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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JOHN GHIOTTO et al., Plaintiffs and Appellants, v. CITY OF SAN DIEGO et al., Defendants and Appellants.	D055029 (Super. Ct. No. 37-2007-00073878-CU-CR-CTL)

APPEALS from a judgment of the Superior Court of San Diego County, Michael M. Anello and Timothy B. Taylor, Judges. Affirmed and remanded for further proceedings.

The annual San Diego Pride Parade (hereinafter, the Pride Parade or the parade) is a celebration of the local gay, lesbian, bisexual and transgendered communities. Four members of the City of San Diego Fire-Rescue Department (the Department) — John Ghiotto, Chad Allison, Jason Hewitt and Alexander Kane (the Firefighters) — were given a direct order to participate in the Pride Parade against their will.

After being forced to participate in the Pride Parade, the Firefighters filed a lawsuit against the City of San Diego (hereafter, the City) and the Department,[1] alleging, among other things, that they were subject to unlawful sexual harassment during the parade and that the order requiring them to participate in the parade violated their right to free speech under the California Constitution. The Firefighters prevailed only on their sexual harassment claim, for which they were individually awarded damages ranging from $5,000 to $14,200. The trial court awarded attorney fees to the Firefighters in the amount of $532,980.35 and costs in the amount $61,383.51.

The City appeals from the judgment, challenging the outcome of the sexual harassment claim and the award of attorney fees and costs. The Firefighters appeal from the ruling against them on the cause of action for violation of their right to free speech under the California Constitution, and they also cross-appeal from the order granting attorney fees.

As we will explain, the parties' arguments lack merit, and accordingly we affirm the judgment. We shall remand to the trial court to determine the attorney fees recoverable by the Firefighters on appeal.

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1 During trial, the court instructed the jury that the Department is a department of the City, and that references in the instructions to the City would mean both the City and the Department. For the sake of simplicity, we take the same approach here. When referring to the litigation history and legal positions concerning both the City and the Department, we will refer to those entities collectively as "the City." In describing the background facts, however, we will distinguish between the City and the Department when a distinction is relevant.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Firefighters' Participation in the 2007 Pride Parade*

The Firefighters were working at station 5 in the Hillcrest neighborhood of San Diego on the day of the 2007 Pride Parade, which was held in that neighborhood on July 21, 2007. Ghiotto is a captain in the Department. Kane is a firefighter/paramedic. Allison is a firefighter/emergency medical technician. Hewitt is a captain/paramedic, but was an engineer/paramedic at the time of the parade.

The Pride Parade, which is organized by a nonprofit group called San Diego LGBT Pride, is a large public event held on the City's streets. In 2007, there were approximately 150,000 spectators at the Pride Parade and 9,000 participants. A wide variety of community organizations participate in the Pride Parade, including a sizeable contingent of public safety and law enforcement officers, primarily from Southern California. That contingent is the largest in the Pride Parade and in 2007 had approximately 250 members. A group of approximately 20 volunteers from the Department marched in the 2007 Pride Parade, including many senior staff, with the Fire Chief and two Assistant Fire Chiefs among them. The Department also was represented in the parade by an ambulance driven by an emergency medical technician.

The Pride Parade's organizer requested that the Department have a fire engine in the parade. Until two days before the Pride Parade, the Department had planned to honor that request by using a volunteer crew from station 25. However, due to a family emergency, the engineer in that crew had to withdraw, and the substitute engineer did not

want to participate in the Pride Parade. Therefore, Department officials determined that the fire engine from station 5 — with the Firefighters assigned as its crew — should be assigned to participate in the Pride Parade. There was no formal policy in place at the time regarding the staffing of parades. However, the practice was generally to assign the fire engine company on duty in the community where the parade occurs, which in this case was the company assigned to station 5.

None of the Firefighters wanted to participate in the Pride Parade, and they communicated that objection to their superiors.[2] Among other things, Ghiotto suggested to his superiors that the fire engine be driven by Department volunteers who were already committed to marching in the parade. Over the Firefighters' objections, Assistant Fire Chief Jeffrey Carle authorized that the Firefighters be given a direct order to participate, and that order was given to the Firefighters by their battalion chief.[3]

The Firefighters' participation in the Pride Parade lasted approximately three hours. They initially assembled in a staging area and then proceeded in their fire engine through the parade with the contingent of volunteers from the Department marching in front of them. As we will set forth in further detail when we discuss the City's appeal from the judgment on the sexual harassment claim, during the Pride Parade sexually

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2 Historically, certain Department employees did not want to be assigned to participate in the Pride Parade and would therefore take off from work the day of the Pride Parade to ensure that they would not be required to participate. Management level officials in the Department were aware of this practice.

3 According to the trial testimony, direct orders are not normally given in the Department and serious consequences result from disobeying one.

related comments and gestures were specifically directed at the Firefighters from some of the parade spectators, and certain parade spectators wore sexually suggestive clothing or publicly exposed themselves.

B. *The Firefighters Complain About Their Forced Participation in the Pride Parade, and the City Reacts to Those Complaints*

After the Pride Parade, the Firefighters were upset by what they had experienced. Ghiotto asked for a form so that he could file a complaint with the City's equal employment investigation office. Further, Ghiotto informed his supervisor that he believed the crew needed critical incident stress debriefing.

Fire Chief Tracy Jarman quickly became aware of the Firefighters' complaints about having been required to participate in the Pride Parade. On Monday, July 23, 2007, Fire Chief Jarman contacted the president of the union that represented the Firefighters about developing a policy for participation in parades. On August 1, Fire Chief Jarman and two Assistant Fire Chiefs held a meeting with the Firefighters at which the Firefighters demanded a promise that no one else in the Department would be forced to participate in a future Pride Parade. Fire Chief Jarman could not make that commitment. She told the Firefighters that she would have to confer with the union about a change in policy. Although Fire Chief Jarman stated that she was sorry for what the Firefighters went through, she also pointed out that the Department is required to serve the community.

After the August 1 meeting, the Firefighters formally retained an attorney to pursue a legal claim. They filed sexual harassment complaints with the California

Department of Fair Employment and Housing on August 3, 2007, requesting a right-to-sue letter. Around the same date, the Firefighters filed forms with the City's equal employment investigation office, in which they complained about being forced to participate in the Pride Parade.

Shortly after retaining an attorney, the Firefighters decided to publicize their objections to being forced to participate in the Pride Parade. Ghiotto and his attorney appeared on local radio and on the national television show *The O'Reilly Factor* and gave interviews to print publications.

The Firefighters then began receiving threats and unwanted public attention. Among the threats was a telephone message left on Ghiotto's home answering machine. Because of the public attention on him at the fire station, Ghiotto eventually relocated to a different station. Due to the move, Ghiotto was no longer able to receive additional compensation for serving as battalion medical officer.

On August 9, 2007, the Department issued an interim parade staffing policy, which provided:

> "Parades approved by the Fire Chief will be communicated and staffed in the following manner:
>
> • At least 30 days prior to the parade, an Office of the Chief memo will be distributed to all fire station crews and administrative offices announcing the parade and outlining details for those who volunteer to participate. . . . We will first seek a non-paid volunteer for the assignment. In the event that no non-paid volunteer is available for the assignment, the department may select an engineer who volunteered, on a first-come, first-served basis, to drive the apparatus. Due to the vital interests of the City with regard to public safety and ensuring the appropriate operation of the apparatus, the engineer will be compensated four (4) hours of overtime pay. . . . [¶] . . . [¶]

> • The qualified engineer who has volunteer and is assigned to the parade will be responsible for picking up the front line apparatus prior to the parade, and driving it to the parade staging location. . . .
>
> • Any other Fire-Rescue Department personnel who volunteer and participate in the Parade shall not be compensated."

This interim policy described a process for soliciting volunteers to participate in parades, but did not guarantee that employees would not be required to participate if volunteers were unavailable.

Roughly 11 months later, on July 1, 2008, the City put into place a permanent parade staffing policy. The permanent policy was included in the annual memorandum of understanding with the union representing the Department's firefighters, which was the product of a meet and confer process between the City and the union. Unlike the interim policy, the permanent parade policy plainly stated that no employee would be given a direct order to participate in any parade against his or her will. The permanent parade policy provides:

> "Approximately 30 days prior to parades approved by the Fire Chief, an apparatus request will be forwarded from the Public Information Office to the Battalion Chief and Engine Company serving the parade area. This request will be in addition to a general announcement notifying personnel of the event and requesting volunteers to march in the parade.
>
> "Any employee who does not wish to participate shall notify their immediate supervisor of that fact at least five calendar days before the event. Battalion Chiefs will be responsible for providing suitable on-duty volunteer replacement personnel to fully staff the company and to remain in service.
>
> "No employee will be forced to participate in any parade.
>
> "If there are no willing on-duty members who wish to participate, volunteers will be solicited from the will-work list, staffing the parade

apparatus completely or replacing the member who does not wish to participate for the period of the parade. The on-duty member who does not wish to participate will report to his/her Battalion Chief for reassignment.

"If an entire crew does not wish to participate, a ready reserve apparatus will be placed in service with an inventory completed. The on duty crew not wishing to participate will staff the ready reserve rig during the period of the parade, and a will-work crew will staff the front-line rig in the station that serves the area of the parade.

"Battalion Chiefs will ensure that adequate preparation time for the apparatus to be in the parade is allowed, and that the required inventories are performed in the event of apparatus change-outs for the parade."[4]

C. *Litigation of the Firefighters' Lawsuit*

Meanwhile, on August 28, 2007, less than a month after the interim parade policy went into effect, the Firefighters filed this lawsuit. The first amended complaint asserted six causes of action: (1) sexual harassment in violation of Government Code section 12940, subdivision (j); (2) failure to maintain an environment free from sexual harassment in violation of Government Code section 12940, subdivision (k); (3) retaliation for complaining about sexual harassment in violation of Government Code section 12940, subdivision (h); (4) negligent infliction of emotional distress; (5) false light invasion of privacy; and (6) violation of the California Constitution's guarantee of free of speech under article I, section 2(a)). The trial court sustained the City's demurrer to the causes of action for negligent infliction of emotional distress and false light

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4 It is unclear to us whether a copy of the Department's permanent parade policy was entered into evidence during the first trial. However, Fire Chief Jarman described the policy in her testimony. The text of the permanent parade policy was admitted as an exhibit in the second trial.

invasion of privacy in the first amended complaint with leave to amend and then sustained a demurrer on those causes of action without leave to amend after the Firefighters repled them in a second amended complaint.

The Firefighters filed a third amended complaint alleging the remaining four causes of action, and the case then proceeded to trial in September 2008, with the cause of action for violation of the right to free speech tried to the court, and the other causes of action tried to a jury. The Firefighters apparently opted to merge their first two causes of action (i.e., sexual harassment in violation of Gov. Code, § 12940, subd. (j); and failure to maintain an environment free from sexual harassment in violation of Gov. Code, § 12940, subd. (k)) into a single claim for the purposes of trial.

The jury found against the Firefighters on the retaliation cause of action, but was unable to reach a verdict on the sexual harassment claim. The trial court therefore declared a mistrial on the sexual harassment claim. On the cause of action for violation of the right to free speech under the California Constitution, the trial court issued a statement of decision explaining that the Firefighters had not sustained their burden of proof on that cause of action.

Due to the mistrial, the trial court held a second jury trial on the sexual harassment claim. The jury found in favor of the Firefighters. It awarded $5,000 in noneconomic damages to each of the Firefighters, and awarded an additional $100 to Allison and an additional $14,200 to Ghiotto in economic damages. The trial court subsequently denied the City's motions for judgment notwithstanding the verdict (JNOV) and a new trial.

The Firefighters filed a posttrial motion for an award of attorney fees and costs based on the statutory attorney fee provision Government Code section 12965, subdivision (b) and on Code of Civil Procedure section 1021.5. The trial court concluded that the Firefighters were entitled to a fee award on both of the statutory grounds set forth in their motion, but denied recovery for certain fees and applied a negative multiplier of 50 percent. It awarded the Firefighters the amount of $532,980.35 in attorney fees and $49,036.20 in costs.

The City appeals from the judgment on the sexual harassment claim and from the trial court's order awarding attorney fees. The Firefighters appeal from judgment against them on their cause of action for violation of the right to free speech, and they challenge the amount of the trial court's attorney fee award.

II

DISCUSSION

A. *The Firefighters' Challenge to the Trial Court's Ruling on the Cause of Action for Violation of the California Constitution's Guarantee of the Right to Free Speech*

We first address the Firefighters' challenge to the trial court's ruling against them on their cause of action for violation of the right to free speech under the California Constitution.

