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21 STUART MAISLIN, CORRIE MALINKA, MARK SAVALA, and RALPH MCCOMB

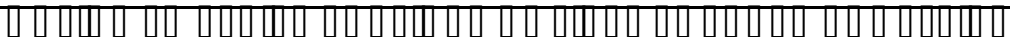
22 SUPERIOR COURT OF THE STATE OF CALIFORNIA

23 COUNTY OF LOS ANGELES

24 MITCHELL GROBESON, an individual and a) Case No. BC 150151 (c/w BC 159142,
25 tax payer,) BS 043521 and BS 049282
26)
27 Plaintiff,) [The Honorable Carolyn B. Kuhl]
28)
29 Petitioner,) **DEFENDANTS' NOTICE OF**
30) **MOTION AND MOTION TO STRIKE**
31 vs.) **PORTIONS OF PLAINTIFF'S FIRST**
32) **AMENDED COMPLAINT;**
33) **MEMORANDUM OF POINTS AND**
34 CITY OF LOS ANGELES, et al.) **AUTHORITIES**
35)
36) Date: April 29, 1999
37 Defendants,) Time: 9:00 a.m.
38) Dept: 22
39 Respondents.)
40) Action Filed: May 16, 1996
41) Discovery Cutoff: None
42) Trial Date: None

43 **TO PLAINTIFF AND TO HIS ATTORNEYS OF RECORD:**

44 PLEASE TAKE NOTICE that on April 29, 1999 at 9:00 a.m., or as soon thereafter as the
45 matter may be heard, in Department 22 of the above entitled Court, located at 111 North Hill Street,
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1 Los Angeles, California, defendants City of Los Angeles, Willie Williams, Daniel Watson,

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1 John Dunkin, John Moran, Rich Gonzalez, Larry McKinley, Constance Dial, Michael Chambers,
2 Eric Coulter, Tammy Tatreau, John Weaver, Joseph Priebe, Wallace Graves, Stuart Maislin,
3 Corrie Malinka, Mark Savala, and Ralph McComb will and hereby do move this Court for an order
4 striking the following portions from plaintiff's first amended complaint ("FAC"):

5 1. All of the state law tort causes of action -- the first, second, third, seventh, eighth,
6 tenth, eleventh, and fourteenth causes of action -- are barred by the statute of limitations as to
7 eleven (11) of the individual defendants whose names should be stricken therefrom: Lieutenant
8 Eric Coulter, Captain Constance Dial, Lieutenant John Dunkin, Captain Rich Gonzales, Lieutenant
9 Wallace Graves, Captain Stuart Maislin, Sergeant Larry McKinley, Commander John Moran,
10 Lieutenant Tammy Tatreau, Commander Daniel Watson, and Lieutenant John Weaver.¹

11 2. All of the claims occurring before December 5, 1994 that give rise to the above state
12 law tort causes of action (*i.e.*, the first, second, third, seventh, eighth, tenth, eleventh, and fourteenth
13 causes of action) are also barred by the statute of limitations as to all defendants. Therefore, the
14 Court should strike paragraphs 31 - 104 of the First Amended Complaint from the these causes of
15 action.

16 3. All of the federal law causes of action -- the fourth, fifth, and sixth causes of action --
17 are barred by the statute of limitations as to the same eleven individual defendants in paragraph
18 no. 1, (*i.e.*, Lieutenant Eric Coulter, Captain Constance Dial, Lieutenant John Dunkin, Captain Rich
19 Gonzales, Lieutenant Wallace Graves, Captain Stuart Maislin, Sergeant Larry McKinley,
20 Commander John Moran, Lieutenant Tammy Tatreau, Commander Daniel Watson, and Lieutenant
21 John Weaver), plus Sergeant Gary Baker whose names should be stricken from these causes of
22 action.

23 4. All of the claims occurring before January 18, 1995 that give rise to the above federal
24

25 _____
26 ¹ A statute of limitations defense may be raised by a motion to strike. Doyle v. Fenster, 47
27 Cal.App.4th 1701, 1706-1707 (1996); PH II, Inc. v. Superior Court, 33 Cal.App.4th 1680,
28 1683 (1995).



1 law causes of action (*i.e.*, the fourth, fifth, and sixth causes of action) are barred by the statute of
2 limitations as to all defendants. Therefore, the Court should strike paragraphs 31 - 111 of the First
3 Amended Complaint from the these causes of action.

