation, unsupported by any evidence.

The court did find a triable issue of fact as to whether Lee may have "stymied" Bishop's attempt to be rehired based on a possible discriminatory animus toward the disabled or those who take CFRA leave. It noted that Bishop took steps to initiate the reapplication process by calling Robbins and Magana, but they never got back to him. In addition, Lee's June 28 email to Robbins "clearly raises the inference that Lee opposed Plaintiff being rehired and injected himself into the rehire process." Therefore, the court ruled that Bishop could go to trial on Trendwest's failure to rehire him, but it eliminated the May 2006 administrative termination and the expulsion from the training program as grounds for recovery.

The court also summarily adjudicated even the rehiring issue in favor of Lee personally, on grounds that an individual supervisor cannot be held liable for CFRA retaliation. (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173; *Grobeson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, 796-798 [*Jones* applies retroactively]; *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 287.)

Since the court found no triable issue of material fact surrounding Bishop's termination, it also summarily adjudicated the wrongful termination claim (fourth cause of action) in defendants' favor.

Bishop's FEHA retaliation claim (fifth cause of action) under section 12940, subdivision (h), was also resolved against him because he failed to show that he engaged in any protected activity during his employment at Trendwest. (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 874 (*Thompson*).)

The court also granted summary adjudication to defendants on Bishop's claim of intentional infliction of emotional distress (seventh cause of action) because Bishop presented no evidence that defendants' conduct "was so extreme and outrageous" as to allow for such recovery.

Finally, Bishop had voluntarily dismissed the contract and implied covenant claims (eighth and ninth causes of action), so the court summarily adjudicated those claims as well.

These rulings eliminated all claims against Lee, as well as all claims based on Lee's harassing conduct. They left Bishop to pursue only his claims related to Trendwest's failure to rehire him *after* his ejection from Indio, and based only on disability discrimination or retaliation for having taken medical leave.

The court also granted Wyndham's separate motion for summary judgment because there was no legitimate dispute that neither it nor its predecessor, Cendant, was ever Bishop's employer. Thus, Wyndham was eliminated from the lawsuit, leaving WVO and Trendwest as the sole defendants.

On May 14, 2008, Bishop filed a motion for reconsideration, which was denied on June 10, 2008.

VI. THE TRIAL

A. In limine motions

Although the rulings on summary adjudication precluded Bishop from asserting *claims* based on associational discrimination, it was not until the in limine motions that all *evidence* relating to anti-Arab animus was excluded. Not all evidence from the northern California period was excluded, however. Bishop was allowed to present evidence of Lee's statements in the Walnut Creek meeting in June 2004 regarding employees on medical leave, as well as other evidence from the northern California period relating to Lee's attitudes toward and treatment of disabled employees and those who took medical leave. The trial court allowed Bishop to testify regarding the fact of his January 2006 demotion to San Diego, as well as the circumstances of his termination, but not the reasons for his demotion or his mental crisis. The jury was also told repeatedly throughout the trial that the lawfulness of the termination itself was not at issue.

As noted above, Bishop was not allowed to present evidence that other Trendwest employees were terminated after taking CFRA medical leave, as such evidence was deemed "me too" evidence, which defendants argued was irrelevant, more prejudicial than probative, confusing, and time-consuming. The only termination the jury heard about—other than Bishop's—was Mirzadegan's.

B. Directed verdict on failure to rehire based on disability discrimination

After the close of evidence, defendants moved for a directed verdict on both of Bishop's remaining claims. The court granted a directed verdict on the FEHA disability discrimination claim, but denied the motion with respect to the CFRA retaliation claim.

The court found no evidence that the failure to rehire Bishop after his administrative termination was due to his depression, as opposed to retaliation for having taken medical leave. The court said "there was no evidence that the . . . alleged refusal to hire had anything to do with a particular disease or disorder."

C. Issues submitted to the jury

Given the previously described rulings, the jury was given only the CFRA retaliation claim to decide, and even that was severely restricted by the time it went to the jury.

Trendwest's defense was simple: it had not violated any of Bishop's rights in failing to rehire him because he never filled out a formal written application form after he was terminated and did not comply with the other formal rehiring requirements.[13] Thus, it was Bishop's failure to move the process forward that prevented his rehiring.[14]

Bishop admitted he never formally applied to be rehired, but explained that was because he believed he had never been terminated and remained an employee while in training in Indio. Robbins never called him back, no one from Trendwest ever gave him an application, and no one specifically told him to fill one out. He thought he should not

[13] In addition to a written application, Trendwest's policy manual required a former employee seeking to be rehired to submit to a drug test, a personality test, and a background check. Trendwest's transfer policy required a sales employee transferring from one office to another to obtain the written approval of the project director of the office he was leaving, as well as that of the project director of the office to which he planned to transfer.

[14] When Bishop, as a former employee, was rehired into the northern California region in May 2004, he was sent a letter offering him the job on May 4, but he did not fill out an application until May 26, 2004. This seems to suggest greater flexibility than the company wishes to acknowledge with regard to its hiring practices.

have been terminated in the first place and believed Lee was behind it. He thought any further attempt to be rehired would be futile.

Bishop admitted he did not obtain the written approvals required to transfer to Indio before he showed up for the training program. His attorneys made an offer of proof, however, that Park, then the project director in San Diego, had given him oral approval to transfer to Indio.

But Robbins testified that, since Bishop did not fill out an application, she had no reason to review his personnel file at the time to see if he was eligible for rehire. After reviewing Bishop's file in connection with this lawsuit, Robbins found the earlier co-worker complaint would not have prevented Bishop from being rehired.

Indeed, Trendwest insisted at trial, if only Bishop had filled out a written application form, he, in fact, *would* have been rehired. Defense counsel told the jury that by failing to fill out an application form, Bishop "never gave [Trendwest] a chance to rehire or to not rehire him." He said Bishop "had no desire to go back" to Trendwest, and he effectively told Trendwest to "take this job and shove it."

In defining "failed to rehire," the court instructed the jury that Bishop had to prove he "applied and was qualified for the position at Trendwest." "Applied . . . for the position," in turn, was defined—at defendants' request—as requiring Bishop to "prove that he performed all the tasks required by the employer and requested by the employer."[15]

Based on the jury instruction emphasizing Bishop's need to comply with Trendwest's procedures, as well as its instruction defining "futility," [16] the jury's role was

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[15] This instruction was derived from *Levy v. Regents of University of California* (1988) 199 Cal.App.3d 1334, 1346-1347, *Ibarbia v. Regents of University of California* (1987) 191 Cal.App.3d 1318, 1328-1329, and *Tagupa v. Board of Directors* (9th Cir. 1980) 633 F.2d 1309, 1312.) Those cases involved allegations relating to an initial failure to hire, not failure to rehire. The law and motion court also distinguished them on grounds that "the plaintiffs failed to take steps explicitly asked of them."

[16] The court ultimately drafted a special instruction on futility, invoking *Teamsters v. United States* (1977) 431 U.S. 324, 366-367, which held that nonapplicants

severely circumscribed. Having been given a special verdict form with 11 questions, it ultimately answered only two preliminary questions: (1) "Did Robert Bishop prove by a preponderance of the evidence that he applied for the sales job in Indio?" and (2) "Did Robert Bishop prove by a preponderance of the evidence that it would have been futile for him to have applied for the sales job in Indio?" The jury responded "no" to both questions.

Having failed to establish that he complied with Trendwest's formal requirements for rehiring, Bishop never received a jury verdict on whether retaliation for having taken medical leave was a motivating reason for Trendwest's failure to hire him for a sales job in Indio, much less for terminating him in the first place or ejecting him from the training program.

D. The judgment and subsequent proceedings

On July 25, 2008, judgment was entered for defendants Trendwest and WVO. Bishop filed a notice of appeal on August 7, 2008, with an amended notice to correct clerical errors filed on August 26. On September 2, 2008, judgment was entered in favor of defendants Lee and Wyndham, in accordance with the April 30 order on summary judgment and summary adjudication.[17]

On August 8, 2008, defendants filed in the trial court a memorandum of costs claiming $68,366.60. Bishop filed a motion to strike on August 27. After further briefing, on October 15, 2008, the court awarded defendants costs of $51,969.46. Bishop filed a second notice of appeal from the postjudgment order on November 10, 2008. On March 1, 2010, we ordered the cases consolidated on appeal.

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could recover under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) (Title VII) if they had been deterred from applying for a job based on their knowledge of an employer's discriminatory practices. Trendwest successfully argued that the doctrine required a "discriminatory policy." We express no opinion on the correctness of this view.

[17] We exercise our discretion to deem the earlier notice of appeal properly covered this judgment as well. (Cal. Rules of Court, rule 8.104 (d)(2); *Cabral v. Soares* (2007) 157 Cal.App.4th 1234, 1239, fn. 2.)

DISCUSSION

APPEAL NO. A122517

I. ISSUES IN NO. A122517

Bishop challenges the law and motion court's summary adjudication of his associational harassment and discrimination claims based on the FEHA statute of limitations. He claims the associational harassment in northern California and his ultimate termination were all part of a continuing violation. (§ 12960, subd. (d).)

Bishop also claims the court improperly resolved factual issues in connection with his disability discrimination and CFRA retaliation claims, erroneously leaving only the failure to rehire him as a basis for recovery. He further contends the declarations of two of defendants' officers and employees, Roger Craig, California area HR director for WVO, and Brian Whitaker, HR generalist for Trendwest's Northwest Region, which would have supported his argument that Trendwest's disability leave policy was not consistently applied, were improperly excluded from evidence on summary adjudication.