As we have explained, during the first trial the court issued a statement of decision rejecting the Firefighters' claim that the City violated their right to free speech under the California Constitution.[5]

The trial court relied on two separate and independent grounds in concluding that the Firefighters "have not and cannot sustain their burden of proof on their freedom of speech claim." It ruled that (1) "there was no violation . . . of [the Firefighters'] right to freedom of speech"; and (2) even if the Firefighters could establish a violation of their right to freedom of speech, the injunctive relief that they sought was not warranted because the Department had "changed its policy with respect to required participation in the Pride Parade." As we will discuss, we affirm the trial court's ruling based on the second of these grounds, and therefore do not, and need not, address whether the City violated the Firefighters' right to freedom of speech under the California Constitution. (See *People v. Leonard* (1983) 34 Cal.3d 183, 187 ["It is well established that 'we do not reach constitutional questions unless absolutely required to do so to dispose of the matter before us.'"].)

In reviewing the trial court's determination that injunctive relief was not warranted, we apply an abuse of discretion standard of review. (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 390 (*Horsford*)

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5 Article I, section 2(a) of the California Constitution protects the right to freedom of speech by providing that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (*Ibid*.)

["The grant or denial of a permanent injunction rests within the trial court's sound discretion and will not be disturbed on appeal absent a showing of a clear abuse of discretion."].) "'[T]o the extent the trial court had to review the evidence to resolve disputed factual issues, and draw inferences from the presented facts, [we] review such factual findings under a substantial evidence standard.' [Citation.] We resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge all reasonable inferences to support the trial court's order." (*Ibid*.)

Here, the only remedy that the Firefighters sought for the alleged violation of their free speech rights was injunctive relief.[6] The trial court determined that the relief sought by the Firefighters was not warranted because the Department had changed its policy on parade participation. Specifically, the trial court's statement of decision cited Fire Chief Jarman's testimony, in which she explained that the Department had adopted a policy in approximately June 2008, under which parades would now be staffed exclusively by volunteers. Relying on this testimony, the trial court found that "there is no basis in the evidence for this court to conclude that Plaintiffs or any other firefighters will ever again

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6 Specifically, Firefighters sought "[a] permanent injunction prohibiting defendants from ordering or otherwise compelling any [Department] personnel to participate in any way in future Gay Pride Parades and from giving any adverse evaluation or making any other report or taking any other action against any employee for declining to participate in a Gay Pride Parade."

In limiting the remedy that they sought to injunctive relief, the Firefighters acted consistently with our Supreme Court's decision in *Degrassi v. Cook* (2002) 29 Cal.4th 333, 344, in which our Supreme Court, in the circumstances presented, declined to recognize a constitutional tort action for damages to remedy an asserted violation of the state Constitution's guarantee of free speech.

be ordered to participate in the Pride Parade against their will." It accordingly determined that injunctive relief was not appropriate.

The trial court based its decision on the operative principle that "[i]njunctive relief will be denied if, at the time of the order of judgment, there is no reasonable probability that the past acts complained of will recur, i.e., where the defendant voluntarily discontinues the wrongful conduct." (*California Service Station etc. Assn. v. Union Oil Co.* (1991) 232 Cal.App.3d 44, 57.) "A change in circumstances, rendering injunctive relief moot or unnecessary, justifies the denial of an injunction. [Citations.] . . . An injunction should not be granted as punishment for past acts where it is unlikely that they will recur." (*Donald v. Cafe Royale, Inc.* (1990) 218 Cal.App.3d 168, 184; *Rosicrucian Fellow. v. Rosicrucian Etc. Ch.* (1952) 39 Cal.2d 121, 144 ["an injunction 'is ordered against past acts only if there is evidence that they will probably recur'"].) "'[E]quity acts in the present tense, and that relief is dependent on present and future conditions rather than solely on those existing when the suit was brought.'" (*Mallon v. City of Long Beach* (1958) 164 Cal.App.2d 178, 188.)

The Firefighters do not take issue with the legal principle on which the trial court relied in exercising its discretion to deny injunctive relief. Instead, the Firefighters argue that substantial evidence does not support a finding that the Department would no longer order employees to participate in the Pride Parade against their will.

The Firefighters' argument relies principally on the testimony of Assistant Fire Chief Carle. According to the Firefighters, Assistant Fire Chief Carle testified on cross-examination "that he would again order firefighters to participate in the Pride Parade

under the same circumstances (that is, if scheduled volunteers did not appear to drive the fire engine)." We do not agree with the Firefighters' characterization of Assistant Fire Chief Carle's testimony. The following testimony is at issue:

> "Q. . . . Now, Chief, despite all these things we've talked about, when my clients say they were exposed and some of the things you heard and saw yourself, is it true, Chief, even given the same circumstances, you would do the same thing again and give them that direct order?
>
> "A. If we were in the same circumstances at that time that I gave that order, yes, absolutely I would give that order again.
>
> "Q. Okay. Would that be true even knowing what the City's sexual harassment policy is, and knowing what goes on at the Gay Pride Parade, would you still give that order?
>
> "A. I think knowing now what goes on at the parade is what [led] us to our new policy. And I think that's the reason we're doing it differently now."

As we understand this testimony, Assistant Fire Chief Carle was making a distinction between what his actions would be *with* and *without* the new parade staffing policy. As Assistant Fire Chief Carle explained, there is a "new policy" and "we're doing it differently now."[7] We find no support for the Firefighters' assertion that Assistant Fire Chief Carle asserted that regardless of the new policy he would continue to order personnel to participate in parades against their will if volunteer staffing was not sufficient.

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[7] In the second trial, Assistant Fire Chief Carle's testimony was more to the point: He explained, "Knowing what I know now, I would not have to give that order. We have a policy in place that takes care of what they were concerned about."

To support their argument that the City might continue to order employees to participate in the Pride Parade against their will, the Firefighters also rely on a statement by trial counsel for the City. They contend that counsel's statement calls into question the trial court's finding that Department personnel would no longer be ordered, against their will, to participate in the Pride Parade. Specifically, the Firefighters point to counsel's statement in closing argument in the first trial that "the City has to serve all its community equally. It tries to accommodate its employees. Wants happy employees. It won't discriminate if they get no volunteers."

We conclude that this statement does not serve to undermine the substantial evidence supporting the trial court's finding that Department personnel would no longer be subject to forced participation in the Pride Parade. Arguments of counsel are not evidence. (*Fuller v. Tucker* (2000) 84 Cal.App.4th 1163, 1173.) Further, even if counsel's argument could be considered to be evidence, counsel did not make a statement that the Department would continue to require participation in the Pride Parade in the absence of volunteers. Instead, counsel's statement — made to the jury that was deciding the sexual harassment issue — appears to have been offered as an explanation for why the Department required the Firefighters to participate in the Pride Parade in 2007.

The Firefighters also contend that despite the Department's current policy, which relies on volunteers to staff parades, the Department "can reverse that policy" or "simply elect not to enforce it." The argument is unpersuasive. Although noncompliance or change in policy is always a possibility, the Firefighters have identified no evidence suggesting that the Department will not continue to follow the current policy. Indeed, the

policy is part of the Department's memorandum of understanding with the union representing the Department's firefighters, with any changes subject to a further collective bargaining process.

In sum, we conclude that substantial evidence supports the trial court's finding that "there is no basis in the evidence for this court to conclude that Plaintiffs or any other firefighters will ever again be ordered to participate in the Pride Parade against their will." Accordingly, the trial court was well within its discretion to rule against the Firefighters on its cause of action alleging violation of the right to free speech on the ground that that injunctive relief was not warranted.

B. *The City's Challenge to Sexual Harassment Verdict and Denial of Motion for JNOV*

We next consider the City's challenge to the judgment in favor of the Firefighters on their cause of action for sexual harassment.

Arguing that insufficient evidence supports a finding that the offensive conduct at the Pride Parade was severe or pervasive, as required for a claim of sexual harassment, the City challenges both (1) the jury's verdict in favor of the Firefighters on the sexual harassment cause of action; and (2) the trial court's denial of the City's motion for JNOV on that cause of action. Both issues involve the same sufficiency of the evidence analysis, and we will consider them together.

1. *Standard of Review*

"When a party challenges the jury's findings based on insufficient evidence to support those findings, we apply the substantial evidence standard of review." (*Zagami,*

Inc. v. James A. Crone, Inc. (2008) 160 Cal.App.4th 1083, 1096.) Substantial evidence is defined as evidence of "'"'"'ponderable legal significance . . . reasonable in nature, credible, and of solid value [, and]'"' . . . '"relevant evidence that a reasonable mind might accept as adequate to support a conclusion"' . . . ."'" (*Young v. Gannon* (2002) 97 Cal.App.4th 209, 225.) We review the record as a whole, resolving all conflicts in favor of the prevailing party and indulging all legitimate and reasonable inferences in favor of the jury's findings. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.) If the jury's findings are supported by substantial evidence, contradicted or uncontradicted, the judgment must be upheld regardless of whether the evidence is subject to more than one interpretation. (*Ibid.*) Similarly, "[o]n appeal from the denial of a JNOV motion, this court reviews the record in order to make an independent determination whether there is any substantial evidence to support the jury's findings. [Citations.] The scope of the review is limited to determining whether there is any substantial evidence, contradicted or not, to support the jury's verdict." (*Murray's Iron Works, Inc. v. Boyce* (2008) 158 Cal.App.4th 1279, 1284.) Accordingly, the issue before us is whether substantial evidence supports the jury's sexual harassment verdict.[8]

2. *Applicable Law*

We begin with an overview of the law applicable to the Firefighters' sexual harassment claim.

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8 As the issue of whether the harassment was severe or pervasive is a question of fact, within the province of the jury, we reject the City's attempt to characterize the inquiry as a "matter of law."

"Since 1985, [the Fair Employment and Housing Act (FEHA)] has prohibited sexual harassment of an employee. (See Gov. Code, § 12940, subd. (j)(1).)" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1042 (*Hughes*).) As relevant here, Government Code section 12940, subdivision (j)(1) provides that "[a]n entity shall take all reasonable steps to prevent harassment from occurring . . . ," and "[a]n employer may . . . be responsible for the acts of nonemployees, with respect to sexual harassment of employees . . . where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action." (*Ibid.*)[9]

"California's FEHA 'recognize[s] two theories of liability for sexual harassment claims . . . ". . . quid pro quo harassment, where a term of employment is conditioned upon submission to unwelcome sexual advances . . . [and] hostile work environment, where the harassment is sufficiently pervasive so as to alter the conditions of employment and create an abusive work environment."'" (*Hughes, supra*, 46 Cal.4th at p. 1043.)

Here, the Firefighters allege hostile environment sexual harassment. Under a hostile environment theory, "a workplace may give rise to liability when it 'is permeated with "discriminatory [sex-based] intimidation, ridicule, and insult," [citation], that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment[.]"'" (*Lyle v. Warner Brothers Television*

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9 "In 2003, the Legislature amended the [FEHA] to state that employers are potentially liable when third party nonemployees (e.g., the employer's customers or clients) sexually harass their employees. (Stats. 2003, ch. 671, § 2, amending [Gov. Code,] § 12940, subd. (j)(1).)" (*Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 918, fn. omitted (*Carter*).)

Productions (2006) 38 Cal.4th 264, 279 (*Lyle*).) Thus, "the hostile work environment form of sexual harassment is actionable only when the harassing behavior is *pervasive* or *severe*. . . . To prevail on a hostile work environment claim under California's FEHA, an employee must show that the harassing conduct was 'severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex.'" (*Hughes*, *supra*, 46 Cal.4th at p. 1043, citation omitted.) To be actionable, "'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.'" (*Lyle*, at p. 284.) "[C]onduct that is severe or pervasive enough to create an objectively hostile or abusive work environment is unlawful, even if it does not cause psychological injury to the plaintiff." (*Id*. at p. 283.)

"Whether the sexual conduct complained of is sufficiently pervasive to create a hostile or offensive work environment must be determined from the totality of the circumstances . . . ," and "[t]he factors that can be considered in evaluating the totality of the circumstances are: (1) the nature of the unwelcome sexual acts or works (generally, physical touching is more offensive than unwelcome verbal abuse); (2) the frequency of the offensive encounters; (3) the total number of days over which all of the offensive conduct occurs; and (4) the context in which the sexually harassing conduct occurred." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609, 610 (*Fisher*).) "With respect to the pervasiveness of harassment, courts have held an employee generally cannot recover for harassment that is occasional, isolated, sporadic, or trivial; rather, the

employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature. [Citations.] That is, when the harassing conduct is not severe in the extreme, more than a few isolated incidents must have occurred to prove a claim based on working conditions." (*Lyle*, *supra*, 38 Cal.4th at pp. 283-284.)