4 5. The ninth cause of action under the Fair Employment and Housing Act (“FEHA”) is
5 barred by the plaintiff’s failure to exhaust administrative remedies and should be stricken as to the
6 following defendants:

7 (i) Captain Dial on the ground that plaintiff never filed the requisite complaint
8 with the Department of Fair Employment and Housing (“DFEH”) against her;

9 (ii) Lieutenant Coulter, Lieutenant Dunkin, Captain Gonzales, Sergeant
10 McKinley, Commander Moran, Lieutenant Tatreau, Commander Watson, Lieutenant Weaver, and
11 Lieutenant Graves on the ground that the ninth cause of action is barred by the statute of limitations
12 as to them;

13 (iii) Chief Williams as to all claims except one on the ground that he did not assert
14 any of those claims in his complaint to the DFEH as required by law;² and

15 (iv) All defendants on the ground that plaintiff did not allege that he received the
16 requisite “right-to-sue letter” from the DFEH.

17 6. All state law tort causes of action -- the first, second, third, seventh, eighth, tenth,
18 eleventh, and fourteenth causes of action -- as to Chief Williams arising out of his decision to
19 investigate and discipline certain police officers are barred by the immunity under Government Code
20 Section 821.6. Therefore, the Court should strike paragraphs 59, 121, 125, and 129 of the First
21 Amended Complaint from these causes of action.

22 7. All state law tort causes of action against Captain Stuart Maislin are barred by the
23 immunity under Government Code Section 821.6, and therefore, Captain Maislin's name and
24

25 ² The only claim that plaintiff alleged in the complaint with the DFEH and, hence, the only
26 claim that may be asserted in the ninth cause of action, is contained in paragraphs 112 and 113 of the
27 FAC, arising out Chief Williams’ alleged attempt to prevent plaintiff from holding a public
28 memorial in early 1995.



1 paragraph 95 of the First Amended Complaint should be stricken from the first, second, third,
2 seventh, eighth, ninth, tenth, eleventh, and fourteenth causes of action.

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DATED: April __, 1999

LeBOEUF, LAMB, GREENE & MacRAE,
LLP

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By: _____

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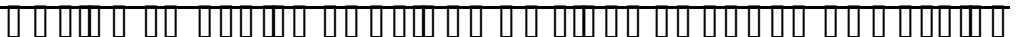


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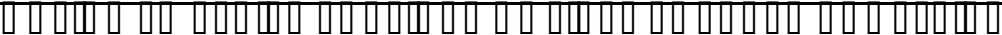


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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **1. INTRODUCTION**

3 This action arises out of plaintiff Mitchell Grobeson's second tour of duty with the
4 Los Angeles Police Department ("LAPD") following the settlement of his first lawsuit against the
5 LAPD. Plaintiff alleges that he was discriminated and harassed due to his sexual orientation, and
6 that he was retaliated against because of his first lawsuit against the LAPD.

7 Based on these allegations, plaintiff filed the present action. In his prolix First Amended
8 Complaint ("FAC"), plaintiff indiscriminately names eighteen (18) defendants, which include the
9 City of Los Angeles ("City") and seventeen (17) supervisors of the LAPD. Plaintiff's FAC also
10 asserts an incredible fourteen (14) causes of action.

11 The defendants now bring the instant motion to strike (which is filed concurrently with their
12 demurrer). This motion is intended to narrow the number of defendants and causes of action in this
13 case, thus eliminating the needless time and expense of litigating meritless claims. As will be set
14 forth below, this Court should grant the motion to strike for the following reasons:

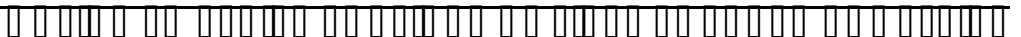
15 First, all of the state law tort causes of action -- the first, second, third, seventh, eighth, tenth,
16 eleventh, and fourteenth causes of action -- are barred by the statute of limitations as to eleven of
17 the individual defendants.¹

18 Second, all of the claims occurring before December 5, 1994 that give rise to the state law
19 tort causes of action (*i.e.*, the first, second, third, seventh, eighth, tenth, eleventh, and fourteenth
20 causes of action) are also barred by the statute of limitations as to all defendants.

21 Third, all of the federal law causes of action -- the fourth, fifth, and sixth causes of action --
22 are barred by the statute of limitations as to twelve of the individual defendants.²

24 _____
25 ¹ Those eleven individual defendants are Lieutenant Coulter, Captain Dial, Lieutenant Dunkin,
26 Captain Gonzales, Lieutenant Graves, Captain Maislin, Sergeant McKinley, Commander Moran,
Lieutenant Tatreau, Commander Watson, and Lieutenant Weaver.

27 ² These are the same eleven defendants listed in the above footnote plus Sergeant Gary Baker.