Finally, Bishop contests the summary judgment entered on behalf of Wyndham on grounds that it was not Bishop's employer, pointing to his own belief, as well as evidence from other Trendwest employees, that Wyndham's predecessor in interest (Cendant) was their ultimate employer.

With respect to the trial, Bishop contends the trial court erred in excluding evidence of anti-Arab animus on the part of Trendwest management that occurred more than one year before he filed a FEHA complaint, claiming such evidence was nevertheless relevant to his remaining disability discrimination and CFRA retaliation claims because it was relevant to the issue of the futility of his filing a formal application. He also cites as error the exclusion of testimony by his human resources expert, Dr. Jay Finkelman.

Bishop also challenges the directed verdict on his claim of disability discrimination, which left only the CFRA retaliation claim for the jury.

Finally, Bishop claims instructional error because the trial court refused to instruct on his requested definition of "applicant" and failed to instruct that one manager's

hostility toward employees who take medical leave may be attributed to other Trendwest employees who actually made the decision not to rehire him.

II. LEGAL PRINCIPLES

FEHA prohibits harassment or discriminatory employment actions based on an employee's "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation." (§ 12940, subd. (a).) The statute equally forbids harassment, retaliation**,** or discrimination against an employee who "*is associated with* a person who has, or is perceived to have, any of those characteristics." (§ 12926, subd. (m) (italics added).)

FEHA also contains an anti-retaliation provision, which forbids an employer "to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." (§ 12940, subd. (h).) In order to state a claim under this section the employee must show that he or she engaged in some "protected activity" as described by the statute. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1125.)

The CFRA grants employees a right to take off up to 12 weeks per year for certain family needs, such as caring for a newborn baby or ill parents, as well as for the employee's own "serious health condition." (§ 12945.2, subd. (c)(3).) The employer must reinstate the employee to the same or comparable position if he or she returns to work within the 12-week leave period. (§ 12945.2, subd. (a).)

The CFRA incorporates its own anti-retaliation provision,[18] which reads: "It shall be an unlawful employment practice for an employer to refuse to hire, or to discharge, fine, suspend, expel, or discriminate against, any individual because of any of the

[18] Both the FEHA and the CFRA retaliation provisions were initially invoked by Bishop, but the FEHA retaliation claim was resolved against him on summary adjudication. We are not sure it makes a difference to our analysis, but we restrict our consideration of Bishop's medical leave retaliation claim under the CFRA provision (§ 12945.2, subd. (*l*)), rather than under the FEHA provision (§ 12940, subd. (h)).

following: [¶] (1) An individual's exercise of the right to family care and medical leave provided by subdivision (a). [¶] (2) An individual's giving information or testimony as to his or her own family care and medical leave, or another person's family care and medical leave, in any inquiry or proceeding related to rights guaranteed under this section." (§ 12945.2, subd. (*l*)(1) & (2).) (*Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 261 (*Dudley*).)

Summary judgment may be granted only if the court finds there is "no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc. § 437c, subd. (c).) Summary adjudication may be granted only on "one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty." (*Id.*, § 437c, subd. (f)(1).)

We review a grant of summary judgment or summary adjudication de novo. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 453 fn. 3; *Knight v. Hayward Unified School Dist.* (2005) 132 Cal.App.4th 121, 128.) We must " 'view the evidence in the light most favorable to plaintiff[] as the losing part[y]' and 'liberally construe plaintiff['s] evidentiary submissions and strictly scrutinize defendan[t's] own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff['s] favor.' [Citation.]" (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 96-97.) Similarly, any reasonable inferences from the plaintiff's evidence that favor his claims must be accepted as true. (*Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 148.) In fact, "the evidence must be incapable of supporting a judgment for the losing party in order to validate the summary judgment." (*Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 877; accord, *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 308.)

Under the burden shifting approach of *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, the plaintiff must offer a prima facie case of discrimination or harassment. (*Id*. at p. 802.) If he or she makes such a showing, the burden then shifts to the defendant to offer a legitimate, nondiscriminatory reason for the adverse employment action. (*Id*. at pp. 802-803.) If the employer offers such an explanation, the burden shifts back to the

employee to prove by a preponderance of the evidence that the purported nondiscriminatory reason is a sham or pretext, and the real reason for the adverse action was prohibited discrimination. (*Id*. at p. 804.)

This, of course, describes the shifting burdens at trial, but at the summary adjudication phase, the moving party retains the ultimate burden of proving there is no triable issue of fact on one or more causes of action. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 356 (*Guz*); *Sandell v. Taylor-Listug, Inc.*, *supra*, 188 Cal.App.4th at p. 309.) This is often accomplished by requiring an employer who moves for summary judgment or summary adjudication to proceed directly to the second step of the *McDonnell Douglas* test, namely, to demonstrate a legitimate, nondiscriminatory reason for the adverse employment action. (*Guz*, *supra*, 24 Cal.4th at pp. 356-357; see also *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 520, fn. 2; *Nelson v. United Technologies* (1999) 74 Cal.App.4th 597, 613 (*Nelson*).)

Even after an employer has produced competent evidence of a nondiscriminatory reason, it is entitled to summary judgment only if "the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Guz*, *supra*, 24 Cal.4th at p. 361.) "Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. These include the strength of the plaintiff's prima facie case, the probative value of [any] proof that the employer's explanation is false, and any other evidence that supports the employer's case." (*Id.* at p. 362.)

III. THE COURT PROPERLY ELIMINATED BISHOP'S CLAIMS OF ASSOCIATIONAL DISCRIMINATION, HARASSMENT, AND RETALIATION BY SUMMARY ADJUDICATION.

A. The law and motion court correctly found the associational discrimination and harassment claims were barred by the statute of limitations.

Despite the leniency with which we review Bishop's claims, his most potent weapon in this lawsuit—Lee's unsavory character—cannot overcome a failure to show that Bishop took reasonably prompt action to complain about the alleged associational

harassment, retaliation, and discrimination that he now claims he suffered. (§§ 12926, subd. (m), 12940, subds. (a), (h), (j).) There was also a glaring lack of evidence that Lee's animosity toward Arabs and other minority groups had anything to do with Bishop's termination in May 2006 or the failure to rehire him thereafter. Even when the offensive remarks were at their peak, and his Arab co-workers allegedly were being illegally fired, Bishop filed no "associational" discrimination or harassment complaint with DFEH. And no timely lawsuit.

Section 12960, subdivision (d), establishes a one-year statute of limitations for an employee to file a complaint with the DFEH, yet Bishop's DFEH complaint was not filed until nearly three years after Mamou was terminated, and approximately 28 months after Mirzadegan was terminated in December 2004, which was the last anti-Arab action or remark cited by Bishop.

To prevail against a statute of limitations defense, Bishop would have to identify at least one incident of associational harassment or discrimination occurring within the limitations period (i.e. after April 13, 2006). (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1056 (*Yanowitz*); *Thompson*, *supra*, 186 Cal.App.4th at p. 880.) He failed to do so. Thus, any claim Bishop might otherwise have had for associational discrimination or harassment had already expired long before he actually filed his complaint. The trial court correctly ruled that any cause of action based on discrimination against associates of Arabs during the northern California period was time-barred.[19]

[19] Bishop argues in his reply brief that the one-year limitations period should not be strictly enforced because of the policy of allowing employers and employees to attempt to resolve their differences informally without depriving the employee of a cause of action if the efforts at reconciliation prove futile. (See *Yanowitz*, *supra*, 36 Cal.4th at pp. 1056, 1058, fn. 18) Such an argument is irrelevant to the facts before us, as Bishop makes no showing whatsoever that he was engaged in any sort of conciliation with Trendwest at any time before he was terminated.

B. There was no "continuing violation" that would allow Bishop to recover for associational harassment or discrimination.

To circumvent the limitations issue, Bishop claims the harassment he suffered in northern California, his demotion to Novato, the renewed harassment in Oceanside, the demotion to San Diego, and his ultimate termination without being rehired all were part of an ongoing campaign against him—because of his association with Arabs—dating back to his association with Mamou and Damlakhi in northern California in 2004. Bishop also claims that Lee's anti-Arab sentiments and his hostile attitude toward employees who took disability leave were linked, so that his termination in May 2006 was the culmination of events that began before the one-year cut-off date and continued up until his termination. Therefore, he invokes an exception to the one-year statute of limitations under the "continuing violation" doctrine. (*Yanowitz*, *supra*, 36 Cal.4th at p. 1056; see also, *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823; *Nazir*, *supra*, 178 Cal.App.4th at p. 270.)

"Under that doctrine, an employer is liable for actions that take place outside the limitations period if these actions are sufficiently linked to unlawful conduct that occurred within the limitations period." (*Yanowitz*, *supra*, 36 Cal.4th at p. 1056.) The doctrine requires a "temporally related and continuous course of conduct," its purpose in part being to allow the plaintiff sufficient time to determine whether a singular act of retaliation or harassment will develop into an actionable course of conduct. (*Id.* at p. 1058.)

In applying the continuing violation doctrine, we examine three factors: whether the employer's actions (1) were sufficiently similar in kind; (2) have occurred with reasonable frequency; and (3) have not acquired a degree of permanence. (*Yanowitz, supra*, 36 Cal.4th at p. 1059.)