When the severity of harassment is at issue "'"[t]hat inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. . . . The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensibility to social context, will enable courts and juries to distinguish between simple teasing or roughhousing . . . and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."'" (*Lyle*, *supra*, 38 Cal.4th at p. 283.) Our Supreme Court has observed that "an employee seeking to prove sexual harassment based on no more than a few isolated incidents of harassing conduct must show that the conduct was 'severe in the extreme,'" but "[a] single harassing incident involving 'physical violence or the threat thereof' may qualify as being severe in the extreme." (*Hughes*, *supra*, 46 Cal.4th at p. 1043.)[10] "Generally . . .

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10 The jury was accordingly instructed with CACI No. 2524 as follows:

"'Severe or pervasive' means conduct that alters the conditions of employment and creates a hostile or abusive work environment.

"In determining whether the conduct was severe or pervasive, you should consider all the circumstances. You may consider any and all of the following:

"a) The nature of the conduct;

"b) How often, and over what period of time, the conduct occurred;

sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff." (*Lyle, supra,* 38 Cal.4th at p. 284.)

"In the context of sex discrimination, prohibited harassment includes 'verbal, physical, and visual harassment, as well as unwanted sexual advances.'" (*Lyle, supra,* 38 Cal.4th at p. 280.)

3. *Analysis*

The jury made a specific finding that the sexual harassment of the Firefighters during the Pride Parade was severe or pervasive. The City argues that, taking the totality of the circumstances into account, the harassment was not severe or pervasive because (1) "the offensive parade conduct . . . occurred only intermittently over the course of three hours"; and (2) the Firefighters were not "physically assaulted or threatened [with] assault" but were, instead, "subjected to what can fairly be described as simple teasing, offhand comments, and extremely isolated incidents of partial nudity or lewd behavior."[11] The City focuses on the issue of whether the harassment was severe or

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"c) The circumstances under which the conduct occurred;
"d) Whether the conduct was physically threatening or humiliating;
"e) The extent to which the conduct unreasonably interfered with an employee's work performance."
Further, the jury was instructed:
"Pervasive harassment means a concerted pattern of harassment over time in the workplace of a repeated, routine or generalized nature, as opposed to harassment that is occasional, isolated, sporadic or trivial."

11 The City also contends that because some of the offensive conduct complained of by the Firefighters would be protected by the First Amendment, that conduct should not

pervasive, but it does not challenge the sufficiency of the evidence to support the other jury findings essential to the sexual harassment verdict, including — as required by Government Code section 12940, subdivision (j)(1) — that the City "kn[e]w or should . . . have known of the harassing conduct," and that the City "fail[e]d to take reasonable steps to prevent the harassment."

As we will explain, we conclude that the record contains substantial evidence to support a finding that the sexual harassment experienced by the Firefighters during the Pride Parade was severe and pervasive, thus altering the conditions of employment and creating a hostile or abusive work environment. Our conclusion is based on the Firefighters' testimony — which the jury was entitled to credit — that they were the target of repeated unwelcome sexual conduct that was specifically directed at them as they participated in the parade at the direct order of the Department.[12]

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give rise to a sexual harassment claim because "[i]mposing liability on the City for failure to prevent sexual harassment based on such evidence is in essence penalizing the City for not violating the First Amendment rights of the parade participants or businesses." We need not decide whether each instance of offensive conduct was protected by the First Amendment, as we reject the premise of the Firefighters' argument, namely, that the City could have prevented harassment only by infringing on parade goers' First Amendment rights. As shown by the parade staffing policy eventually adopted by the Department, sexual harassment of Department personnel during the Pride Parade can be prevented, while still honoring the First Amendment rights of parade goers, by simply assigning volunteers who do not perceive the Pride Parade as a hostile environment.

[12] Because the Firefighters were forced to participate in the parade by a direct order of the Department, there is no question that the parade was part of their work environment.

a. *Unwelcome Sexual Conduct in the Staging Area*

Initially, we focus on what the Firefighters experienced at the parade staging area. It took approximately 45 to 90 minutes to travel the one-mile parade route and the Firefighters' total time in the parade area was approximately three hours, including the time before and after the parade. Before the parade started, the Firefighters waited in a staging area for 45 minutes to an hour. There, certain unwelcome sexual conduct was directed toward them.

First, the Firefighters saw a man on a float in short spandex pants "dancing, touching himself, fondling, in front of three men." He was "posing and gyrating his hips, grabbing his genitalia." According to Kane, "Then he began looking at us, he was kind of staring at us in the rig." Allison saw the man look directly at him.

Second, at the staging area, a man approached the Firefighters and repeatedly offered them Twinkies, which Kane, Allison and Hewitt interpreted to be sexually suggestive, based in part on the speaker's tone of voice.

Third, while in the staging area, Allison saw his uncle's life partner and greeted him with a hug and a kiss on the cheek. A man standing behind Allison said, "Oh, look, the fireman is giving out hugs; I hope he gives me a hug." The man was wearing a shirt stating "Have you ever ridden a fat man?" and was pointing to his shirt while looking at Allison.

b. *Unwelcome Sexual Conduct During the Parade*

We now turn to the Firefighters' experience while driving the parade route.

The Firefighters drove through the parade while seated inside their fire engine. At the beginning of the parade, the Firefighters initially waved to the crowd. However, they soon stopped because, as Hewitt explained, in response to the waves certain spectators "would start licking their lips and doing simulated sex acts, grabbing their crotch." As Kane stated, "everybody [was] kind of sexually giving us gestures, licking their lips, saying things," which made him "uncomfortable" and caused him to stop waving. Allison stopped waving to the crowd after a man in sado-masochistic gear responded by rubbing his nipples and wagging his tongue at Allison while making eye contact. More than once during the parade, Kane saw "simulated sex acts" in which two men pretended to have anal sex, and he saw men grabbing other men's genitals while looking toward him. Allison similarly saw a man groping another man's genitals through a tight-fitting bathing suit, and he also saw men blowing kisses at him. Ghiotto saw a man "with his penis hanging out" during the parade, as well as people groping themselves and "grinding on each other." All of the Firefighters observed numerous men wearing G-strings that exposed their buttocks and women wearing pasties on their otherwise-exposed breasts.

Further, all of the Firefighters heard numerous lewd comments directed at them. As Kane explained, he heard comments directed at him during the parade revolving around the word "hose," including "'show me your hose,'" "'let me blow your hose,'" "'pull out your hose,'" and "'you have a long hose.'" He also heard comments involving "'mouth-to-mouth'" and "'you make me hot.'" Kane estimated that he heard between 100 and 1,000 such comments. According to Kane, "At first it was kind of funny," but "when

they add up, they become really frustrating" and "difficult to handle."[13] Other fire department personnel present at the parade, including Fire Chief Jarman, testified that the lewd comments — such as "'show me your hose'" and "'it's getting hot in here'" — were coming not only from the parade spectators, but also from microphones at the four parade announcing booths.

As described by Kane, the atmosphere at the parade included a lot of "hypersexual" people who "thought we wanted to have a good time with them." Although acknowledging that the vast majority of the parade spectators acted and were dressed appropriately, Kane testified that the sexually related conduct from a portion of the spectators was "continuous throughout the parade." Allison and Kane felt trapped in the parade. As Ghiotto testified, "We were basically put on a public display, I felt. I never felt humiliated, embarrassed in public like that . . . ."

Ghiotto testified that he had no objection to the "gay lifestyle," and Kane testified that he had no problem seeing same-sex couples showing public affection. Allison testified about a gay uncle, with whom he is very close, and stated that he has no trouble serving the gay community. Hewitt similarly testified that he had no problem with gay people or with serving Hillcrest's gay community. Thus, as we perceive the trial testimony, the jury could reasonably conclude that the Firefighters' claim of sexual

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13 Similarly, Allison heard hundreds of lewd comments directed at him, such as, "'you make us hot,'" "'put out my fire,'" "'give me mouth-to-mouth,'" and hose-related comments such as "'blow my hose'" and "'show me your hose.'" Hewitt heard comments such as "'let me see your hose'" "throughout" the parade, which were so numerous that he "wouldn't try counting them." Ghiotto heard "dozens" of crude comments during the parade.

harassment was not based on their exposure to the gay community during the parade, but rather, as Ghiotto explained, they "didn't want to be put on a pedestal in . . . public view and be ridiculed" as the center of sexual attention in the parade. We stress, therefore, that our evaluation of whether the conduct that the Firefighters experienced at the Pride Parade was sufficiently severe or pervasive to constitute sexual harassment does *not* depend on the fact that the conduct occurred at an event celebrating and attended by the City's gay community. Instead, the relevant point is that because of a direct order, the Firefighters were required to participate in a public event at which a barrage of sexual attention was directed specifically at them. The same analysis would apply to any type of public event, and to harassment victims and perpetrators of any gender and any sexual orientation.

Assuming, as we must, (1) that the jury credited the Firefighters' testimony about the sexual nature of the comments and gestures directed at them on a continuous basis throughout the course of the one-mile parade route, and (2) that the jury also viewed the three incidents at the staging area as unwelcome sexual conduct directed at the Firefighters, substantial evidence supports a finding that the Firefighters experienced sexual harassment of a severe nature that was pervasive throughout the entire time they were assigned to participate in the parade. In light of the evidence we have set forth above, we reject the City's characterization of the atmosphere that the Firefighters experience at the parade as "simple teasing, offhand comments, and extremely isolated incidents of partial nudity or lewd behavior." The jury was well within the bounds of reason to conclude that the sexual conduct at the parade directed toward the Firefighters

was "'severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex'" (*Hughes*, *supra*, 46 Cal.4th at p. 1043), and that the conduct of some of the parade spectators, when taken together over the course of the parade, was "'"conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."'" (*Lyle*, *supra*, 38 Cal.4th at p. 283.)

As the jury found, and the City does not challenge, the City knew or should have known of harassing conduct occurring at the Pride Parade and did not take reasonable steps to prevent it. The City (through the Department) gave the Firefighters a direct order to participate in the parade. As we have explained, under the proper standard of review, substantial evidence supports the jury's finding that the sexual harassment experienced by the Firefighters at the Pride Parade was severe and pervasive. We therefore reject the City's argument that the evidence is insufficient to support the jury's sexual harassment verdict.

c. *The Authorities Cited by the City Are Not Persuasive*

The City relies on several cases to argue that the evidence is insufficient to support a finding that the unwelcome sexual conduct directed at the Firefighters during the parade was severe or pervasive. We are not persuaded, as none of those cases deal with analogous factual situations.

The City relies on *Herberg v. California Institute of the Arts* (2002) 101 Cal.App.4th 142, 150-154 (*Herberg*) to argue that the parade's short duration was insufficient to give rise to a claim of sexual harassment. *Herberg* held that the presence

of a sexually explicit pencil drawing for 24 hours in an art school's gallery was not sufficient to constitute sexual harassment. (*Ibid*.) However, in this case, instead of being exposed to a single piece of sexual art in the context of an art exhibition, the Firefighters were subjected to continuous sexual comments and conduct by numerous people, directed specifically at them, over the entire course of the parade, which they were unable to avoid because their employer required them to be there. Further, we reject the City's attempt to extract from *Herberg* the principle that "it is doubtful that any non-physical harassing conduct in the workplace lasting only a day or less could ever be considered pervasive." When harassing conduct is "severe in the extreme," an isolated instance will be sufficient to establish sexual harassment. (*Lyle, supra,* 38 Cal.4th at p. 284.) Conduct that is directed at a person is more severe than general sexual content in the workplace. (*Id*. at pp. 284-285.) Here, the continuous sexual comments and conduct that the Firefighters experienced during the parade may reasonably be characterized by a jury as "severe in the extreme" due to their intensity and the fact that they were directly targeted at the Firefighters, and thus are sufficient to support a finding of sexual harassment, regardless of the fact that they occurred on only one day.

The City cites *Lyle, supra*, 38 Cal.4th 264, *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121 (*Mokler*), and *Hughes*, *supra*, 46 Cal.4th 1035, to argue that what the Firefighters experienced during the parade was neither severe nor pervasive. However, those cases are not factually similar to the Firefighters' case.

Lyle considered whether a comedy writers' assistant for the television show *Friends* had a case for sexual harassment based on the sexual comments and gestures that

the comedy writers made in the workplace. (*Lyle*, *supra*, 38 Cal.4th at pp. 294-295.) *Lyle* concluded that because most of the "sexually coarse and vulgar language at issue did not involve and was not aimed at plaintiff or other women in the workplace," that language could not give rise to a sexual harassment claim. (*Id*. at p. 272.) The isolated instances of vulgar language that *were* directed specifically at women in the workplace were not directed at plaintiff, and thus could only have given rise to a harassment claim if they had permeated the work environment, which they did not. (*Id*. at pp. 289-290.) Here, in contrast, the sexual comments and conduct were aimed directly at the Firefighters, who were required by their employer to serve as the center of attention in the sexual atmosphere of the parade.