1 Fourth, all of the claims occurring before January 18, 1995 that give rise to the above federal
2 law causes of action (*i.e.*, the third, fourth, and fifth causes of action) are barred by the statute of
3 limitations as to all defendants.

4 Fifth, the ninth cause of action under the Fair Employment and Housing Act (“FEHA”) is
5 barred for failing to exhaust administrative remedies as to the following defendants:

6 (i) Captain Dial on the ground that plaintiff never filed the requisite complaint
7 with the Department of Fair Employment and Housing (“DFEH”) against her;

8 (ii) Lieutenant Coulter, Lieutenant Dunkin, Captain Gonzales, Sergeant
9 McKinley, Commander Moran, Lieutenant Tatreau, Commander Watson, Lieutenant Weaver, and
10 Lieutenant Graves on the ground that the claims against them are barred by the statute of limitations;

11 (iii) Chief Williams as to all claims except one on the ground that he did not assert
12 any of those claims in his complaint to the DFEH as required by law;³ and

13 (iv) All defendants on the ground that plaintiff did not allege that he received the
14 requisite “right-to-sue letter” from the DFEH.

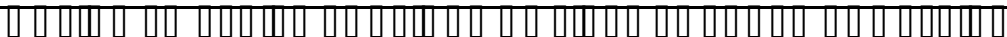
15 Sixth, all state law tort causes of action -- the first, second, third, seventh, eighth, ninth, tenth,
16 eleventh, and fourteenth causes of action -- against Chief Williams arising out of his decision to
17 investigate and discipline certain police officers are barred by the immunity under Government
18 Code Section 821.6.

19 Finally, all state law tort causes of action against Captain Stuart Maislin are barred by the
20 immunity under Government Code Section 821.6.

21 Accordingly, the defendants respectfully request that this Court grant their motion to strike in
22 its entirety.

23 **2. SUMMARY OF THE RELEVANT ALLEGATIONS IN PLAINTIFF’S COMPLAINT**

24 _____
25 ³ The only claim that plaintiff alleged in the complaint with the DFEH and, hence, the only
26 claim that may be asserted in the ninth cause of action, is contained in paragraphs 112 and 113 of the
27 FAC, arising out Chief Williams’ alleged attempt to prevent plaintiff from holding a public
28 memorial in early 1995.



1 The following allegations in plaintiff's FAC are relevant to this motion to strike:

2 Plaintiff, Mitchell Grobeson, returned to the LAPD on July 19, 1993.⁴ (FAC, ¶ 37.)

3 Plaintiff alleges that as soon as he returned to the LAPD, the individual defendants began
4 discriminating against and harassing him based on his sexual orientation, and retaliating against him
5 for his first suit against the LAPD. (FAC, ¶ 137.)

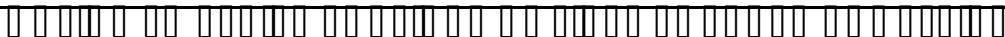
6 On or about June 5, 1995, plaintiff submitted a claim for damages with the City arising out of
7 these allegations. (FAC, ¶ 143 and Exhibit E thereto.) That claim alleged discrimination and
8 harassment based on his sexual orientation, and retaliation based on his first lawsuit, all of which
9 give rise to the present action. (Id.) On July 20, 1995, the City sent a letter to plaintiff's counsel
10 stating that plaintiff's claim was untimely as a matter of law. (FAC, pp. 129-130.) Specifically,
11 the City denied the claim on the grounds that, inter alia, it was time-barred for all events which
12 occurred prior to December 5, 1994. (Id.).

13 However, plaintiff's allegations in the FAC against eleven of the named defendants all
14 occurred prior to December 5, 1994. Specifically, the date of the last allegation against each of
15 these defendants is as follows:

- 16 • Lieutenant Coulter -- August 4, 1994 (FAC, ¶ 93),
- 17 • Captain Dial -- January 6, 1994 (FAC, ¶ 80),
- 18 • Lieutenant Dunkin -- September 1993 (FAC, ¶ 53.),
- 19 • Captain Gonzales -- October 6, 1993 (FAC, ¶¶ 61-63),
- 20 • Lieutenant Graves -- February 22, 1994 (FAC, ¶ 84),
- 21 • Captain Maislin -- August 15, 1994 (FAC, ¶ 95),
- 22 • Sergeant McKinley -- January 2, 1994 (FAC, ¶ 78),
- 23 • Commander Moran -- September 23, 1993 (FAC, ¶ 58),
- 24 • Lieutenant Tatreau -- July 14, 1994 (FAC, ¶ 90),
- 25 • Commander Watson -- October 15, 1993 (FAC, ¶ 65), and

26 _____
27 ⁴ Plaintiff's first stint with the LAPD was from 1982 to 1988. (FAC, ¶¶ 30, 35.)