Bishop's claim fails at the outset, as he presented no evidence of any offensive remarks or hostile acts toward Arabs or their associates during the limitations period. The bigoted statements alleged by Bishop in northern California were not sufficiently "similar in kind" to any conduct during the limitations period to warrant application of

the continuing violation doctrine. Because the anti-Arab remarks were discontinued in southern California, there also was no sufficient regularity or frequency of such comments.

As to whether the adverse employment actions had "acquired a degree of permanence" to start the statute of limitations running, this factor, too, disfavors Bishop. (*Yanowitz*, *supra*, 36 Cal.4th at p. 1059.) This determination turns on whether the "employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile." (*Richards v. CH2M Hill, Inc.*, *supra*, 26 Cal.4th at p. 823; accord *Yanowitz*, *supra*, 36 Cal.4th at p. 1059, fn. 19.) Bishop could have made a complaint with DFEH when he was demoted to the Novato office, or when he was demoted to San Diego, but he filed no complaint within a year of either of those actions. These concrete adverse employment actions certainly provided the degree of permanence required to start the statute of limitations running.

To shore up his claim of a continuing violation, Bishop attempts to establish a link between Lee's animus toward Arabs and his suspicious attitude about employees who took medical leave. The attempt fails. The two groups of allegations have no logical connection, and the law and motion court properly found there was no triable issue of fact on this point. Any inferential chain tying Lee's anti-Arab remarks in 2004 to a non-Arab employee's termination in 2006 after he took a disability leave is extremely attenuated at best. We agree with the court below that Bishop's evidence did not raise a reasonable "inference that Lee linked taking fake disability leave with employees of Syrian and Arab descent, so that any discriminatory animus toward these groups is one and the same."[20]

[20] The court found Bishop had shown "only that Lee dislikes Tamer Mamou, . . . and that Lee thought Mamou may have encouraged the misuse of disability leave. . . . This does not create an inference that Lee linked Syrian and Arab employees as a whole with the misuse of disability leave or that any animus Lee had toward Syrian and Arab employees translated to an animus toward employees who took medical leave."

Bishop points to nothing more probative than a statement by Lee in his deposition that he "suspected that—based on [his] previous experience in northern California and the fact that [Bishop] came from northern California and had been associated with the people in northern California, that it was possible that he had misused the medical leave system . . . ." Lee's reference to "northern California" was not an overt reference to Arabs. And Lee's suspicion seemed to be tied more to the timing of Bishop's leave than anything relating to his affiliation with Arabs, as Lee found it "highly suspicious that within days of being demoted . . .[Bishop] went on medical leave."

In fact, later in his deposition Lee testified the phony medical leave "does seem to tie back to [Mamou] in a lot of cases. However, [medical leave has] been misused by a lot of people, not—not just Tamer Mamou or—or people related to Tamer in one way or another." Bishop's brief excerpt from Lee's deposition, considered in context, did not create a triable issue on a "continuing violation" theory.

C. Bishop failed to present evidence that his association with Arabs amounted to a protected activity or was related to his job loss, so as to support harassment, discrimination, or retaliation claims.

In addition, Bishop presented no evidence raising a triable issue that he was terminated in 2006 *because* he had friendly relations at work with Mamou and Damlakhi two years earlier. Obviously, Lee had a hard-driving, heavy-handed management style, a wicked tongue, and an insulting manner. He not only admitted he made the "dog's ass" criticism of Bishop, but said he "regularly" uses that phrase to motivate "underperforming" offices. But FEHA is not concerned with crude behavior, ill temper, or poor management skills. Some of Lee's offensiveness was doubtless due to his confrontational personality, not bigotry per se. As the law and motion court said, "Contemptible as [Lee's] conduct may be, it cannot reasonably be seen as a discriminatory act."

The law and motion court observed, "There is some vague evidence that before [their] first encounter, Lee knew of Plaintiff's friendship with employees of Syrian and Arab descent. . . . However, even if Lee knew of this friendship, without more evidence,

this does not create a reasonable inference that Lee was hostile toward Plaintiff because of this association, rather than the performance of Plaintiff's store." We agree that Bishop should not be allowed to "piggy back" on the claims of Arab Muslims, who may have suffered actual discrimination at Trendwest, merely by portraying himself as their worksite friend.

There is scant legal authority discussing under what circumstances employees may recover if they suffer discrimination or harassment because they are "associated with" a protected group. (§ 12926, subd. (m).) Based on our application of the FEHA statute of limitations, we need not venture a definitive opinion on that issue.

Nonetheless, a recent decision, *Thompson*, *supra*, 186 Cal.App.4th 860, filed after briefing in this case was completed, provides support for our conclusion that Bishop may not recover for associational discrimination or harassment because Lee's anti-Arab epithets and other bigoted comments were not directed at him. *Thompson* held that a white police officer could not recover for negative comments made by his superiors about African-Americans, even though he had provided a testimony in support of litigation initiated by an African American co-worker. (*Id*. at pp. 869, 876-878.) " '[O]nly harassment that specifically targeted those who associated with and advocated for African-Americans will result in an actionable hostile work environment claim for such individuals. . . .' [Citation]" (*Id*. at p. 878.)

Whatever the meaning of "associated with" in section 12926, subdivision (m), we are convinced that a valid claim of "associational" discrimination or harassment would require a greater showing than that made by Bishop here.[21] None of the discriminatory comments recited by Bishop were directed at him, and although Bishop claims he was harassed, nothing in the content of the harassment of *him* revealed a bias against those

[21] *Thompson* addressed the issue initially as one of standing, citing federal cases dealing with application of Title VII. (*Thompson*, *supra*, 186 Cal.App.4th at pp. 877-878.) The opinion does not even discuss associational protection under section 12926, subdivision (m). We need not decide whether we agree with *Thompson*'s analytical approach to agree with the ultimate result.

who affiliate with Arabs (e.g., he was never called an "Arab lover" or similar discriminatory epithet).

Bishop's case is even weaker than that in *Thompson*, *supra*, 186 Cal.App.4th 860, where the white police officer had provided litigation support to an African American officer. (*Id*. at p. 869, 876-878.) Bishop did not at any time in northern California make any complaint about Lee's treatment of his Arab friends.[22] Although he eventually helped Mamou and other former Trendwest employees in their lawsuits (see *Mamou*, *supra*, 165 Cal.App.4th at pp. 706, 710), that help was offered only after Bishop himself was terminated. During the time he remained in Trendwest's employ, Bishop professed loyalty to Trendwest and admittedly downplayed his friendship with his Arab co-workers to avoid confrontation with Lee. This factor also supports the court's disposition of the retaliation claim on grounds that Bishop had presented no evidence of a "protected activity," which is required for a claim under section 12940, subdivision (h).[23]

For these reasons we affirm the summary adjudication order insofar as it resolved the second, fifth, and sixth causes of action against Bishop.[24]

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[22] Bishop did, early on, ask Fiore why Lee was so hostile towards him. This appears to have been an entirely self-interested complaint having nothing to do with protesting the mistreatment of his Arab co-workers. Bishop never told Fiore that Lee's hostility toward him was founded on anti-Arab animus, or even that Lee's bigoted remarks offended him.

[23] Defendants also correctly point out that the FEHA retaliation cause of action was abandoned on appeal.

[24] Bishop also contends that, even if the law and motion court did not err in granting summary adjudication, the trial court erred in excluding testimony about Lee's racist remarks from the northern California period. Bishop argues that evidence of Lee's anti-Arab animus was not automatically rendered inadmissible as irrelevant to the claims remaining for trial. (Code Civ. Proc., § 437c, subd. (n)(1); *Raghavan v. Boeing Co.* (2005) 133 Cal.App.4th 1120, 1137.) He claims evidence of Lee's bigoted statements was still relevant to his claims for disability discrimination and CRFA retaliation because it would help to explain why he believed it was futile to fill out a new application. Because we will reverse the summary adjudication of these two causes of action—and a new trial will be required—we need not address this issue.

IV. SUMMARY ADJUDICATION WAS IMPROPERLY GRANTED ON CERTAIN FACTUAL THEORIES FOR BISHOP'S DISABILITY DISCRIMINATION AND CFRA RETALIATION CLAIMS BECAUSE THERE WERE TRIABLE ISSUES OF FACT AND BECAUSE THE COURT'S RULING IN EACH INSTANCE FAILED TO "COMPLETELY DISPOSE" OF THE CAUSE OF ACTION.

A. There was a triable issue of fact whether Bishop's administrative termination in May 2006 was "automatic" and part of a "consistently enforced" policy.

Trendwest's policy manual included a provision allowing it to administratively terminate employees who did not return to work after their 12 weeks of CFRA leave. In addition, Robbins swore in a declaration the policy was consistently applied during her tenure in HR beginning in January 2006. In apparent reliance on these evidentiary materials, the law and motion court found there was no legitimate dispute that Trendwest had a policy, consistently enforced in 2006, that all employees who failed to return from a CFRA leave after the expiration of their protected 12 weeks would be automatically, administratively terminated, and that Bishop was terminated in accordance with that policy. The court evidently found this showing was sufficient to meet Trendwest's burden on the second *McDonnell Douglas* step, offering a nondiscriminatory reason for the discharge.