Further, *Mokler*, *supra*, 157 Cal.App.4th 121, 144-145, which concerned a coworker's inappropriate conduct on three occasions over a five-week period (involving brief touching and "boorish" comments), and *Hughes*, *supra*, 46 Cal.4th 1035, 1048-1049, which involved sexual propositions made to the plaintiff on two occasions (over the telephone and later that day at a social event), are not analogous to the intense and concentrated barrage of sexual comments and conduct directed at the Firefighters during the parade.

We therefore reject the City's challenge to the sufficiency of the evidence to support the judgment in favor of the Firefighters on the sexual harassment claim. The verdict was supported by substantial evidence.

C. *The City's Challenge to the Judgment Based on Alleged Instructional Errors*

We next consider the City's challenge to several of the jury instructions either given or refused by the trial court during the second trial.

1. *Applicable Standards*

When reviewing the City's claims of instructional error, we apply the rule that "[a] party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 (*Soule*).) "The trial court's 'duty to instruct the jury is discharged if its instructions embrace all points of law necessary to a decision.'" (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 82 (*Cristler*).)

When reviewing the propriety of jury instructions, we apply a de novo standard of review. (*Cristler*, *supra*, 171 Cal.App.4th at p. 82.) "When a party challenges a particular jury instruction as being incorrect or incomplete, 'we evaluate the instructions given as a whole, not in isolation.'" (*Ibid*.) Further, "'"[a] reviewing court must review the evidence most favorable to the contention that the requested instruction is applicable since the parties are entitled to an instruction thereon if the evidence so viewed could establish the elements of the theory presented."'" (*Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1157.)

In the event the trial court erred, "[a] judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13.)" (*Soule*, *supra*, 8 Cal.4th

at p. 580.) "Instructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict.'" (*Ibid*.)

2. *Refusal of Instruction on Isolated Instances of Sexual Harassment*

The City challenges the trial court's denial of its request for the following instruction: "For an employer to be liable for insolated incidents of sexual harassment, the incidents must be particularly severe and generally must include conduct similar in nature to physical violence or the threat of physical violence." In support of the requested instruction, the City cited *Herberg*, *supra*, 101 Cal.App.4th 142, 151, 153, and *Sheffield v. Los Angeles County Dept. of Social Services* (2003) 109 Cal.App.4th 153, 163-164 (*Sheffield*).[14]

The trial court denied the instruction on the grounds that it did not accurately state the law, and the substance of the instruction was covered by another instruction.

As we will explain, the trial court would have incorrectly stated the law if it *had* instructed the jury that, at a minimum, the threat of physical violence must be present for

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14 *Herberg* stated, "Although plaintiffs argue that 'even a single incident of severe harassment may be sufficient' to establish liability by an employer for sexual harassment, a review of the cases they cite reveals that such a single incident must be severe in the extreme and generally must include either physical violence or the threat thereof." (*Herberg*, *supra*, 101 Cal.App.4th at p. 151.) *Sheffield* stated, "[C]ase law appears to adhere to the old adage that 'sticks and stones may break my bones, but words will never hurt me,' nonetheless, when violence or the threat of violence is added to the equation, a trier of fact could determine Appellant's conditions of employment had been drastically changed and that she was in a hostile work environment." (*Sheffield*, *supra*, 109 Cal.App.4th at pp. 163-164.)

an isolated instance of harassment to give rise to liability. Therefore, the trial court properly declined to give the requested instruction.

Although our Supreme Court has stated that "an employee seeking to prove sexual harassment based on no more than a few isolated incidents of harassing conduct must show that the conduct was 'severe in the extreme,'" and that "[a] single harassing incident involving 'physical violence or the threat thereof' *may* qualify as being severe in the extreme . . ." (*Hughes*, *supra*, 46 Cal.4th at p. 1043, italics added), it has never stated that physical violence or the threat thereof *must* be present to render harassment "severe in the extreme." Instead, physical violence is only one factor that may increase the severity of harassment, and a determination whether harassment is severe must depend on an application of "[c]ommon sense, and an appropriate sensibility to social context . . . ." (*Lyle*, *supra*, 38 Cal.4th at p. 283.) Further, "'[w]hether an environment is "hostile" or "abusive" can be determined only by looking at *all the circumstances*. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462, italics added.)

The trial court thus properly declined to instruct the jury that the threat of physical violence is required when isolated instances of harassment are at issue. Instead, the jury was properly instructed to "consider all the circumstances" in determining whether the Firefighters were subjected to sexual harassment that was severe or pervasive, including "[h]ow often, and over what period of time, the conduct occurred" and "[w]hether the

conduct was physically threatening or humiliating." This instruction accurately reflected the law, but still enabled the City to make its argument that the harassment experienced by the Firefighters was not sufficiently severe to constitute a hostile environment in light of its short duration and the lack of a physical threat.

3. *Refusal of Instruction on City's Responsibility for Acts of Nonemployees*

The City requested the following instruction on its responsibility for the acts of nonemployees, which was taken verbatim (with certain omissions) from Government Code section 12940, subdivision (j)(1):

> "An employer may be responsible for the acts of non-employees, with respect to sexual harassment of employees, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. (Fn. omitted.)
>
> "In reviewing cases involving the acts of non-employees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of those non-employees shall be considered."

The trial court ruled that it would give only the first paragraph of the requested instruction. The trial court explained that the second paragraph would potentially mislead the jury because it "renders the instruction back into the legalese that [the Judicial Council of California Civil Jury Instructions were] designed to avoid." The City decided to withdraw its request for the instruction if the second paragraph was not included, as the first paragraph was already adequately covered by another instruction.[15]

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15 The jury was instructed, under the heading "Sexual Harassment — Essential Factual Elements," that to establish they were subjected to sexual harassment by nonemployees, the Firefighters must prove, among other things, "[t]hat the City . . .

The City argues that the trial court erred in refusing to give the second paragraph of the proposed instruction because it was entitled to have the jury instructed that, according to statute, it should consider the extent of the City's *control* over the nonemployees. We disagree. "'[I]nstructions on points which have been sufficiently covered by other instructions may properly be refused . . . .'" (*City of Pleasant Hill v. First Baptist Church* (1969) 1 Cal.App.3d 384, 408.) "'"The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole."'" (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.)

Here, the jury instructions already informed the jury that the City could not be found liable unless it "fail[ed] to take *reasonable* steps to prevent harassment." (Italics added.) The concept that the jury should consider the *reasonable* steps taken by the City subsumes the concept that the jury should consider whether the City could have controlled nonemployees who committed the harassing behavior. (Cf. *Carter*, *supra*, 38 Cal.4th at p. 930 [acknowledging that it "may be true" that the elements of control and legal responsibility in Gov. Code, § 12940, subd. (j)(1) were covered by preexisting statutory language requiring employers to "'take all reasonable steps to prevent harassment from occurring,'" but remanding because the parties and the jury did not have the opportunity to expressly focus on the elements in the statutory language enacted after the trial].)

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through its supervisors knew or should have known of the conduct and failed to take immediate and appropriate corrective action."

4. *Refusal of Instruction on Subsequent Precautionary Measures*

The City sought an instruction, based on Evidence Code section 1151 and regarding subsequent precautionary measures, in which the jury would be informed that "[e]vidence of precautionary measures taken after the occurrence of an event may not be considered as evidence of culpable conduct in connection with the event." The trial court refused to give the instruction, commenting that it was "legalese," and explaining that it was inappropriate because the City had "offered the evidence itself for a different relevant purpose," namely, to show that it took immediate corrective action in response to the harassment.

We conclude that the trial court properly rejected the proposed instruction, as it would have been confusing to the jury and an inaccurate statement of the law in the context of a sexual harassment case. Evidence Code section 1151 states that "[w]hen, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event." The rule expressed in Evidence Code section 1151 is intended to apply in negligence cases or cases of reckless or wanton misconduct (*Ault v. International Harvester Co.* (1974) 13 Cal.3d 113, 118), based on the policy that "the exclusion of such evidence may be necessary to avoid deterring individuals from making improvements or repairs after an accident has occurred." (*Id*. at p. 119.)

However, in a sexual harassment case, the issue of whether the defendant failed to take immediate and appropriate corrective action in response to the harassing conduct is a

central factual element required by the statute, which the Legislature has determined should be presented to and decided by the finder of fact. (Gov. Code, § 12940, subd. (j)(1).) In contrast to negligence law, sexual harassment law promotes precautionary and remedial measures by making the absence of those measures one of the central elements of the plaintiff's case. Indeed, here, the jury was instructed that for the Firefighters to establish their case, they must prove, among other things, that "the City . . . knew or should have known of the conduct and failed to take immediate and appropriate corrective action."

In light of the focus in the jury instructions on whether the City took immediate and appropriate corrective action, it would have misled and confused the jury to receive an instruction that evidence of precautionary measures taken by the City after the parade cannot be considered as evidence of the City's culpable conduct. The trial court therefore properly rejected the proposed instruction.

5. *Refusal of Instruction Regarding Third Party Conduct As Superseding Cause*

The trial court declined to instruct the jury with CACI No. 432, regarding third party conduct as a superseding cause, on the ground that the instruction was inapplicable. The proposed instruction stated:

> "[The City] claims that it is not responsible for plaintiffs' harm caused by the later misconduct of members of the public after the parade. To avoid legal responsibility for the harm, [the City] must prove all of the following:
>
> "1. That the conduct of members of the public occurred after the conduct of [the City];

"2. That a reasonable person would consider the conduct of the members of the public as a highly unusual or an extraordinary response to the plaintiffs' participation in the parade;
"3. That [the City] did not know and had no reason to expect that the members of the public would act in a wrongful manner; and
"4. That the kind of harm resulting from the conduct of the members of the public after the parade was different from the kind of harm that could have been reasonably expected from [the City's] conduct."

The City argues that this instruction was relevant to inform the jury that it should not award damages based on the threat that Ghiotto received on his answering machine after the Firefighters went public with their complaints about being forced to participate in the parade. According to the City, "[w]ithout this instruction, the jury was misled into believing they could assess damages against the City for such criminal misconduct perpetrated by a member of the public." Further, the City contends that the purported error was prejudicial because "the higher damages award for Ghiotto resulted from the failure to give this instruction."

We reject the City's contention. Even if the trial court erred (which we do not decide), the City cannot establish that it is "'probable' that the error 'prejudicially affected the verdict.'" (*Soule*, *supra*, 8 Cal.4th at p. 580.) As reflected on the special verdict form, the jury did not award additional damages to Ghiotto based on any emotional distress from the threatening phone message. Instead, the jury awarded him the same amount of $5,000 to compensate for noneconomic loss that it awarded to the other Firefighters. The additional amount awarded to Ghiotto was $14,200 for "[p]ast and future lost earnings," which was the amount of earnings he testified that he lost when he

relocated to a new fire station in the aftermath of the Pride Parade and was no longer able to serve as battalion medical officer. Therefore, any error was harmless.

6. *Instruction on General Work Atmosphere*

Over the City's objection, the trial court gave the following instruction regarding evidence of the general work atmosphere:

> "A reasonable person may be affected by knowledge that other workers are being sexually harassed in the workplace, even if he or she does not personally witness that conduct. Evidence of the general work atmosphere, involving employees other than the plaintiff, is relevant to the issue of whether there existed an atmosphere of hostile work environment."

This instruction is consistent with *Fisher*, *supra*, 214 Cal.App.3d 590, 610-611, and *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 520, which explained that when a plaintiff is a direct victim of sexual harassment, the plaintiff's knowledge that other employees have been sexually harassed is relevant to establishing hostile environment sexual harassment, even if the employee does not directly witness the harassment in his or her immediate work environment. The City contends that the instruction should not have been given because none of the Firefighters "testified that he was personally aware that other workers were sexually harassed." We disagree.

The Firefighters did testify about harassment in prior parades. Kane testified that he had heard about prior parades in which firefighters were "cat called" and "squirted with fluids," and "dildos [were] being thrown at the rig." Allison had heard that in previous parades, somebody threw a dildo at the fire truck and the truck was squirted with anal lubricant. Ghiotto and Hewitt testified generally that they were reluctant to

participate in the Pride Parade because they had heard about the kinds of things that had happened at past Pride Parades.