28



1 • Lieutenant Weaver -- January 11, 1994 (FAC, ¶ 82).

2 Notwithstanding the untimeliness of these claims as to these eleven defendants, plaintiff
3 named them in the instant action. Defendants now bring the instant motion to strike, which should
4 be granted for the reasons set forth below.

5 //

6 **3. ARGUMENT**

7 a. **THE FIRST, SECOND, THIRD, SEVENTH, EIGHTH, TENTH, ELEVENTH,**
8 **AND FOURTEENTH CAUSES OF ACTION AGAINST ELEVEN OF THE**
9 **INDIVIDUAL DEFENDANTS ARE BARRED BY THE STATUTE OF**
10 **LIMITATIONS**

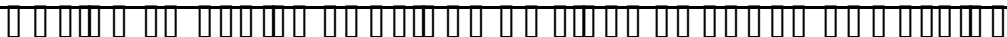
11 A tort cause of action against a city and its employees is governed by the California Tort
12 Claims Act.⁵ Government Code § 810 et seq. Under the Tort Claims Act, no state law cause of
13 action can be brought against a city or its employees unless a formal claim has first been filed with
14 the city. Government Code § 945.4.

15 The plaintiff must file his formal claim with the city by "not later than six months after the
16 accrual of the cause of action." Government Code § 911.2. The accrual of the cause of action is
17 the same as for the commencement of the statute of limitations. Id. at § 901. As such, the plaintiff
18 is required to file his or her formal claim with the city within six months after the alleged wrongful
19 acts occurred. Dixon v. City of Turlock, 219 Cal.App.3d 907, 909-910 (1990).

20 The statutory time limits within which a claim must be presented to a city is regarded as
21 mandatory. City of San Jose v. Superior Court, 12 Cal.3d 447, 454 (1974); Taylor v. Mitzel, 82
22 Cal.App.3d 665, 672 (1978). The issue of whether a claim was timely filed is a question of law.
23 McKeown v. First Interstate Bank, 194 Cal.App.3d 1225, 1229 (1987).

24 **1. The State Law Tort Causes Of Action Should Be Dismissed As To Eleven**
25 **Of The Individual Defendants**

26 ⁵ The first, second, third, seventh, eighth, tenth, eleventh, and fourteenth causes of action are
27 all state law tort causes of action. The other causes of action (*i.e.*, the fourth, fifth, sixth, ninth,
28 twelfth, and thirteenth causes of action) are subject to a different statute of limitations.



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In the present case, plaintiff did not present his claim to the City on a timely basis as to the following eleven individual defendants: Lieutenant Coulter, Captain Dial, Lieutenant Dunkin, Captain Gonzales, Lieutenant Graves, Captain Maislin, Sergeant McKinley, Commander Moran, Lieutenant Tatreau, Commander Watson, and Lieutenant Weaver. Specifically, plaintiff filed his claim with the City on or about June 5, 1995. (FAC, ¶ 143 and Exhibit E thereto.) Under the six month claim filing requirement, therefore, the alleged wrongful acts by each of these individual defendants must have occurred on or "after" December 5, 1994 (*i.e.*, six months from December 5, 1994 is June 5, 1995). As such, any acts occurring "**before**" **December 5, 1994** are time-barred.

Here, the allegations against each of the eleven individual defendants occurred before December 5, 1994. In particular, the date of the last alleged act by each defendant is as follows:

- Lieutenant Coulter -- August 4, 1994 (FAC, ¶ 93),
- Captain Dial -- January 6, 1994 (FAC, ¶ 80),
- Lieutenant Dunkin -- September 1993 (FAC, ¶ 53.),
- Captain Gonzales -- October 6, 1993 (FAC, ¶¶ 61-63),
- Lieutenant Graves -- February 22, 1994 (FAC, ¶ 84),
- Captain Maislin -- August 15, 1994 (FAC, ¶ 95),
- Sergeant McKinley -- January 2, 1994 (FAC, ¶ 78),
- Commander Moran -- September 23, 1993 (FAC, ¶ 58),
- Lieutenant Tatreau -- July 14, 1994 (FAC, ¶ 90),
- Commander Watson -- October 15, 1993 (FAC, ¶ 65), and
- Lieutenant Weaver -- January 11, 1994 (FAC, ¶ 82).