Bishop argued the "administrative termination" was pretextual, presenting evidence that other Trendwest employees had been allowed to stay on disability leave for six months or more. He also presented evidence that even some Trendwest managers (including Lee himself) and high ranking HR personnel believed there was a six-month maximum medical leave policy. For instance, Magana, the HR generalist who had worked at Trendwest for ten years, testified in deposition and at trial that her supervisors had told her that medical leave lasted for six months. Indeed, Massengill himself, who processed Bishop's termination papers, testified in his deposition that CFRA (or FMLA)

leave lasted only 12 weeks, but "short-term disability medical leave" could last up to six months.[25]

Moreover, the language of Trendwest's policies was neither as clear, nor as hard and fast, as the law and motion court's ruling would imply. The relevant policy provides that "[i]n most cases" the employee would be "subject to" administrative termination, but "[t]his policy may vary in accordance with business needs . . . ." Bishop argues the manual was conflicting and confusing in this area, and thus a factual issue existed as to its proper interpretation.

Nevertheless, the court concluded that Trendwest's policy had "changed between 2005 and 2006," and Bishop's evidence of longer allowable leaves was not "from a relevant time period." Since January 1, 2006, the court concluded, the company consistently allowed only 12 weeks' leave. It credited none of Bishop's evidence regarding longer leaves because it found uncontradicted evidence of the change in policy. The 2005 policy provided, "Employees on leave for a period of time greater than six (6) months will be subject to Administrative Termination, which means that their right to reinstatement will cease." The policy apparently in effect when Bishop was terminated provided: "In most cases . . .employees on leave for a period of time greater than 12 weeks will be subject to Administrative Termination, which means that their right to reinstatement will cease. . . . This policy may vary in accordance with business needs or as required by applicable state or federal law." Exactly when the policy changed is somewhat unclear, as the Leave of Absence policy indicates it was "Revised 4/26/06" (while Bishop was on leave), and the subsection entitled, "To Request a Family or Medical LOA" indicates it was "Revised July 20, 2005."

Thus, the language of Trendwest's policies was neither as clear, nor as hard and fast, as the law and motion court's ruling would imply, as illustrated by the language, "[i]n most cases" the employee would be "subject to" administrative termination, but "[t]his policy may vary . . . ." The pamphlet Bishop was given entitled "What You

[25] Bishop was qualified for short-term disability benefits.

Should Know About Your Medical Leave" also states that employees are "subject to" administrative termination if they fail to return to work when their leave expires. Bishop argues that a factual issue existed as to the proper interpretation of these policies.

Besides, Bishop claims that even as of May 2006 Trendwest did not have an "automatic" and consistent administrative termination policy. No form of the word "automatic" appears in the policies, although the declarations of Robbins and Massengill—drafted by Trendwest's lawyers—included identical language that Bishop was "automatically, administratively terminated" in accordance with Trendwest's policy.

But Massengill's deposition testimony was substantially different, in that he testified such terminations were "not automatic," but "ha[d] to be reviewed" by local HR. The actual decision to terminate was "up to the site's discretion," and the site "absolutely" could instruct Massengill's office not to terminate the employee. Massengill's office always checked with the site before processing an administrative termination, and would not process the termination until it received from "southern California" the "information that [it] need[ed] to terminate" the particular employee. HR at the site could extend the medical leave and in some cases had extended it. As for the three-week delay in processing Bishop's termination (May 19-June 12), Massengill said it was most likely due to a delay by the southern California HR people in reporting whether Bishop was to be terminated or retained. Although the normal policy was to allow 12 weeks for CFRA leave, "it's up to the site's director, HR manager, whatever, to make the decision on whether to extend it." Even Robbins testified in deposition that she thought exception to the termination policy might be made for a brief additional period of leave.

This is hardly undisputed evidence of an "automatic" or "consistently applied" process. The term "automatic" implies that no human action or discretion was involved, as if the termination were accomplished by a computer upon the occurrence of the first day of unprotected leave. Yet Bishop's termination form was not processed until more than three weeks after his leave expired. And "consistently applied" suggests there is no

deviation allowed and no discretion involved, whereas Massengill's and Robbins's depositions showed substantial room for exercise of discretion.

Despite the foregoing evidence, Trendwest argues that the discrepancies between Massengill's declaration and his deposition are "much ado about nothing." Maybe a jury will conclude that. Maybe not. We review the discrepancies on summary adjudication, and read them as raising a triable issue of material fact whether Trendwest's administrative termination policy was "automatic" and was applied uniformly, and whether in Bishop's case it was applied in a neutral fashion or whether Lee's unfounded suspicions about Bishop's disability leave somehow tainted the process.

Moreover, there was more direct evidence that Massengill did not process Bishop's termination "automatically." In his deposition Massengill identified an email sent by his assistant to Robbins, asking, "Has he [Bishop] come back to work yet because he was supposed to be on [administrative termination] on 5/19/06."[26] No response to the email was produced. Massengill testified that if Robbins had responded to the email by instructing Massengill's office not to terminate Bishop, that request would have been honored, again discrediting Trendwest's claim that the administrative termination was "automatic."

Magana, who had worked in HR for four years, also testified that the company normally would contact employees who were out on medical leave to assess their status before they would actually be terminated; and Massengill agreed in his deposition that the site "absolutely" should do so. In Bishop's case, however, no such contact was made. This deviation from standard practice also could have lent support to an inference of discrimination or retaliation in the processing of Bishop's termination.

Finally, Jan Cannon, who had once been vice president of HR director for Trendwest, stated in her deposition in the *Wiley* case that HR would "update" an employee's manager before he or she was terminated. Cannon was also questioned

[26] Robbins nevertheless asserted under oath that the termination was handled entirely by Florida personnel. The email itself is not included in the record.

about an email in which Fiore commented on and made a "recommendation" about the termination of another employee (Larry Kenney) who had not returned from medical leave on time.

Indeed, having insisted throughout the summary adjudication proceeding that the termination was processed "automatically" by Massengill, and that Robbins was not involved, defense counsel admitted during in limine arguments that Robbins was involved, but "[t]hat's the extent of the local involvement" in southern California. Perhaps the full story has yet to be told.

The email to Robbins asked if Bishop had returned to work, but since Robbins worked in Irvine, and Bishop's last position was in San Diego, she would have had no basis for responding without consulting *someone else*. It is reasonable to infer she would have contacted either Lee (whose office was next door to hers) or someone in the San Diego office.[27] Notably, when Robbins became concerned about Bishop's presence in Indio, she did not call Friedman or McDowell, but rather Lee himself. But even assuming Robbins called someone in San Diego, the evidence presented by Trendwest does not foreclose the possibility that the San Diego contact may have consulted Lee before deciding that Bishop should be terminated.

Though Bishop claims he called Robbins to try to get reinstated as a sales representative in Indio, Trendwest has tried to cast doubt on that testimony based on Robbins's inability to remember the call. And though Trendwest now casts all blame on Bishop for failing to carry through with the application process, Lee testified in his deposition that if Bishop had in fact called HR, "they would've initiated the paperwork." Lee evidently intended to imply that no such phone call occurred, but his comment also implies that HR normally would have facilitated the rehiring. A jury should have been allowed to decide if Robbins was deterred from following that normal course by Lee's insistent email that Bishop was "NOT gonna" be rehired.

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[27] Massengill's May 15 letter was cc'd to the San Diego office. Massengill said this was because Bishop had last worked in that office, and the office would be informed of the impending termination "[s]o that they can contact the employee."

Finally, construing the evidence most favorably to Bishop, he had been offered a new job in Indio before his 12 weeks of leave expired, a job offer that could be a complicating factor, one that could have altered the manner in which Trendwest's written policy was interpreted and applied. A jury could reasonably conclude that, if McDowell's offer to bring Bishop onboard in Indio had been communicated to Robbins or Massengill before Bishop was administratively terminated, the proposed administrative termination would have been halted. Even Robbins admitted in her deposition that if she had known about McDowell's offer to hire Bishop in Indio, she would have "taken that into consideration" in deciding whether he should be terminated. Whatever may account for the lack of communication within Trendwest, and whomever may be to blame, Bishop was entitled to have a jury sort out the facts and ascribe responsibility.

B. There was a triable issue whether Lee was involved in the administrative termination.

The law and motion court also concluded there was "no evidence of Lee's involvement" in Bishop's administrative termination. This ruling theoretically could independently support the summary adjudication (but see section IV.D., *post*), as Lee was the only Trendwest employee whom Bishop accused of harboring discriminatory animus toward employees who took disability leave.[28] The law and motion court correctly noted, however, that Lee need not have been the "ultimate decisionmaker" for Trendwest to be liable under FEHA and CFRA; so long as he was involved in or influenced the termination decision, his discriminatory animus could be imputed to the actual decisionmaker. (*Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 114-116; *Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 667.)

[28] Perhaps Bishop was unaware, but the Sixth District's opinion in *Mamou* described Fiore as having a "a 'fear' that people were inappropriately using medical leave 'as a means of taking days off.' He evidently found such leaves objectionable even if an employee were truly sick: 'I felt that, in comparison to my own approach to work, if I'm sick or whatever, have stress or whatever, my opinion is people should still work and I still work.' " (*Mamou*, *supra*, 165 Cal.App.4th at p. 696.)

Granted, Lee, Robbins and Massengill declared under oath that Lee was not "involved" or played no "role" in the decision. But given the fact that the ultimate decisionmaker was never identified,[29] we cannot accept those declarations as eliminating a triable issue as to whether he may have influenced the decision.[30] Indeed, Trendwest insisted—and continues to insist—that *no employee* in southern California participated in the termination decision, despite clear evidence to the contrary.[31] (Cf. *Mamou*, *supra*, 165 Cal.App.4th at p. 726.)