Further, the instruction was relevant not only to what happened at *previous* parades, but to events in the 2007 Pride Parade that not all of the Firefighters personally witnessed. As their testimony demonstrated, the Firefighters — who were sitting on two different sides of the fire engine during the parade — witnessed slightly different things during the parade. The instruction thus served to inform the jury that it could take into account the collective experience of the Firefighters to the extent that the Firefighters discussed their parade experience with each other after the parade, as they testified that they did.

We therefore conclude that the trial court did not err in giving the instruction.[16]

D. *The City's Challenge to the Trial Court's Evidentiary Rulings*

We now turn to the City's argument that the trial court erred in certain evidentiary rulings made during the second trial. "Broadly speaking, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence." (*People v. Waidla* (2000) 22 Cal.4th 690, 717; see also *People v. Rowland*

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16 In addition, even if there was error in informing the jury that it could consider "general work atmosphere, involving employees other than the plaintiff," it is not reasonably probable that the jury would have reached a different verdict in the absence of such an instruction (*Soule*, *supra*, 8 Cal.4th at p. 580), as the central evidence of harassment in this case consisted of the comments and conduct that all of the Firefighters personally witnessed at the parade in 2007, and that provided ample evidence to support the jury's verdict.

(1992) 4 Cal.4th 238, 264 [abuse of discretion review applies to hearsay, relevancy and undue prejudice challenges to the admission of evidence].)

1. *Evidence of an Anonymous Threat to Ghiotto*

During the trial, Ghiotto testified that he received an anonymous threat on his home telephone answering machine approximately seven to 10 days after the Pride Parade. Over the City's objection, the trial court admitted evidence of the telephone message, receiving a transcript of the message into evidence and allowing a recording of the message to be played for the jury.[17]

According to the City, in this appeal it "renews its argument . . . that this evidence is not admissible on the following grounds: lack of foundation; hearsay; no relevancy; and the probative value is substantially outweighed by the probability that its admission creates the substantial danger of undue prejudice, confusion of the issues, or the misleading of the jury." We consider these arguments in turn.

The City's foundation argument rests solely on the observation that it cannot be authenticated because "[n]o one knows who made the threatening message." However, this argument lacks merit because Ghiotto established a sufficient foundation for the admission of the message by establishing its authenticity based on his personal knowledge that it was the message left on his home answering machine. (Cf. *O'Laskey v.*

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17 As transcribed, the message stated: "Well you are out of time, you God damn wetback Mexicans stand up against somebody else they can discriminate against. Go back to Mexico you fuck'n asshole. You ain't seen nothing yet. The harassment is only beginning."

Sortino (1990) 224 Cal.App.3d 241, 249 [explaining that authentication of tape recordings is based on rule for authentication of writings]; Evid. Code, § 1400 ["Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is . . . ."].) Whether or not Ghiotto knew who left the message, he was still able to confirm that he received it.

The City's relevancy challenge is premised on the contention that because the telephone message was left *after* the Pride Parade, it is irrelevant to the Firefighters' claim for sexual harassment. We disagree. Events after the Pride Parade are relevant because the damages incurred by the Firefighters as a result of the harassment may have arisen after the actual parade. Here, for instance, the telephone message may have been motivated by Ghiotto's public complaints about being forced to participate in the Pride Parade, which in turn were a direct result of the sexual harassment he suffered. Thus, the evidence that Ghiotto received a disturbing threat after going public about his complaints was relevant to proving that he suffered emotional distress damages as a result of the parade.[18]

We also reject the City's contention that the evidence was inadmissible hearsay. The hearsay rule applies to out-of-court statements offered to prove the truth of the matter

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[18] Even if we were to conclude that the threatening telephone message is not relevant and should not have been admitted, we would conclude that any error in admitting the evidence was harmless. Because Ghiotto was awarded the same amount of emotional distress damages as the other Firefighters, the admission into evidence of the threatening message apparently did not influence the jury's verdict.

asserted. (Evid. Code, § 1200.) Here, the content of the message was not offered to prove the truth of any facts stated in the message, but rather to prove that Ghiotto had received a threatening and offensive message. It was therefore admitted for the effect that it had on the listener rather than the truth of the matter asserted.

Finally, the trial court was within its discretion to determine that evidence of the telephone message should not be excluded under Evidence Code section 352 as more prejudicial than probative. The City contends that because the message was "racist and included a threat of harm," its effect would be to "arouse the passion of the jury and inflame the jury against the City." The trial court could reasonably conclude that although the telephone message was offensive, the jury would not have its passions aroused against the City to a prejudicial extent by hearing the message, and that therefore the message should be admitted for its probative value in showing the consequences of Ghiotto's participation in the Pride Parade.

2. *Testimony of the Firefighters' Sexual Harassment Expert*

We next consider the City's challenge to portions of the testimony of the Firefighters' expert witness Kevin Williams, who described himself as an expert in compliance issues concerning harassment, discrimination and retaliation, and has conducted hundreds of investigations related to discrimination and harassment. Williams testified that he was retained to determine whether or not the City knew or should have known of an established pattern of harassment against firefighters and whether the City conducted a proper investigation. His testimony focused on a manual for compliance officers prepared by the California Department of Fair Employment and Housing (DFEH

manual), which he customarily uses to assist with an investigation. Williams elaborated on those standards and testified that the City followed those standards in its own written sexual harassment policy.

Based on the content of Williams's expert report, the City filed a motion in limine to exclude Williams's testimony on the basis, among others, that he should not be permitted to opine on the application of the law to the facts, as that was the role of the jury. The trial court ruled that Williams "may not provide opinions on what the law is or should be, nor on whether a prima facie case has been established." During Williams's trial testimony, the City sought to enforce this ruling, objecting more than once on the ground that Williams was being called upon to testify regarding legal standards.

On appeal, the City focuses on several portions of Williams's testimony, arguing that the trial court should have excluded that testimony because Williams "render[ed] legal conclusions and opinions." The City relies on case law holding that although an expert may opine on an ultimate issue, "[t]here are limits to expert testimony, not the least of which is the prohibition against admission of an expert's opinion on a question of law." (*Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178.)

We now turn to an examination of each of the portions of testimony that the City finds objectionable.

First, Williams testified that in conducting an investigation into alleged discrimination, he commonly will look for deviations from regular procedures and practices. According to Williams, one deviation present in this case was "the temporary suspension of the obscenity and nudity ordinances" during the Pride Parade, based on his

review of the Municipal Code. He said that this atmosphere "set the tone and the environment" for the harassment that the Firefighters experienced. According to the City, Williams improperly testified to his "interpretation of what conduct those ordinances proscribed." We disagree. Williams was not asked to opine on the type of conduct prohibited by the City's obscenity and nudity ordinances. He merely made a brief comment that the enforcement of those ordinances had been suspended during the Pride Parade.

Moreover, testimony by Assistant Fire Chief Carle and by the San Diego police lieutenant who was in charge of police enforcement during the parade extensively covered the fact that the Municipal Code provisions prohibit vulgar or indecent language on the streets and nudity on public lands, and that the public nudity provisions were not aggressively enforced during the parade. The City does not challenge the admission of that testimony, and accordingly, we would conclude that any error in admitting Williams's testimony was harmless.[19]

Next, according to the City, Williams testified that "all of the necessary facts existed to establish that the offensive conduct was severe in this case." The City did not provide a citation to the record in connection with this argument, and after having

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19 The City also contends that Williams's testimony "suggest[ed] the City could be held liable for sexual harassment for failing to enforce ordinances governing profanity, nudity and vulgarity, when in fact Government Code section 818.2 confers immunity on the City from liability for injury caused by failing to enforce any law." As we read the testimony, however, Williams did not suggest that the City could be liable based on its failure to enforce the ordinances. Instead, he noted the lax enforcement of the ordinances as red flags that the Pride Parade might be a hostile environment.

reviewed Williams's testimony, we are uncertain as to what statement the City has in mind. However, we note that during direct examination, counsel for the Firefighters referred to the chart that he had been using during trial to keep track of witnesses' testimony about the different types of objectionable conduct during or relating to the Pride Parade in 2007 or past years. He asked, "this chart that I showed you . . . , have you ever had a case where there has [*sic*] been reports of crude comments, vulgar gestures, public nudity, provocative dance and dress, simulated sex acts, unwarranted materials of a sexual nature, insults and threats in one case out of the some 300 that you've investigated?" Williams answered, "Never. I have not seen a case like that where all the elements are involved. . . . [N]ever have I seen that many involved in one case in terms of it being in this case severe in the . . . extreme." Assuming this is the testimony to which the City refers, we do not perceive it as stating a legal conclusion. Although Williams used the word "severe," which mirrors the legal standard for a sexual harassment claim, his answer was aimed at comparing this case to others he had investigated, rather than at opining regarding liability for sexual harassment in this case.[20]

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20 Further, we note that the City did not object to the question posed to Williams, and it did not move to have Williams's statement stricken. Therefore, we may refuse to review the issue on appeal. (*People v. Benson* (1990) 52 Cal.3d 754, 786, fn. 7 (*Benson*) ["It is, of course, 'the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal.'"]; see also Evid. Code, § 353, subd. (a).)

The City also contends that Williams improperly "render[ed] an opinion that FEHA's severe element was satisfied by the anonymous threat on Ghiotto's voice mail because it had a 'causal link' to the parade." We disagree with the City's characterization of Williams's testimony. Williams explained that, based on the DFEH manual, "the greater the severity, the less the need for a repetitive number of sexual . . . instances of behavior," and that "you only need one occurrence where there is a . . . threat, a violence or a perceived threat of violence in the workplace." He further explained, in words that are difficult to follow, that "there also must be a causal connection between . . . the workplace incident, you know, that it's associated with the incident and the parade, but since . . . they were in fact ordered to be there, it is connected to the workplace, so it is relevant." This testimony does not, in our view, amount to a statement by Williams that the anonymous threat directed toward Ghiotto rendered the harassment severe as a matter of law.

Finally, relying on a ground other than that Williams's testimony stated a legal conclusion, the City objects to Williams's statement that "[i]f there's a threat involved . . . the core issue is . . . from the objective standard of a reasonable person, you have to look at the harassment in the shoes of the victim, so to speak. And if . . . there is a threat, it heightens the perception in the victim's mind of the severity of the hostile workplace and environment." The City argues that this testimony was "unfair and prejudicial to the City" because, in the case of a threat, such as that received by Ghiotto, the jury was being told "that under the law they should envision themselves receiving a racist and threatening message at home." The City contends that the testimony is an example of the

impermissible "so-called 'golden rule' argument, by which counsel asks the jurors to place themselves in the plaintiff's shoes and to award such damages as they would 'charge' to undergo equivalent pain and suffering." (*Beagle v. Vasold* (1966) 65 Cal.2d 166, 182, fn. 11.)

We disagree for two reasons. First, Williams's statement was not made in the context of asking the jury to award a certain amount of damages for pain and suffering, and thus is not an example of the "golden rule" argument. Second, the City reads far too much into Williams's testimony. In stating that the harassment should be viewed "in the shoes of the victim," Williams was merely accurately explaining that the perspective of the victim should be taken into account when deciding whether a reasonable person would view certain conduct as harassment, and that a person who has been threatened would be more sensitive to workplace harassment. There were no comments suggesting that the jurors should imagine themselves personally receiving a threat.

3. *Photographs from Other Events*

The City filed motions in limine to exclude photographs as lacking adequate foundation, irrelevant and prejudicial unless those photographs "portray[] people or events actually at the Pride Parade," and specifically to exclude photographs taken at the adjacent Pride Festival, which the Firefighters did not attend. The trial court ruled that "photographs for which a proper foundation is laid . . . are admissible, i.e. if they depict activities plaintiffs witnessed at the 2007 parade (in the staging area or along the route)." As the trial court explained, the photograph would be admissible if a witness was able to testify "that this is a fair and true depiction of what I witnessed." According to our

review of the photographs, several of them depict individuals in sexually provocative clothing or engaged in sexually suggestive conduct.

Summarizing the photographic evidence at trial admitted into evidence at the request of the Firefighters, the City states that one photograph was from the 2005 Pride Parade; 10 photographs were from the 2006 Pride Parade; and 21 photographs were admitted into evidence after "witnesses testified that they saw something similar or substantially similar at the 2007 Pride Parade."

The City's appellate argument is based solely on Evidence Code section 352.[21] The City argues that the trial court should not have admitted any of the photographs because the probative value of the photographs was outweighed by undue prejudice and the danger of misleading the jury. According to the City, "[t]he photographs of flamboyantly dressed or scantily dressed individuals taken at other venues or on different dates grossly confused the issue for the jury's resolution" and that "[t]he effect of allowing such photographs to come into evidence to prove sexual harassment was to impermissibly relieve Plaintiffs of proving that the harassment was in their workplace and they had personally witnessed it."

In determining the relevancy of evidence and whether it should be excluded as unduly prejudicial, confusing or misleading under Evidence Code section 352, the trial

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21 Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

court is vested with broad discretion. (*People v. Harris* (2005) 37 Cal.4th 310, 337; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) "'[T]he "prejudice" referred to in Evidence Code section 352'" is characterized by "'evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues.'" (*People v. Heard* (2003) 31 Cal.4th 946, 976.)

Here, the trial court was well within its discretion under Evidence Code section 352 to admit the photographs. Almost all of the photographs were admitted only after a witness testified that he or she witnessed something substantially similar to what was depicted in the photograph in the 2007 Pride Parade.[22] Therefore, the photographs were highly probative to establish that the Firefighters were forced to work in a sexual environment when they were ordered to participate in the parade. "'The prejudice that [Evidence Code] section 352 "'is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.'"'" (*People v. Branch* (2001) 91 Cal.App.4th 274, 286.) The trial court could reasonably conclude that whatever emotional bias the photos might evoke against the City, the probative nature of the photographs outweighed that prejudice.

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22 The only pre-2007 photographs that were not connected by witness testimony directly to something observed in the 2007 Pride Parade were not unduly prejudicial to the City. First, exhibit 107 depicts a portion of the crowd along the parade route in 2005, but does not contain any unusually-dressed or peculiarly-behaving individuals and was admitted into evidence after testimony that it accurately portrayed the volume of the crowd at the Pride Parade. Exhibit 128 depicts a convertible car in the 2006 Pride Parade carrying several men — all normally dressed — with an advertisement for "rentboy.com" on the side of the car. The organizer of the Pride Parade testified that the photo appeared to be a scene from the Pride Parade, but did not identify the parade year.

4. *Rebuttal Testimony of Richard Carlson*

The City's last challenge to the evidence admitted at trial concerns a witness that the Firefighters called in their rebuttal case.

Former San Diego Police Officer Richard Carlson testified that he rode in the 2007 Pride Parade in an antique automobile. His location was approximately four vehicles in front of the contingent from the Department,[23] and behind the other police officers who were participating in the Pride Parade. According to Carlson, he observed a man in the crowd who opened his trench coat to reveal an 18-inch-long rubber phallus, which he waived to the parade participants. The man then shot a squirt gun toward Carlson's vehicle, which caused Carlson to be sprayed in the ear, nostrils, eyes and mouth with a liquid having the odor of a "dish rag that had been sitting out for a long period of time." According to Carlson, he developed a sinus infection within 48 hours of being in the parade — implying that the liquid in the squirt gun was the cause.

Carlson was called to testify in rebuttal to San Diego Police Chief William Lansdowne's testimony that while participating in the 2007 Pride Parade he did not see any sexual gestures, and specifically did not see a person in the crowd with a raincoat, flashing a rubber phallus and squirting water in people's faces. Prior to Carlson's testimony, the City objected that Carlson's testimony should have been offered in the Firefighters' case-in-chief, and that the evidence concerning the squirt gun was not

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[23] As we have explained, the Department's contingent was made up of numerous individuals marching on foot, followed by the fire engine driven by the Firefighters.

relevant to sexual harassment. The trial court overruled the objection and permitted Carlson to testify.

On appeal, the City argues that Carlson's testimony should not have been admitted because it "did not relate to any new matter developed after Plaintiffs concluded their case in chief," and it "was not relevant."[24]

We reject the City's argument because, as we have explained, Carlson's testimony did indeed serve to rebut evidence offered during the City's case, namely, Police Chief Landsdowne's testimony that he observed no sexual gestures during the 2007 Pride Parade. Carlson's testimony served to cast doubt on the credibility of Lansdowne's testimony because Lansdowne was riding in front of Carlson, and Carlson saw the man in the trench coat display the phallus and squirt the gun at the groups in front of him.

E. *The Parties' Challenges to the Trial Court's Award of Attorney Fees and Costs*

We now turn to both the City's and the Firefighters' challenges to the trial court's ruling on the Firefighters' motion for an award of attorney fees and costs.

A deferential standard of review guides our analysis. "A trial court's exercise of discretion concerning an award of attorney fees will not be reversed unless there is a manifest abuse of discretion. . . . '"The 'experienced trial judge is the best judge of the

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24 The City also argues that Carlson's testimony was prejudicial because "[t]he jury was invited to imagine for themselves what that fluid was right before deliberating." To the extent the City is arguing that the evidence should have been excluded under Evidence Code section 352 as more prejudicial than probative, it has waived this argument by failure to make it to the trial court. (*Benson, supra*, 52 Cal.3d at p. 786, fn. 7; Evid. Code, § 353, subd. (a).)

value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong['] — meaning that it abused its discretion. . . ."' . . . Accordingly, there is no question our review must be highly deferential to the views of the trial court. . . . [¶] At the same time, discretion must not be exercised whimsically, and reversal is appropriate where there is no reasonable basis for the ruling or the trial court has applied 'the wrong test' or standard in reaching its result. . . . Thus, in attorney fee determinations such as this one, the exercise of the trial court's discretion 'must be based on a proper utilization of the lodestar adjustment method, both to determine the lodestar figure and to analyze the factors that might justify application of a multiplier.'" (*Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1239-1240, citations omitted.)

As we have explained, the Firefighters filed a posttrial motion for an award of attorney fees and costs. The statutory basis for the motion was (1) the provision in FEHA stating that the trial court, "in its discretion, may award to the prevailing party reasonable attorney's fees and costs" (Gov. Code, § 12965, subd. (b)); and (2) Code of Civil Procedure section 1021.5, which permits an award of attorney fees to a successful party in certain circumstances in "any action which has resulted in the enforcement of an important right affecting the public interest" (*ibid.*). The Firefighters sought the award under FEHA based on their success on the sexual harassment claim, and they sought the award under Code of Civil Procedure section 1021.5 on the theory that their cause of action for violation of their right to free speech under the California Constitution, even if not successful, was the catalyst for the Department's adoption of the volunteer-only

parade policy. The Firefighters submitted documentation that they incurred $1,253,334 in attorney fees,[25] and $61,383.51 in nonstatutory costs. They argued that the trial court should accept the full amount of the attorney fees as the reasonable lodestar amount and should apply a multiplier of two to compensate for counsel's risk in accepting a contingent case.

The City opposed the motion. Among other things, it argued that an award of attorney fees should be denied, or at least reduced, based on (1) the Firefighters' limited success in the litigation, and (2) the fact that, given the small monetary recovery obtained, the action purportedly could have been brought as a limited civil case. (See Code Civ. Proc., § 86 [describing the type of proceedings considered limited civil cases]; Code Civ. Proc., § 1033, subd. (a) ["Costs or any portion of claimed costs shall be as determined by the court in its discretion in a case other than a limited civil case . . . where the prevailing party recovers a judgment that could have been rendered in a limited civil case."]; *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 976 (*Chavez*) [§ 1033, subd. (a) "gives a trial court discretion to deny attorney fees to a plaintiff who prevails on a FEHA claim but recovers an amount that could have been recovered in a limited civil case"].)

The trial court concluded that the Firefighters were entitled to a fee award on both of the statutory grounds set forth in their motion, but that a downward departure from the

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[25] The fees were comprised of $1,211,554 through the second trial, plus an additional $56,030 incurred for posttrial motions.

lodestar was appropriate. Specifically, the trial court reduced the lodestar by, among other things, (1) denying recovery of fees for two lawyers and one law clerk who billed a relatively small amount of time on the case; (2) denying recovery for the $115,104 in fees attributable solely to the first trial; and (3) applying a negative multiplier of 50 percent.

The trial court explained that it was applying the negative multiplier because (1) the Firefighters did not prevail on four of their five causes of action; (2) they recovered only "a fraction of the pretrial indications of what plaintiffs thought the case was worth"; (3) the damages awarded to Allison, Hewitt and Kane ($5,100, $5,000 and $5,000, respectively) were "at or near the small claims court limit," and the damages awarded to Ghiotto ($19,200) "were below the floor for a limited jurisdiction case"; and (4) "the taxpayers of San Diego will ultimately bear the burden of the fee award" and "the last several years have not been fiscally happy ones for the municipality."

After making adjustments to the lodestar amount, the trial court ultimately awarded $532,980.35 in fees to the Firefighters.

The trial court also awarded $49,036.20 of the costs to the Firefighters. In so doing, it rejected the City's argument based on Code of Civil Procedure section 1033, subdivision (a) that all of the costs should be stricken on the ground that the judgment recovered could have been rendered in a limited civil case. The trial court explained that "[t]he action does not meet the definition of a limited jurisdiction case . . . as injunctive relief was sought in the complaint."

The City challenges both the attorney fee award and the cost award, and the Firefighters challenge the attorney fee award. We discuss each party's arguments in turn.

1. *The City's Challenge to the Award of Attorney Fees and Costs*

a. *The City's Challenge to the Award Made Pursuant to FEHA Is Without Merit*

The trial court awarded attorney fees pursuant to Government Code section 12965, subdivision (b), properly following the principle that under FEHA, "in exercising its discretion, a trial court should ordinarily award attorney fees to a prevailing plaintiff, unless special circumstances would render an award of fees unjust." (*Young v. Exxon Mobil Corp.* (2008) 168 Cal.App.4th 1467, 1474.)

The City's challenge to the trial court's decision to award attorney fees under FEHA is premised on *Chavez*, *supra*, 47 Cal.4th 970, which was issued by our Supreme Court in 2010, after the orders at issue here. *Chavez* examined the interplay between Government Code section 12965, subdivision (b), which gives the trial court discretion to award attorney fees in an action for damages brought under FEHA, and Code of Civil Procedure section 1033, subdivision (a), which gives the trial court discretion to deny costs (including attorney fees) when a party recovers a judgment that could have been rendered in a limited civil case. (*Chavez*, at pp. 986-989.) Specifically, *Chavez* answered the question: "If . . . a party brings an action under the FEHA that is not brought as a limited civil case and recovers an amount that could have been awarded in a limited civil case, does the trial court have discretion under [Code of Civil Procedure] section 1033[, subdivision](a) to deny that party's motion for attorney fees?" (*Id*. at p. 976.) *Chavez* concluded that in such a circumstance, the trial court *does* have discretion under Code of Civil Procedure section 1033, subdivision (a) to deny attorney fees that otherwise would

be recoverable under FEHA, but that in exercising its discretion under Code of Civil Procedure section 1033, subdivision (a), "the trial court must give due consideration to the policies and objectives of the FEHA." (*Chavez*, at p. 976.)

The City argues that the trial court's fee and cost awards must be reversed because the trial court did not have the opportunity to apply the standards articulated in *Chavez* to guide its discretion in deciding whether to deny attorney fees and costs pursuant to Code of Civil Procedure section 1033, subdivision (a). According to the City, if the trial court had the benefit of *Chavez*, it may have completely denied the fees and costs sought by the Firefighters instead of only reducing the fees.

The City's argument is misplaced because the trial court found Code of Civil Procedure section 1033, subdivision (a) to be altogether *inapplicable* here on the basis that the injunctive relief sought by the Firefighters could not have been afforded in a limited civil case. Code of Civil Procedure section 1033, subdivision (a) applies "where the prevailing party recovers a judgment that could have been rendered in a limited civil case." (*Ibid*.) As the trial court explained in denying the City's motion to strike the costs pursuant to Code of Civil Procedure section 1033, subdivision (a), "[t]he action does not meet the definition of a limited jurisdiction case . . . as injunctive relief was sought in the complaint."[26] Therefore, it is irrelevant whether the trial court had the benefit of *Chavez*

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26 In the order awarding attorney fees, the trial court addressed the City's argument that "the awards to three of the plaintiffs might have been made in the small claims division of the Superior Court," but it declined to deny costs on that basis. Instead, it noted that a downward adjustment of fees was warranted based on the Firefighters' relative lack of success. In doing so, it appears *not* to have relied on any discretion

when making its ruling, as *Chavez* addressed the standards for determining whether to deny attorney fees under Code of Civil Procedure section 1033, subdivision (a) *when an action could have been brought as a limited civil case*, which was not the case here.