Lee, of course, denied having any involvement in Bishop's termination. In the final analysis, his declaration was the only competent evidence to prove he was not "involved" in Bishop's termination. However, we cannot accept that sole evidence, where Lee may have signed the declaration having a particular meaning of "involved" in mind, and his definition may not have been as broad as the legal concept. Moreover,

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[29] Lee claimed he could not recall who told him that Bishop had not returned from medical leave. Lee admitted telling Park it was "just speculation" whether Bishop would return from leave. Park, by the time Bishop was terminated, had become project director in the San Diego office. If Lee's remark was interpreted by Park as a sign that Lee did not want Bishop back, then the decision to administratively terminate Bishop may well have been influenced by Lee's remark.

[30] Robbins testified in her declaration and at trial that Lee was not involved in the administrative termination. However, she would have had no knowledge whether Lee exercised influence through the sales department. Similarly, Massengill, whose declaration also said that Lee was not involved, admitted in his deposition that his statement only applied to a lack of involvement in processing the paperwork.

[31] This defense tactic is disturbingly similar to the one Trendwest used in Mamou's lawsuit where, represented by the same attorneys, Trendwest tried to blame upper management in a remote location for Mamou's termination, rather than acknowledging that Fiore participated in the decision. (*Mamou*, *supra*, 165 Cal.App.4th at pp. 726-727.) The Sixth District rejected Trendwest's argument that a distant participant's ambiguous declaration could support a summary judgment, holding that Trendwest had not "dispelled all triable issues of fact with respect to the participation of Fiore in Mamou's dismissal . . . ." (*Id.* at p. 726.) We paraphrase its conclusion, with which we agree: "It is Trendwest who seeks to establish beyond a triable issue of fact that any animus held by [Lee] was immaterial because [he was] not involved in [Bishop's] dismissal. For purposes of this appeal, the contrary inferences arising from Trendwest's own evidence must be accepted as true." (*Id.* at p. 727.)

while we do not judge credibility on a summary adjudication motion, a court may exercise discretion to deny summary judgment or summary adjudication "where the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof." (Code Civ. Proc., § 437c, subd. (e).) This is an appropriate case for the exercise of such discretion.

There is no question that Lee harbored a discriminatory animus toward employees who took disability leave, or at least those who abused their CFRA rights. And there was a huge body of evidence that Lee had a pre-existing mission to rid Trendwest of any employee who abused the leave policy.[32] Lee himself admitted he believed Bishop had "misused" the medical leave system, and also admitted he communicated that opinion to McDowell.

Since Trendwest has never identified the employee in southern California who actually gave the go ahead to process the administrative termination, we infer from Massengill's deposition that there is a triable issue of material fact about Lee's role in the administrative termination. If Lee intentionally withheld from HR information on the promised transfer for the purpose of seeing Bishop terminated, if Lee was or was not consulted by anyone or otherwise influenced anyone (such as Robbins or Park) in the administrative termination process, or if Lee acted (or failed to act) from a discriminatory or retaliatory motive, all are triable issues of material fact that should have been left to the jury.

C. There was a triable issue concerning Lee's role in the ouster of Bishop from the Indio training program.

As noted above, the law and motion court also found there was no triable issue regarding Bishop's ouster from the Indio training program because Robbins made that

[32] We do not suggest that a company may not terminate an employee who, in fact, has misused CRFA leave. (See, e.g., *McDaneld v. Eastern Municipal Water Dist. Bd.* (2003) 109 Cal.App.4th 702, 707-708.)

decision, not Lee. Again, we find a broader factual dispute about the role played by Lee in the ejection of Bishop from the Indio training program.

The law and motion court found evidence that Lee was *involved* in the ejection of Bishop from Indio, but concluded that Bishop had not raised a triable issue as to pretext. McDowell testified at his deposition in *Wiley* that he "was actually going to hire [Bishop] in [Indio], but Carter [Lee] said no."[33] By the time of his deposition in this case, however, McDowell testified that Friedman told him that Bishop had been administratively terminated and had to go back through HR to get rehired. [34]

The law and motion court concluded that McDowell's later deposition simply clarified his earlier testimony, noting that McDowell's testimony "does not reveal any discriminatory animus on Lee's part." It therefore found Bishop's evidence "does not create the inference that Defendants' proffered reasons for this termination— that Plaintiff had already been administratively terminated—are pretextual." The Indio expulsion, too, was thus foreclosed as a basis for recovery under either FEHA or CFRA. By this reasoning, the court effectively resolved a disputed fact rather than identifying it as a triable issue for the jury.

In addition, although the law and motion court did not discuss the timing of the job offer in Indio, we think it bears further examination. Because the Indio office was delayed in opening, Bishop's failure to report for work at the end of his medical leave was arguably not due solely to the lack of a doctor's certification, but also to the fact of that delay.

Bishop has consistently claimed his agreement with McDowell to go to work in Indio occurred in approximately April 2006. Yet, McDowell filed a declaration in the

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[33] The "Carter [Lee] said no" testimony was not in evidence at trial apparently because it was not allowed.

[34] Robbins testified in her deposition that normally, if a project director wanted to rehire a former employee, he would not send the employee to HR to fill out an application. Rather, he would send HR a "rehire request form." Robbins would then start the rehire process, and the project director would give an application directly to the employee to fill out.

summary adjudication proceeding that *Bishop approached him* about getting the job in Indio, and their conversation did not occur until *"late June"* 2006. Lee's declaration in support of summary adjudication also said he learned in "late June 2006" that Bishop "was going to come to work for [McDowell] in Indio." Thus, Trendwest took the position that Bishop had already been administratively terminated *before* he was offered the Indio job.

Bishop's assertion that the job offer was made in April 2006 therefore presented a disputed issue of fact, and another we think was material.[35] The date the offer was made could have affected a reasonable juror's assessment of how this unusual circumstance may have altered application of Trendwest's usual policy.

Despite his declaration, McDowell clearly testified at trial that *he recruited Bishop* for the position in Indio, and their first discussion may have occurred as early as January 2006. McDowell continued calling Bishop after he went on medical leave, but Bishop initially failed to return his calls. Bishop called McDowell back in approximately April or May 2006 and told McDowell he was onboard for Indio; Lee approved the arrangement at that time. McDowell and Bishop had frequent subsequent contacts about the job, and both were enthusiastic about the prospect of his working in Indio. McDowell thought Bishop was a "great salesman" and "certainly somebody that [McDowell] wanted to have onboard."[36]

McDowell's trial testimony strongly suggested that Bishop had accepted the job offer by April or May 2006, before Bishop's leave expired and before he was

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[35] Bishop's version that the agreement occurred earlier is confirmed by his psychiatrist's testimony and his therapist's notes recording, as of April 24, 2006, Bishop's statement that he had been hired for a new job in Indio under a new supervisor and expected to begin work there in "one to one-and-a-half months."

[36] McDowell did testify that Bishop assured him he had all the approvals required by company policy to make the move, and Bishop appears, in fact, to have believed he had done everything required of him.

administratively terminated.[37] Lee's trial testimony was consistent with this timing. And, in fact, in summation to the jury, Trendwest's attorney admitted that Lee had approved the hiring of Bishop for the Indio office in March.

We also find puzzling the law and motion court's reliance on McDowell's report of his telephone conversation with Lee as "not reveal[ing] any discriminatory animus." It is not necessary for Lee to have made a discriminatory statement at the very moment that he instructed McDowell to remove Bishop from the training class. We find other independent evidence of Lee's discriminatory animus against those on disability leave, including Lee's self-professed and unfounded belief that Bishop's leave was phony. Considered together with Lee's crusade to rid the company of any employee who took an undeserved medical leave, we cannot agree that Trendwest eliminated all triable issues surrounding Bishop's ejection from the training program.

Our Supreme Court has recently held that even "stray remarks" of a discriminatory nature from an earlier time, not in the context of an employment decision, nevertheless may be relevant in demonstrating a discriminatory motive for an adverse employment action. (*Reid v. Google, Inc., supra,* 50 Cal.4th at p. 539.) In *Reid v. Google, Inc.* the issue was whether certain remarks by co-workers ridiculing the plaintiff for being an older engineer were admissible to prove that when he was transferred to a phantom job and eventually terminated, it was actually the result of age-based discrimination. (*Id.* at pp. 518-519.) The issue was whether California should adopt the so called "stray remarks" doctrine invoked by the federal circuit courts to exclude admission of discriminatory comments of "non-decision-makers" or of "decision makers outside of the decisional process." (*Id*. at p. 516.)

The court refused to adopt a "stray remarks" doctrine under California's FEHA, noting, "strict application of the stray remarks doctrine . . . would result in a court's

[37] Defense counsel elicited McDowell's testimony at trial that Bishop's agreement to take the job in Indio could have occurred as late as June 2006, evidently in an effort to salvage Trendwest's argument that the job offer was made *after* the administrative termination.

categorical exclusion of evidence even if the evidence was relevant. [A discriminatory] remark not made directly in the context of an employment decision or uttered by a non-decision-maker may be relevant, circumstantial evidence of discrimination. [Citation.] Indeed, Justice O'Connor, who coined the term 'stray remarks,' stated that stray remarks do not constitute 'direct evidence' of discriminatory animus, but acknowledged that such remarks can be 'probative.' [Citation.]" (*Reid v. Google*, *supra*, 50 Cal.4th at p. 539.)