The City also takes issue with the trial court's conclusion that, due to the prayer for injunctive relief, this action could not have been brought as a limited civil case, and that Code of Civil Procedure section 1033, subdivision (a) therefore doesn't apply. According to the City, this ruling "was clearly erroneous because, although injunctive relief was sought, injunctive relief was denied." We disagree. The relevant inquiry for determining if Code of Civil Procedure section 1033, subdivision (a) applies is whether "the action could have been fairly and effectively litigated as a limited civil case." (*Chavez*, *supra*, 47 Cal.4th at p. 987.) Although Code of Civil Procedure section 86 identifies certain categories of equitable actions as limited civil cases, a case in equity to redress a violation of constitutional rights is not among them. (*Id*., subd. (b).) Therefore, because the Firefighters sought injunctive relief as a remedy for an alleged violation of their right to free speech under the California Constitution, this action could not have been litigated as a limited civil case. The trial court thus properly concluded that Code of Civil Procedure section 1033, subdivision (a) does not apply.

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conferred by Code of Civil Procedure section 1033, subdivision (a), but instead on the well-established rule that a court may take a plaintiff's relative lack of success into account deciding the amount of a fee award. (*Chavez*, *supra*, 47 Cal.4th at p. 989 ["'under state law as well as federal law, a reduced fee award is appropriate when a claimant achieves only limited success'"].)

b. *The City's Challenge to the Award of Fees Under Code of Civil Procedure Section 1021.5 Is Without Merit*

The City also contends that the trial court improperly concluded that an attorney fee award was warranted under Code of Civil Procedure section 1021.5 on the theory that the Firefighters' lawsuit was a catalyst for the Department's adoption of an all-volunteer parade policy.

Code of Civil Procedure section 1021.5 is "'a codification of the private attorney general doctrine of attorney fees developed in prior judicial decisions. [Citation.] Under this section, the court may award attorney fees to a "successful party" in any action that "has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any."'" (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565 (*Graham*).)

As relevant here, "'an attorney fee award may be justified even when plaintiff's legal action does not result in a favorable final judgment.'" (*Graham, supra*, 34 Cal.App.4th at p. 565.) Specifically, "'an award of attorney fees may be appropriate where "plaintiffs' lawsuit was a *catalyst* motivating defendants to provide the primary relief sought . . . ." [Citation.] A plaintiff will be considered a "successful party" where an important right is vindicated "by activating defendants to modify their behavior."'" (*Id.* at p. 567.) "'In determining whether a plaintiff is a successful party for purposes of

[Code of Civil Procedure] section 1021.5, "[t]he critical fact is the impact of the action, not the manner of its resolution." [Citation.] [¶] The trial court in its discretion "must realistically assess the litigation and determine, from a practical perspective, whether or not the action served to vindicate an important right so as to justify an attorney fee award" under [Code of Civil Procedure] section 1021.5.'" (*Id*. at p. 566.)

Three requirements must be met to obtain attorney fees under the catalyst theory: "a plaintiff must establish that (1) the lawsuit was a catalyst motivating the defendants to provide the primary relief sought; (2) that the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense . . . ;[27] and (3) that the plaintiffs reasonably attempted to settle the litigation prior to filing the lawsuit." (*Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 608 (*Tipton-Whittingham*).)

The City makes no specific argument concerning the second and third requirement, which the trial court implicitly found were satisfied here.[28] Instead, it

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27 As our Supreme Court has elaborated, "[t]he trial court must determine that the lawsuit is not 'frivolous, unreasonable or groundless' [citation], in other words that its result was achieved 'by threat of victory, not by dint of nuisance and threat of expense.'" (*Graham*, *supra*, 34 Cal.4th at p. 575.) This involves "a determination at a minimum that '"the questions of law or fact are grave and difficult."'" (*Id*. at pp. 575-576.)

28 We note that the City states, without elaboration, that "[t]he trial court reversibly erred in finding Plaintiffs were entitled to litigation costs under a catalyst theory given [the] finding [in the first trial that] the free speech claim lacked merit." If this statement is intended to address the second requirement for the application of the catalyst theory, namely, that "the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense" (*Tipton-Whittingham*, *supra*, 34 Cal.4th at p. 608), we reject the argument. Based on our review of the briefing on the free speech

contends that the Firefighters' lawsuit was not a catalyst for the Department's change in the parade staffing policy because the Department had already formulated the interim policy at the time the lawsuit was filed. To succeed in this argument, the City must establish that the trial court lacked substantial evidence for its factual finding "that the City enacted the final, permanent all-volunteer parade policy only because the plaintiffs pushed the Department to do so through the vehicle of this litigation." (*Ciani v. San Diego Trust & Savings Bank* (1994) 25 Cal.App.4th 563, 577 [whether an action brought by a party caused a benefit "is a factual question for the trial judge [citation], whose determination will not be disturbed if supported by substantial evidence"].) As we will explain, the City has not met this burden.

In analyzing whether substantial evidence supports a finding that the filing of the litigation was a catalyst for seeking a change in the Departments' parade policy, we focus on the chronology of events. The 2007 Pride Parade occurred on July 21, 2007. On August 1, Fire Chief Jarman and two other top officials met with the Firefighters, who sought a promise that nobody else would be forced to participate in a Pride Parade. At that meeting, Fire Chief Jarman could not make a promise on that issue. She stated that she would work with the union that represented the Firefighters to draft a parade staffing policy, but that the policy would have to take into account the needs of the community.

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cause of action, that claim was "'not frivolous, unreasonable or groundless'" (*Graham, supra,* 34 Cal.4th at p. 575), and presented genuine and difficult legal issues for resolution by the trial court. Moreover, to the extent the trial court determined that the cause of action lacked merit because the Department had already permanently changed its parade policy, that was not the case at the time that the Firefighters filed their lawsuit.

The Department's interim parade staffing policy was issued on August 9, 2007. As we have explained, the interim policy set up a process for soliciting volunteers to staff parades, but fell short of guaranteeing that employees would not be required to participate in any parade. The Firefighters then filed their lawsuit on August 28, 2007.

The parties do not dispute that before adopting a permanent policy for staffing parades, the Department was required to negotiate with the union representing the Department's employees so that the policy could be incorporated into the memorandum of understanding governing the terms and conditions of employment. Accordingly, the interim policy stayed in place until the union collective bargaining process took place, resulting in a permanent parade staffing policy reflected in a memorandum of understanding between the union and the City on July 1, 2008, while the Firefighters' lawsuit was pending. Unlike the interim policy, the permanent parade staffing policy contained a commitment that "[n]o employee will be forced to participate in any parade."

Under these circumstances, substantial evidence supports the trial court's finding that the Firefighters' lawsuit was a catalyst for the adoption of the current parade staffing policy. Although the interim policy was adopted before the commencement of the lawsuit, that interim policy was unacceptable to the Firefighters because it did not guarantee that no Department employee would be required to participate in a parade. The fact that a different policy, more favorable to the Firefighters' demands, was adopted after the litigation was filed reasonably can give rise to an inference that the litigation was a

catalyst for the policy change.[29] (See *Hogar Dulce Hogar v. Community Development Com. of City of Escondido* (2007) 157 Cal.App.4th 1358, 1366 ["When, after litigation is initiated, a defendant has voluntarily provided the relief a plaintiff is seeking, the chronology of events may raise an inference that the litigation was the catalyst for the relief."].) Because substantial evidence supports the trial court's finding on the applicability of the catalyst theory, the trial court was well within its discretion to adopt that theory in awarding fees under Code of Civil Procedure section 1021.5.

2. *The Firefighters' Challenge to the Amount of the Attorney Fee Award*

The Firefighters contend, on several grounds, that the trial court abused its discretion in arriving at the amount of the attorney fee award. We first present an overview of the legal standards that the trial court applies when setting the amount of attorney fees to be awarded, and we then examine each of the Firefighters' challenges to the award.

a. *Applicable Legal Standards*

The same method for arriving at the amount of attorney fees to be awarded is used for both of the attorney fee statutes that the trial court relied on here, namely, Code of Civil Procedure section 1021.5 (the private attorney general theory) and Government Code section 12965, subdivision (b) (the FEHA attorney fee provision). Indeed, "'[i]n

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29 Further, as the trial court found, because the Department failed to take action after receiving a memo from Captain Lynda Lynch in 2006 raising concerns about the Pride Parade that year, a reasonable inference was raised that the Department may not have followed through with a permanent all-volunteer parade policy had the Firefighters not pursued their lawsuit.

deciding whether to, and how to, award fees under [Government Code] section 12965, subdivision (b), courts will look to the rules set forth in cases interpreting [Code of Civil Procedure] section 1021.5.'" (*Chavez, supra*, 47 Cal.4th at p. 985.)

"When a party is entitled to attorney fees under [Code of Civil Procedure] section 1021.5, the amount of the award is determined according to the guidelines set forth by . . . [*Serrano v. Priest* (1977) 20 Cal.3d 25, 48-49 (*Serrano III*)]." (*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 321.) "*Serrano III* requires the trial court to first determine a 'touchstone' or 'lodestar' figure based on a 'careful compilation of the time spent and reasonable hourly compensation for each attorney . . . involved in the presentation of the case.' [Citations.] That figure may then be increased or reduced by the application of a 'multiplier' after the trial court has considered other factors concerning the lawsuit." (*Press*, at p. 322.) "*Serrano III* set forth a number of factors the trial court may consider in adjusting the lodestar figure. These include: '(1) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award; (4) the fact that an award against the state would ultimately fall upon the taxpayers; (5) the fact that the attorneys in question received public and charitable funding for the purpose of bringing lawsuits of the character here involved; [and] (6) the fact that the monies awarded would inure not to the benefit of the attorneys involved but the organizations by which they are employed.'" (*Press*, at p. 322, fn. 12.) "Just as a

court has discretion to increase the lodestar under several factors in such a case, it may also decrease it by looking at those same factors . . . ." (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 160-161 (*Graciano*).) "'"There is no hard-and-fast rule limiting the factors that may justify an exercise of judicial discretion to increase or decrease a lodestar calculation." [Citation.] There are numerous such factors, and their evaluation is entrusted to a trial court's sound discretion; any one of those factors may be responsible for enhancing or reducing the lodestar.'" (*Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 901 (*Center for Biological Diversity*).)

"The trial judge ultimately has discretion to determine the value of the attorney services. 'However, since determination of the lodestar figure is so "[f]undamental" to calculating the amount of the award, the exercise of that discretion must be based on the lodestar adjustment method.'" (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) "When using the lodestar method to calculate attorney fees under the FEHA, the ultimate goal is 'to determine a "reasonable" attorney fee, and not to encourage unnecessary litigation of claims that serve no public purpose either because they have no broad public impact or because they are factually or legally weak.'" (*Chavez*, *supra*, 47 Cal.4th at p. 985.) "[T]he trial court has discretion to increase or decrease the ultimate award in order to effectuate the purposes of FEHA and to ensure a fair and just result . . . ." (*Horsford*, *supra*, 132 Cal.App.4th at p. 394.)

b. *Disallowance of Time Billed by Certain Timekeepers*

The City first challenges the trial court's decision to reduce the lodestar by disallowing the hours spent on the litigation by Attorney Joseph Infranco, Attorney S. James Stires and law clerk John Barkley.

Infranco billed 146.2 hours, for an amount of $58,480; Stires billed 56.1 hours, for an amount of $21,417.50; and Barkley billed 34.7 hours, for an amount of $3,296.50. The trial court concluded that Infranco's contribution at trial was "minimal" and that the Firefighters did not provide the court with information regarding "any important contributions he made during the pretrial discovery phase." The trial court described Stires and Barkley as "transitory billers," and explained that it had "not been presented with any evidence that these timekeepers added any substantial value to the representation." The Firefighters contend that the denial of fees for these timekeepers was "too arbitrary to be reasonable."

"The 'experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.'" (*Serrano III*, *supra*, 20 Cal.3d at p. 49.) The trial court has the discretion, as here, to disallow hours expended by certain timekeepers, when those hours appear to be inefficient or duplicative. "[T]rial courts must carefully review attorney documentation of hours expended; 'padding' in the form of inefficient or duplicative efforts is not subject to compensation." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132; see also *Horsford*, *supra*, 132 Cal.App.4th at p. 395 ["The basis for the trial court's calculation must be the

actual hours counsel has devoted to the case, less those that result from inefficient or duplicative use of time."].) Accordingly, the trial court was well within its discretion to deny compensation for the time billed by Infranco, Stires and Barkley.

c. *Disallowance of Fees Attributable to the First Trial*

The Firefighters next argue that the trial court should not have deducted the fees incurred during the first trial for a reduction of $115,104. The trial court set forth two reasons for its decision to do so: (1) the Firefighters were not the prevailing parties in the first trial in that they lost on their free speech claim, the jury was unable to reach a verdict on the sexual harassment claim, and the Firefighters lost on the retaliation claim; and (2) the mistrial "very likely . . . resulted at least in part from plaintiffs' tactical decision to request a very substantial award from the first jury." The Firefighters challenge this ruling, contending that "[i]n light of the case law mandating full compensation of attorney's fees in successful FEHA cases, the trial court had no reasonable basis to exclude the fees attributable to the first trial." As we will explain, we disagree.

Case law does not "mandate[e] full compensation of attorney fees" in FEHA cases as the Firefighters contend. In discussing FEHA, our Supreme Court has made clear that the *amount* of an attorney fee award may be determined based on the plaintiffs' relative success or failure. (*Chavez*, *supra*, 47 Cal.4th at p. 989.) Our Supreme Court has explained that "'under state law as well as federal law, a reduced fee award is appropriate when a claimant achieves only limited success.'" (*Ibid*.) "If a plaintiff has prevailed on some claims but not others, fees are not awarded for time spent litigating claims unrelated to the successful claims . . . ." (*Ibid*.) The same rule is applied generally in many types

of cases. (See *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096 [when setting the fee award, the trial court should consider the plaintiff's "'success or failure'"]; *Bingham v. Obledo* (1983) 147 Cal.App.3d 401, 407 ["it is generally undesirable to award fees for time expended unsuccessfully on major portions of a lawsuit"].) Further, under analogous federal law awarding attorney fees in civil rights cases, the United States Supreme Court has directed courts awarding fees to ask "did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 434.)

Applying the principles set forth in the above authorities, we conclude that the trial court properly exercised its discretion in disallowing the fees incurred during the first trial. As the trial court noted, the Firefighters were not successful in the first trial, attributable in part to their tactical decisions.[30] Accordingly, the trial court had the discretion to disallow the fees associated with the portion of the litigation in which the Firefighters did not prevail.[31]

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30 The Firefighters dispute the trial court's finding that the result in the first trial was due in part to their tactical decisions on the amount of damages sought. However, we perceive no basis to reject the trial court's finding on that issue.

31 The Firefighters argue that by disallowing the fees incurred in the first trial and also applying a 50 percent negative multiplier to the remaining fees, the trial court impermissibly applied "an unreasonable double penalty based on the 'limited success' factor." To establish that such a "double penalty" is impermissible, the Firefighters cite *Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615, 626. However, *Ramos* stated that it was improper to use the same factor both in establishing the lodestar and in enhancing the lodestar. (*Ibid*.) The trial court did no such thing here. Instead, after having *already* calculated the lodestar, the trial court, in two factually distinct

d. *Application of a Negative Multiplier*

The Firefighters take issue with the trial court's decision to apply a negative multiplier and reduce the lodestar amount by 50 percent. The trial court cited several factors for its decision to apply a negative multiplier:

> "First, it is inescapable that plaintiffs did not prevail on four of the five claims they originally pursued (and lost a tardy bid to add a sixth claim). Second, the damages awarded on their one successful claim were a fraction of the pretrial indications of what plaintiffs thought the case was worth . . . and the amounts requested of the first jury . . . . Third, the damages were, in the cases of plaintiffs Allison, Hewitt and Kane, at or near the small claims court limit, and in the case of Capt. Ghiotto were below the floor for a limited jurisdiction case. Fourth, the City correctly points out that the taxpayers of San Diego will ultimately bear the burden of the fee award, and it is within the general knowledge of the court . . . that the last several years have not been fiscally happy ones for the municipality. The court is simply not free to ignore the limited success enjoyed by plaintiffs against the foregoing backdrop."

In simplified terms, the trial court applied the negative multiplier because of (1) the Firefighters' limited success in the litigation and (2) the fact that the City's taxpayers would bear the burden of any fee award. As we will explain, both of these factors are a proper basis for the application of a negative multiplier and therefore support the trial court's exercise of its discretion.

First, as we have noted, a trial court properly may reduce a fee award based on the limited success obtained by the plaintiff. Our Supreme Court has explained that "the trial court 'should award only that amount of fees that is reasonable in relation to the results obtained.'" (*Chavez*, *supra*, 47 Cal.4th at p. 989.) "If a plaintiff has prevailed on some

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portions of its analysis, applied the principle that a downward departure is permitted based on limited success. We find no error in the approach.

claims but not others, fees are not awarded for time spent litigating claims unrelated to the successful claims . . . ." (*Ibid*.) Indeed, "'[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief [citation], the only reasonable fee is usually no fee at all.'" (*Ibid*.) Accordingly, the trial court has broad discretion to apply a negative multiplier after considering all of the relevant factors, including the level of success obtained by the plaintiff. (Cf. *Graciano*, *supra*, 144 Cal.App.4th at pp. 160-161 [discussing negative multiplier].)[32] Here, in applying a negative multiplier, the trial court properly relied on the fact that the Firefighters prevailed only on their sexual harassment claim and that, even on that claim, they recovered only a relatively low amount of damages.[33]

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32 The Firefighters fault the trial court for citing *Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 346, when discussing the authorities supporting the decision to apply a negative multiplier, because that case arose under the anti-SLAPP (strategic lawsuit against public participation) statute (Code Civ. Proc., § 425.16), not FEHA. We find no infirmity in the trial court's reasoning. The trial court expressly acknowledged that *Mann* arose "in different circumstances." Further, our Supreme Court has made it clear that reductions in fee awards may be made in FEHA cases based on the success of the litigation. (*Chavez*, *supra*, 47 Cal.4th at p. 989.)

33 The Firefighters argue that in addition to prevailing on the sexual harassment claim, they prevailed on their free speech claim because, as the trial court found, their lawsuit was a catalyst for the Department's adoption of the all-volunteer parade staffing policy. We disagree. The issue of whether the lawsuit was a catalyst for the adoption of the parade policy, and thus entitled the Firefighters to an award of attorney fees under Code of Civil Procedure section 1021.5, is a distinctly different question from the amount of fees that should be awarded. (See *Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 647 ["Whether an award is justified and what amount that award should be are two distinct questions . . . ."].) Here, the Firefighters' failure to obtain a judgment in their favor on the free speech claim was a valid factor for the trial court to consider in setting the amount of an award. Significantly, the trial court determined that the free speech claim lacked substantive merit, and although the Firefighters state that they

Second, our Supreme Court has identified "the fact that an award against the state would ultimately fall upon the taxpayers" as a valid basis for reducing an award of attorney fees. (*Serrano III*, *supra*, 20 Cal.3d at p. 49.) This factor continues to be applied by courts considering fee awards. (See *San Diego Police Officers Assn. v. San Diego Police Department* (1999) 76 Cal.App.4th 19, 24 [affirming application of negative multiplier, which the trial court based on several factors, including that "the award of fees would ultimately be borne by the taxpayers"].) Accordingly, when deciding to impose a negative multiplier, the trial court properly cited the City's financial difficulties and the burden that an attorney fee award would produce.[34]

"succeeded in obtaining" their "major litigation objective" when the Department adopted the all-volunteer parade policy, we note that they nevertheless continued to litigate their free speech claim after the policy was adopted, and continue on appeal to press for a judgment in their favor on that claim. Thus, the Firefighters evidently did not satisfy their litigation objective merely by obtaining a change in the Department's parade policy.

[34] The Firefighters cite *Horsford*, *supra*, 132 Cal.App.4th 359, which concluded that the trial court abused its discretion by considering the fiscal impact that an attorney fee award would have on the public entity defendant when making a fee award. (*Id*. at p. 400.) *Horsford* acknowledged that *Serrano III* identified the burden on taxpayers as a valid factor when arriving at a fee award against a public entity, but it distinguished *Serrano III* because that case did not deal with intentional racism, as was the case in *Horsford*. Unlike *Horsford*, however, this case does not present a compelling case for disregarding the burden a fee award would place on taxpayers. As the trial court here stressed, the jury made only a very modest damages award — reflecting the relatively minor injury at issue here, and it was only *in connection with* the modest damages award that the trial court determined it was proper to take into account the burden that a large fee award would have on taxpayers. In *Horsford*, the plaintiffs recovered far more than a modest damages award. (*Id*. at p. 372.)

e. *Denial of the Enhancement Requested by the Firefighters*

The Firefighters also argue that the trial court abused its discretion in failing to award them an enhancement on the lodestar amount. Specifically, in discussing its reasons for declining to enhance the lodestar amount, the trial court rejected the Firefighters' argument that the contingent nature of a fee award and the delay in payment of the fee award should justify a lodestar enhancement. The Firefighters challenge the trial court's reasons for rejecting those factors as a basis for enhancement in this case.

As to the contingent nature of a fee award, the trial court explained that because the FEHA attorney fee provision "created a reasonable expectation that attorney fees would not be limited by the extent of plaintiffs' recovery," it was therefore the case that "[t]he contingent nature of the litigation . . . was the risk that plaintiffs would not prevail." The trial court explained that "[s]uch risk is inherent in any contingency fee case and is managed by the decision of the attorney to take the case and the steps taken in pursuing it." The trial court declined to view this contingency as a basis for enhancing the lodestar, concluding that "[f]ee enhancement . . . should not be a tool that encourages litigation of claims where the actual injury to the plaintiff was slight."

The trial court's basis for declining to enhance the lodestar based on the contingency of the fee award is sound and reasonable. Indeed, the trial court's discussion closely tracks the wording of the well-reasoned opinion in *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1175 (*Weeks*), which, for the same reasons, rejected the contingency of a fee award in a FEHA case as a basis for enhancing the lodestar amount. As *Weeks* explained:

> "Looking first to the contingent nature of the award, as has already been discussed, the situation here is unlike that in the *Serrano* cases, where it was uncertain that the attorneys would be entitled to an award of fees even if they prevailed. Government Code section 12965, subdivision (b) created a reasonable expectation that attorney fees would not be limited by the extent of Weeks's recovery and that Weeks's attorneys would receive full compensation for their efforts. The contingent nature of the litigation, therefore, was the risk that Weeks would not prevail. Such a risk is inherent in any contingency fee case and is managed by the decision of the attorney to take the case and the steps taken in pursuing it. When the public value of the case is great and the risk of loss results from the complexity of the litigation or the uncertainty of the state of the law, fee enhancement may be proper. Fee enhancement, however, should not be a tool that encourages litigation of claims where the actual injury to the plaintiff was slight. It should not compel a defendant to settle frivolous claims under threat that the weaker the claim the more likely it is that any fees awarded will be enhanced should the plaintiff manage to prevail." (*Weeks*, *supra*, 63 Cal.App.4th at p. 1175.)

The Firefighters contend that the trial court "fail[ed] to consider" the factor of the contingency of the fee award, but that is not the case. The trial court considered that factor. It simply rejected the factor as unpersuasive in this situation.

As to the factor of delay in payment of the attorney fees, the trial court also considered that factor and rejected it as unimpressive. Among other things, the trial court explained that the litigation proceeded without delay, there was no evidence that the nature of the engagement caused counsel to turn away other paying work, and the factor of delay was presumably already built into the rates that counsel charged and that the trial court allowed. The trial court's reasoning on the issue of delay is sound and supports its exercise of discretion to deny the enhancement.

Further, even if there was some error in the trial court's consideration of the contingency and delay factor, it is not reasonably probable that the outcome of the fee

award would have been different if the error had not occurred. This is because the contingency and delay factors relate to an *enhancement* of the lodestar amount, but the trial court set forth extensive reasoning for a decision to apply a *negative multiplier*, rather than an enhancement.

3. *Request for Attorney Fees and Costs on Appeal*

The Firefighters request that we award them their attorney fees incurred on appeal in an amount to be determined by the trial court.

Where an attorney fee award has been made at the trial level, the prevailing party may appropriately request fees on appeal. "'[I]t is established that fees, if recoverable at all — pursuant either to statute or [the] parties' agreement — are available for services at trial *and on appeal*.'" (*Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927; see *Serrano v. Unruh* (1982) 32 Cal.3d 621, 637 [(*Serrano IV*)].)" (*Center for Biological Diversity*, *supra*, 185 Cal.App.4th at 901.) This rule applies to the statutes under which the trial court awarded fees here. (*Serrano IV*, *supra*, 32 Cal.3d at p. 637 [award on appeal under Code Civ. Proc., § 1021.5]; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 448 [award on appeal under FEHA].) Accordingly, because they were awarded attorney fees in the trial court, the Firefighters are also entitled to an award of attorney fees on appeal.

"'Although this court has the power to fix attorney fees on appeal, the better practice is to have the trial court determine such fees . . . .'" (*Center for Biological Diversity*, *supra*, 185 Cal.App.4th at p. 901.) We therefore direct the trial court to consider the amount of appellate attorney fees to be awarded to the Firefighters.

DISPOSITION

The judgment is affirmed. This action is remanded to the trial court to exercise its discretion as to the amount of appellate attorney fees to award to the Firefighters. In the interest of justice, the parties are to bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3).)

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.