The parties have not argued this was a "stray remarks" case, and we have not conceived of it as such, but *Reid v. Google* supports our conclusion that negative comments made by Lee about the disabled or those who took disability leave, even though made at an earlier time, were certainly relevant evidence of a discriminatory animus on his part. The fact that the law and motion court acknowledged Lee was "involved" in the Indio ouster would make those remarks relevant, regardless if he was the ultimate decision maker.

Here we have more than "stray remarks": we have a supervisor stating in a large meeting that he would retaliate against anyone who took a fake medical leave and asking subordinate managers to report any suspected leave abusers. We have the same supervisor's admission in this litigation that he believed Bishop had taken a phony disability leave. These earlier remarks, even if from a time period substantially predating the Indio expulsion, were clearly relevant under *Reid v. Google, Inc*., *supra*, 50 Cal.4th 512, and should have been considered by the law and motion court. Taken in combination with the role Lee played during the ejection of Bishop from Indio, the evidence of discriminatory animus was more than sufficient to withstand summary adjudication.

With regard to Lee's immediate role in ejecting Bishop from Indio, Trendwest's argument, both in summary adjudication and at trial, was that Lee's telephone conversations with Friedman and McDowell did not involve *his directives* that Bishop should be removed from the training session, but only a summary of Robbins's concerns. Indeed, even Lee's email to Robbins on June 28, 2006, was portrayed as involving no

decision, input or influence on Lee's part. He was described at trial as "simply a messenger" for Robbins, with his attorney arguing in summation that Lee's June 28 email was merely "confirming to Laura Robbins that he got the message" and "repeating back" his understanding that Bishop "may not be rehirable."

But a contrary impression may be gleaned from Lee's email itself, which emphatically insisted—in all capital letters yet—that Bishop would *"*NOT" be rehired, ending the sentence with two exclamation points. If emails could speak, this one would be shouting. The extreme emphasis in the email raised a reasonable inference that it would be interpreted as a command, not a recapitulation of a previous conversation. And since that command was issued on the same date that Bishop was ousted from Indio, it may reasonably be inferred that Lee's earlier telephone conversations with Friedman and McDowell were also more emphatic—and more in the nature of a command that Bishop be ejected—than a bland transmission of Robbins's opinion about Bishop's employment status. We find unconvincing Trendwest's portrayal of Lee's role as merely passively reiterating what Robbins purportedly had earlier told him about Bishop's ineligibility for rehiring

In any case, Robbins apparently was not informed of the negotiations and agreements that had been reached regarding Bishop's position in Indio. If Lee withheld from Robbins the information that he, McDowell, and Park had previously approved Bishop's appointment to the position in Indio *because of* his admitted belief that Bishop took an unwarranted medical leave, then his very failure to pass on this critical information to Robbins could be viewed as one step in a course of conduct motivated by discriminatory animus and amounting to retaliation. Lee's statement to McDowell that he would have to "go to bat" for Bishop if he wanted to hire him in Indio—because Lee "wasn't a fan" of Bishop's and would not "go to bat" for him—further suggests that at the least Lee influenced the course of events.

In our view, the intervening offer of a job in Indio changed the landscape considerably with respect to the application of Trendwest's policies. Yet, in keeping with the rulings on summary adjudication, the jury was told repeatedly that the only issue

before it was the failure to rehire Bishop after he was asked to leave Indio, and that his termination was not an issue in the case.[38] We are convinced the combined rulings of the law and motion court and the trial court resulted in trimming down Bishop's case so much that it unreasonably restricted the jury's purview, and effectively gutted Bishop's disability discrimination and CFRA retaliation causes of action. Given Lee's jaundiced view of CFRA disability leave, and Bishop's leave in particular, he may well have influenced the course of action taken by Trendwest. Bishop was entitled to a jury trial to determine whether actual discrimination or retaliation occurred.

D. The court improperly summarily adjudicated facts that did not completely dispose of the cause of action on both the CFRA retaliation and disability discrimination claims.

1. Summary adjudication must "completely dispose" of the cause of action.

"Summary adjudication must completely dispose of the cause of action to which it is directed." (*Nazir, supra,* 178 Cal.App.4th at p. 251.) Indeed, the summary judgment statute itself demands as much: "A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc., § 437c, subd. (f)(1).) We therefore would conclude in any event that the law and motion court's summary adjudication of Bishop's May 19 termination and his ouster from Indio were improper under general summary judgment principles. (See, e.g., *Hindin v. Rust* (2004) 118 Cal.App.4th 1247, 1259-1260; *Rooz v. Kimmel* (1997) 55 Cal.App.4th 573, 593-594.)

The difference between adjudicating "issues" and "causes of action" is more than semantic. As of 1989, Code of Civil Procedure section 437c, subdivision (f) permitted the summary adjudication of virtually any "issue" in a case. (Stats. 1989, ch. 1416, § 16,

[38] The court modified standard jury instruction CACI No. 2620 on the elements of a CFRA retaliation claim. Whereas CACI requires a plaintiff to prove that he was subjected to an "adverse employment action" motivated at least in part by retaliation, the court, at defendants' request and in line with the law and motion court's ruling, instructed the jury that Bishop must prove that "Trendwest failed to rehire" him with such motivation.

pp. 6229–6230; 1990 Amendment, foll. Deering's Ann. Code Civ. Proc., § 437c (1995), p. 305.) In 1990, it was amended to limit summary adjudication to the disposition of one or more "causes of action, affirmative defenses, claims for damages, or issues of duty." (See Stats. 1990, ch. 1561, § 2, p. 7331; *DeCastro West Chodorow & Burns, Inc. v. Superior Court* (1996) 47 Cal.App.4th 410, 418-419.) The purpose of the amendment was "to stop the practice of adjudication of facts or adjudication of issues that do not completely dispose of a cause of action or a defense." (Stats. 1990, ch. 1561, § 1, p. 7330.) (See generally, *Raghavan v. Boeing Co.*, *supra*, 133 Cal.App.4th at p. 1135; *Hood v. Superior Court* (1995) 33 Cal.App.4th 319, 321, 323; *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1854, 1855 (*Lilienthal*); *City of Emeryville v. Superior Court* (1991) 2 Cal.App.4th 21, 23-25.) The current statutory language is even more stringent.[39]

2. **Bishop's pleading included only one cause of action for FEHA discrimination and one cause of action for CFRA retaliation.**

Bishop pleaded his claim of FEHA disability discrimination and his CFRA retaliation claim each as a single cause of action alleging that Trendwest's treatment of him throughout the period May through early July 2006 amounted to an adverse employment action that became tainted at some point by Lee's bias against the disabled or animosity toward those who take disability leave. Put otherwise, the pleadings did not break out the "administrative termination" in May, the ouster from Indio in late June or early July, and the ultimate failure to rehire him as three separate causes of action.

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[39] "A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if that party contends that the cause of action has no merit or that there is no affirmative defense thereto, or that there is no merit to an affirmative defense as to any cause of action, or both, or that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc., § 437c, subd. (f)(1).)

Rather, Bishop alleged that his disability "was a motivating factor in Defendants' decision to discriminate against, harass, and eventually terminate and/or not re-hire" him. Likewise, the CFRA retaliation claim encompassed both the termination and the failure to rehire, resulting in Bishop's being "denied a position, told he was terminated, and that he could not be rehired."

The court should not have granted summary adjudication of discrete facts relating to Bishop's termination because they did not entirely dispose of either the first or third causes of action, as is evident from the fact that summary adjudication was *denied* as to those causes of action. Yet, the court's order specified that the only issue to be tried was Bishop's claim that Trendwest "failed to rehire" him, which was but a portion of what he alleged as an adverse employment action. Proceeding in this manner, at least in the circumstances of this case, violated Code of Civil Procedure section 437c, subdivision (f)(1), with respect to both the claims for disability discrimination and violation of the CFRA.

That Bishop elected to plead a series of events as a single cause of action does not necessarily shield him from summary adjudication of less than his entire pleaded cause of action. In *Lilienthal*, *supra*, 12 Cal.App.4th 1848, we held that a trial court may summarily adjudicate one of "two separate and distinct wrongful acts . . . combined in the same cause of action." (*Id*. at p. 1850.) *Lilienthal* was a malpractice suit against a law firm which had represented plaintiffs "at different times on two separate and distinct matters," in different years, against different plaintiffs, occurring on different properties, requiring different witnesses, and involving different legal issues. The only commonality was that the same law firm provided legal services in both cases. (*Ibid*.) The two causes of action were pleaded as one, it clearly appeared, because the statute of limitations had already run on the earlier transaction.

The trial court believed it could not summarily adjudicate the statute of limitations issue because it would not dispose of the entire cause of action, as pleaded. We disagreed, holding "under subdivision (f) of section 437c, a party may present a motion for summary adjudication challenging a separate and distinct wrongful act even though

combined with other wrongful acts alleged in the same cause of action." (*Lilienthal, supra,* 12 Cal.App.4th at pp. 1854-1855.)

But our case is not like *Lilienthal* because Bishop's first and third causes of action were both based on the *entire series of events* surrounding his termination and the failure to rehire him. The three factual adverse employment actions identified by the law and motion court were close in time (all three occurring within a seven-week period), and related to the same subject matter. Morover, Bishop did not seek separate damages for the three separate adverse actions. There would be no unfairness to either party in treating the described series of events as a single cause of action under each of the statutes. (§§ 12940, subd. (a), 12945.2, subd. (l)(1).) Unlike the plaintiffs in *Lilienthal*, Bishop has not attempted to amalgamate two entirely separate courses of conduct so as to manipulate a statute of limitations or otherwise circumvent the law or gain unfair advantage. On the contrary, by treating each potential adverse employment action as a separate cause of action, the law and motion court allowed Trendwest to obtain a piecemeal adjudication of Bishop's claim, at the same time slicing and dicing Bishop's complaint so thinly as to deprive Bishop of a full and fair hearing on his grievance.

3. The retaliation cause of action was based on the entire course of conduct leading to the loss of Bishop's job.

In discrimination cases, courts typically attempt to identify an "adverse employment action" to which the plaintiff has been subjected; however, as the Supreme Court has noted, that phrase appears nowhere in the FEHA discrimination or retaliation provisions. (*Yanowitz, supra,* 36 Cal.4th at pp. 1049-1050.) Rather, it has been adopted in judicial opinions as a "shorthand expression referring to the kind, nature, or degree of adverse action against an employee that will support a cause of action under a relevant provision of an employment discrimination statute." (*Id.* at p. 1049.)

In defining an "adverse employment action" for purposes of FEHA retaliation, the Supreme Court has made clear that a single, definitive action, such as termination, is not required. The FEHA protects employees not only against unlawful discrimination in "so-called ultimate employment actions such as termination or demotion," but also

against discrimination in "the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement . . . ."[40] (*Yanowitz, supra*, 36 Cal.4th at pp. 1052-1054; accord, *Jones v. Department of Corrections and Rehabilitation* (2007) 152 Cal.App.4th 1367, 1380.) A "series of separate retaliatory acts collectively may constitute an 'adverse employment action.' " (*Yanowitz, supra*, 36 Cal.4th at p. 1058.) Thus, a FEHA retaliation plaintiff may allege a "retaliatory course of conduct rather than a discrete act of retaliation," which acts, considered collectively, amount to an "adverse employment action." (*Id*. at p. 1058; see also, *Dudley, supra*, 90 Cal.App.4th at pp. 264-265.)

The court reached this conclusion by exploring the definition of the word "discriminate." (*Yanowitz, supra*, 36 Cal.4th at p. 1049-1050.) "[T]here is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. [Citations.]" (*Id.* at p. 1055.) A "totality of the circumstances" test, "tak[ing] into account the unique circumstances of the affected employee as well as the workplace context of the claim," should be used to determine whether a course of conduct amounted to discriminatory treatment under the FEHA. (*Id*. at pp. 1052, fn. 11.) If the alleged course of conduct "materially affect[ed] the terms and conditions of employment" (*id*. at p. 1036), it constituted an "adverse employment action" for purposes of FEHA retaliation. (See also, *Nazir*, *supra*, 178 Cal.App.4th at p. 287.)

The CFRA, like the FEHA, specifically forbids certain retaliatory acts, including acts that "discriminate against" the employee. (Compare § 12940, subd. (h) with § 12945.2, subd. (*l*).) We therefore conclude the *Yanowitz* rationale applies to equally to CFRA retaliation that "discriminates against" an employee. (§ 12945.2, subd. (*l*).) As in *Yanowitz*, "[e]nforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute. [¶] It is therefore

[40] The United States Supreme Court has adopted the alternative "deterrence" test under Title VII. (*Burlington Northern & Santa Fe Ry. v. White* (2006) 548 U.S. 53, 67-68.)

appropriate that we consider plaintiff's allegations collectively." (*Yanowitz, supra*, 36 Cal.4th at p. 1056 (fn. omitted); see also, *Dudley, supra*, 90 Cal.App.4th at p. 264.)

Certainly with respect to the retaliation claim, the law and motion court erred in identifying each discrete "adverse employment action" and analyzing each separately and independently, as if in a vacuum. This was the very approach rejected for retaliation claims in *Yanowitz, supra*, 36 Cal.4th 1028. Based on this analysis, we conclude the law and motion court's compartmentalized analysis of the CRFA retaliation cause of action improperly resolved factual issues that did not "completely dispose[] of the cause of action" in violation of Code of Civil Procedure, section 437c, subdivision (f)(1).

4. The discrimination claim also entailed only one cause of action.

We think the same analysis applies to a discrimination claim in which two or more closely contemporaneous "adverse employment actions" are pleaded or identified in discovery, but are alleged to be part of an ongoing course of conduct that in sum resulted in discriminatory adverse action. The Supreme Court has noted that claims of discrimination involve "explicit changes in the 'terms, conditions, or privileges of employment.' " (*Roby v. McKesson* (2009) 47 Cal.4th 686, 706.) [T]herefore, such claims tend to be tied more directly to one particular employment decision. But when several employment decisions are made in succession that result in an employee losing his job, the entire course of conduct should be examined by a jury to determine whether any one of defendants' acts singly, or several in combination, constituted a discriminatory employment decision.

Just as the Court has endorsed a "totality-of-the-circumstances approach" to retaliation claims (*Yanowitz, supra*, 36 Cal.4th at p. 1052, fn. 11), we think the "totality of the circumstances" may be examined to determine whether forbidden discrimination has tainted an employment decision, whether it be termination, ejection from a training program, or failure to rehire. So long as the entire course of conduct produces at least one adverse employment action, the fact that more than one such adverse action could be identified should not make each of them separately subject to resolution on summary adjudication.

The law and motion court cited no authority for its analytical technique of ruling separately on each of the factual theories that could have stood on its own as a separate "adverse employment action." Nor do we see any reason why this approach should be adopted in the employment litigation context any more than in any other.

Bishop complains of the entire way in which his termination and the failure to rehire him were handled. The alleged actions were close in time, the decision in one adverse action affected the decisions in the subsequent actions, and the key actors overlapped. The net outcome was that Bishop's status changed from being employed by Trendwest to not being employed there. The entire course of conduct was therefore properly alleged as a single cause of action for discrimination. Resolution by summary adjudication of the administrative termination on May 19 and the ouster from the Indio training program was improper.

We therefore reverse the court's summary adjudication of the discrete factual theories upon which Bishop's disability discrimination and CFRA retaliation claims were based. These were not separate causes of action, but simply three potential *factual* theories that could potentially support Bishop's cause of action. It was for the jury, then, to decide whether any of the possible theories constituted discriminatory treatment or retaliation under FEHA and CFRA.

Of course, Trendwest argues that none of its actions after May 19, 2006, could materially affect the terms of Bishop's employment because he had already been terminated. But FEHA also forbids an employer "to bar or to discharge [a] person from employment or from a training program leading to employment." (§ 12940, subd. (a).) FEHA also forbids any person "to discriminate against any person in the selection or training of that person in any apprenticeship training program or any other training program leading to employment ." (§ 12940, subd. (c).) A jury must decide whether

Trendwest's relationship with Bishop during his time in Indio was one which subjected Trendwest to the requirements of FEHA.[41]

Because the summary adjudication of the disability discrimination claim was erroneous, we also reverse the directed verdict on the first cause of action. As noted above, there was evidence that Lee was insensitive, at least, to disabled employees. Because Bishop never had a full opportunity to present his disability discrimination claim to a jury, we reverse the judgment entered on the directed verdict, as well.

V. THE SUMMARY ADJUDICATION OF BISHOP'S WRONGFUL DISCHARGE CLAIM MUST BE REVERSED.

A claim for CFRA retaliation also states a claim for wrongful discharge under California common law. (*Nelson*, *supra*, 74 Cal.App.4th at pp. 608-612.) Bishop's wrongful discharge claim was resolved on summary adjudication precisely because the law and motion court found there was no triable issue relating to his termination leaving only the failure to rehire as a basis for potential recovery. Because a termination is required to support a wrongful discharge claim, summary adjudication was also granted as a matter of course on that cause of action. In light of our conclusion that the court improperly resolved discrete facts relating to the termination without completely disposing of the first and third causes of action, it "necessarily follows" that we must also reverse the summary adjudication of Bishop's wrongful discharge claim against

[41] In light of our resolution of the foregoing issues, we need not address Bishop's further claim of error in the court's exclusion of declarations by Craig and Whitaker, filed in the *Wiley* lawsuit, testifying that the maximum period allowed for medical leave was six months rather than 12 weeks. Craig's declaration says this policy had been in effect "for the duration of [his] tenure" at WVO, and it was dated in 2007. The court's basis for excluding these declarations appears to have been that there was a change in policy between 2005 and 2006, and these two declarations were not "from a relevant time period." Since we find Bishop's showing sufficient to defeat summary adjudication without those declarations, we need not address the issue.

Trendwest and WVO.[42] (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1261; *Faust v. California Portland Cement Co.*, *supra*, 150 Cal.App.4th at p. 886.)

Logically, this would also bring Lee back into the lawsuit, as the fourth cause of action was asserted against him individually, as well as against the corporate defendants. However, since individuals may not be held liable for common law wrongful discharge based on violation of the public policies expressed in the FEHA (*Reno v. Baird* (1998) 18 Cal.4th 640, 663), we affirm the summary adjudication of the fourth cause of action in Lee's favor.

VI. THE CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS WAS PROPERLY DISPOSED OF BY SUMMARY ADJUDICATION.

The court summarily adjudicated the intentional infliction of emotional distress claim because Bishop had not presented evidence that Trendwest's conduct in southern California "was so extreme and outrageous as to go beyond all possible bounds of decency." (See *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 499 fn. 5.) The bigoted remarks in northern California "were not directed at [Bishop] or any racial or ethnic group to which he belongs, and [Bishop] never spoke up to say that these remarks caused him distress."

In addition, the court found no factual dispute that Lee's hostile remarks to Bishop in large part related to his job performance. Although Bishop urges us to consider the harassment by Lee during the Oceanside period as evidence of intentional infliction of emotional distress, those remarks, we agree, were not of a nature to support such a claim. Rather, Bishop complains that Lee "micro-manag[ed]" him in Oceanside and that "nothing" he did "was good enough for Lee." Bishop also quotes Lee as having made

[42] Due to our rulings on the summary adjudication issues, a new trial, broader than the last one, will be required. Therefore, we need not decide the remaining evidentiary issues (admissibility of Lee's bigoted remarks, admissibility of expert testimony by Dr. Jay Finkelman) or the instructional issues raised by Bishop (refusal to instruct on Bishop's definition of "applicant" and refusal to instruct that Lee's retaliatory motive could be attributed to the actual decisionmaker).

remarks such as, "What's wrong with you? What are you doing here? What are you doing?" He further argues that the demotion to the San Diego office was part of the intentional infliction of emotional distress.

But here we agree with the law and motion court that "the primary conduct directed at [Bishop] was managerial and within the employment context," and "management decisions, even if improperly motivated, [are] not outrageous conduct." (See *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 80.) Thus, Bishop failed to offer factual support for his claim of intentional infliction of emotional distress.

In addition, a two-year statute of limitations applies to claims for intentional infliction of emotional distress (Code Civ. Proc., § 335.1; *Pugliese v. Superior Court* (2007) 146 Cal.App.4th 1444, 1450), and the harassment Bishop alleged in northern California was outside the limitations period. The only acts occurring within the limitations period were those from the time of Bishop's Oceanside promotion going forward. None of those actions was so "extreme and outrageous" as to support a cause of action for intentional infliction of emotional distress, and none bore any indicia that the actors intended to cause Bishop emotional harm. Thus, even if the earlier obnoxious remarks by Lee would have been actionable under this theory, Bishop's claim was independently barred by the statute of limitations.

VII. SUMMARY JUDGMENT THAT WYNDHAM WAS NOT BISHOP'S EMPLOYER

Bishop acknowledges that he was employed by Trendwest. Yet, he seeks to hold liable not merely it, but alsoWVO, Trendwest's parent corporation, and Wyndham, WVO's parent. But the law and motion court properly granted summary judgment to Wyndham on the theory that it was not Bishop's joint employer under the standards set forth in *Laird v.Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727, 737 (*Laird*).

Wyndham submitted the declaration of Kent Keoppel to establish that Cendant and Trendwest were separate legal corporations, had separate tax identification numbers, and maintained separate financial records. The two companies did not share office space, equipment, human resources or accounting personnel. Cendant did not hire, fire,

promote, demote, supervise or discipline Trendwest employees, did not set their salaries or their schedules, and did not maintain personnel records for Trendwest employees. All of these functions were carried out by Trendwest. In addition, numerous documents signed by Bishop list Trendwest as the employer, with no mention of Cendant.

Given this showing, the burden shifted to Bishop to establish the elements of either the "integrated enterprise" test employed by the federal cases (*Laird, supra,* 68 Cal.App.4th at pp. 737-738), or one of the other five state law tests alternatively employed in FEHA cases: i.e., the alter ego, agency, or equitable estoppel tests identified in *Laird, supra,* 68 Cal.App.4th at pp. 741-743; the "totality of the working relationship" test of *Vernon v. State of California* (2004) 116 Cal.App.4th 114, 124, fn. 7; or the joint employer test of *Jones v. County of Los Angeles* (2002) 99 Cal.App.4th 1039, 1045-1047. As *Laird* cautions, the employee bears a "heavy burden" to meet either the California or federal tests. (*Laird, supra,* 68 Cal.App.4th at p. 737.) Bishop has failed to meet that burden.

The integrated enterprise test focuses on four criteria: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control. (See *Laird, supra,* 68 Cal.App.4th at pp. 738-740.) The interrelation of operation factor required Bishop to show that Wyndham exercised control over Trendwest " 'to a degree that exceeds the control normally exercised by a parent corporation.' " (*Id.* at p. 738.)

The facts relied upon by Bishop to support joint employer liability consisted primarily of Cendant's provision of policy manuals and the like, the appearance of its name on employee paychecks, Cendant's administration of benefits programs for Trendwest, the allowance of employee discounts on other Cendant-owned companies' products and services, the provision of a corporate credit card, and the fact that employees were encouraged to use Cendant's parent relationship as a selling point for customers. The other primary fact Bishop emphasized was his own professed belief (and those of his co-workers) that Cendant was their employer.

Bishop produced evidence that Cendant's name appeared on certain benefits related documents, but those generally described benefits administered by third party providers for Trendwest employees. This factor is insufficient to show interrelation (*Laird*, *supra*, 68 Cal.App.4th at p. 739), and we agree with the law and motion court that the remaining factors did not raise a triable issue of fact.

As for common management, Wyndham produced evidence that Cendant and Trendwest shared no management personnel, and Bishop was unable to produce any contrary evidence. (*Laird*, *supra*, 68 Cal.App.4th at p. 738.)

The third factor, centralized control of labor relations, often seen as the most important factor, is also lacking here. The critical question is which entity made the final decisions regarding employment matters for the employee in question. (*Laird*, *supra*, 68 Cal.App.4th at p. 738.) Although Cendant's name appeared on paychecks of Trendwest employees, Cendant only provided payroll services to Trendwest in the same way a third-party payroll service had previously done. But even payment by a parent company on behalf of its subsidiary does not create a joint employment relationship. (*Jones v. County of Los Angeles*, *supra*, 99 Cal.App.4th at pp. 1046-1047.)

The fourth factor, common ownership and financial control, is insufficient by itself to establish joint employer liability. (*Laird* , *supra*, 68 Cal.App.4th at p. 740.) And Bishop made no showing on this factor beyond the facts recited above. The law and motion court correctly concluded that Bishop failed to meet the integrated enterprises test.

With respect to agency, Bishop's showing falls far short of raising a triable issue that Trendwest was the "mere instrumentality" of Cendant. (*Laird* , *supra*, 68 Cal.App.4th at p. 741.) Likewise, he cannot demonstrate that there was such a "unity of interest" that the two corporations' "separate personalities no longer exist," so as to proceed on an alter ego theory. (*Id*. at p. 742.) The equitable estoppel test would require a showing that Bishop relied on Cendant's conduct to his injury (*id*. at p. 742), but as the law and motion court observed, the injuries alleged by Bishop "bear no causal connection whatsoever to which of the two firms was, or was not, the employer."

The working relationship test of *Vernon v. State of California , supra*, 116 Cal.App.4th 114 uses a more gestalt approach, identifying a dozen factors that could be relevant, and adopting a "totality of the circumstances" approach to analyzing the "myriad facts" involved in the employment relationship, with no one factor being decisive. (*Id*. at p. 125.) Under this test, too, Bishop's showing is insufficient to hold Wyndham liable as a joint employer. As the law and motion court found, Cendant's involvement in Trendwest "was nothing more than the normal oversight a parent corporation might provide . . . . Cendant did not exercise the kind of control necessary to find it a joint employer under *Vernon*."

Finally, the test of *Jones v. County of Los Angeles*, *supra*, 99 Cal.App.4th at pp. 1046-1047 is also unavailing. The factors there outlined were the right to control personnel duties, the power to discharge employees, payment of salaries, the nature of the services provided, and the beliefs of the parties as to who the employer was. For the reasons already stated, the first four of these factors do not support joint employer liability. The fifth factor is simply not enough to hold the parent liable when the belief is held unilaterally by the employee.

VIII. IN APPEAL NO. 123449 THE AWARD OF COSTS MUST BE REVERSED.

On October 15, 2008, the trial court awarded costs to defendants, and Bishop separately appealed from that order. Although the prevailing party is normally entitled to recover costs (Code Civ. Proc., § 1032, subd. (b)), FEHA has its own costs provision which makes an award of costs to a successful defendant discretionary (§ 12965, subd. (b)).[43] Because we reverse the judgment as to which costs were granted, we also reverse the award of costs. Based on our disposition, the only prevailing parties below would be Wyndham and Lee, and their costs would be limited to those through the summary judgment phase. We are unable to ascertain which costs are attributable to

[43] That section provides in pertinent part: "In actions brought under this section, the court, in its discretion, may award to the prevailing party reasonable attorney's fees and costs, including expert witness fees, except where the action is filed by a public agency or a public official, acting in an official capacity." (§ 12965, subd. (b).)

Wyndham's summary judgment motion alone. Therefore, we will reverse the order awarding costs, without prejudice as to Wyndham and Lee.

DISPOSITION

The judgment entered in favor of Wyndham and Lee is affirmed.

The judgment entered in favor of the other defendants is affirmed as to the second and fifth through ninth causes of action. The judgment on the first, third, and fourth causes of action is reversed as to Trendwest and WVO.

The superior court shall vacate its order of April 30, 2008, insofar as it purported to partially adjudicate the first and third causes of action, and insofar as it summarily adjudicated the fourth cause of action in defendants' favor. The court shall enter a different order denying summary adjudication on the entire first, third, and fourth causes of action as to Trendwest and WVO.

The order of costs to defendants entered on October 15, 2008 is reversed, without prejudice as to defendants Lee and Wyndham. The cause is remanded for further proceedings consistent with this opinion. Appellant Bishop is awarded costs on appeal.

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Richman, J.

We concur:

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Kline, P.J.

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Haerle, J.