As such, plaintiff's first, second, third, seventh, eighth, tenth, eleventh, and fourteenth causes of action are time-barred as to these eleven defendants. The Court should strike their names from those causes of action.

2. Additionally, Any Acts That Occurred Before December 5, 1994 Are

Time-Barred

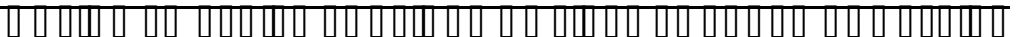
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In addition, all claims against all defendants arising out of allegations that occurred before December 5, 1994 are time-barred for the same reasons discussed above. Plaintiff filed his claim with the City on or about June 5, 1995, and, thus, under the six month claim filing requirement, all acts that occurred before December 5, 1994 are time-barred. In fact, the City sent a letter to plaintiff's counsel denying the claim on the grounds that, inter alia, it was not timely. (FAC, pp. 129-130.)

Additionally, that portion of [plaintiff's] claim which relates to events which occurred prior to December 5, 1994. . . was not presented within six months after those events occurred as required by law. See §§ 900 and 911 of the California Government Code.

(Id.; emphasis added.)

Plaintiff can recover, if at all, only for claims occurring after December 5, 1994. This Court should, therefore, dismiss all claims which arose prior to December 5, 1994 and strike paragraphs 31-104 of the FAC from the state law causes of action.



1 **THE FOURTH, FIFTH, AND SIXTH CAUSES OF ACTION UNDER 42 U.S.C.**
2 **SECTION 1983 ARE BARRED BY THE STATUTE OF LIMITATIONS AS**
3 **TO TWELVE OF THE INDIVIDUAL DEFENDANTS⁶**

4 Plaintiff's fourth, fifth, and sixth causes of action are asserted under 42 U.S.C. Section 1983.
5 These causes of action are governed by the one year statute of limitations. De Anza Properties v.
6 County of Santa Cruz, 936 F.2d 1084, 1085 (9th Cir. 1991). Although a California statute of
7 limitations governs a cause of action under Section 1983, federal law is used to determine when the
8 statute begins to run (*i.e.*, the date of accrual). Elliott v. Union City, 25 F.3d 800, 801 (9th Cir.
9 1994).

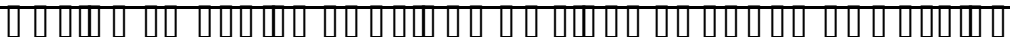
10 Under federal law, a cause of action for a constitutional tort accrues, and the statute of
11 limitations starts to run, when there has been an invasion of plaintiff's legally protected interest.
12 Gregory v. Union Pacific Railroad Co., 673 F. Supp. 1544, 1546 (D. Nev. 1987).

13 "It is widely accepted that a cause of action for a tort accrues when
14 there has been an invasion of the plaintiff's legally protected interest.
15 In other words, a statute of limitations begins to run at the time of the
16 tortious act." (Emphasis added.)

17 Id. at 1546; *accord* Chardon v. Fernandez, 454 U.S. 6, 8, 70 L.Ed.2d 6, 102 S.Ct. 28 (1981) (in
18 discrimination cases, the statute accrues when the plaintiff is aware of the unlawful acts); Gibson v.
19 United States, 781 F.2d 1334, 1340 (9th Cir. 1986) (a cause of action accrues when plaintiff knows
20 or has reason to know of the injury which is the basis of the action).

21 Moreover, a plaintiff cannot escape the statute of limitations by asserting that the limitations
22 period does not begin to run until the occurrence of the "last act" in a conspiracy or in a continuing
23 course of conduct. Gibson v. United States, *supra*, 781 F.2d at 1340. Rather, the one-year statute of
24 limitations runs separately from each overt act that is alleged to cause damage to the plaintiff, and

25 ⁶ These are the Sergeant Gary Baker and the same eleven defendants whose state law tort
26 causes of action are barred by the statute of limitations: Lieutenant Coulter, Captain Dial,
27 Lieutenant Dunkin, Captain Gonzales, Lieutenant Graves, Captain Maislin, Sergeant McKinley,
28 Commander Moran, Lieutenant Tatreau, Commander Watson, and Lieutenant Weaver.



1 the plaintiff may only recover for acts which occur within the limitations period. Id.

2 **1. The Federal Law Causes Of Action Should Be Dismissed As To Twelve**
3 **Of The Individual Defendants**

4 In the present case, plaintiff filed his original complaint in federal court on January 18, 1996.

5 Under the one-year statute of limitations, all of the allegations must have occurred after
6 January 18, 1995. As such, any allegations that occurred before January 18, 1995 are time-barred.

7 Here, all of the allegations against twelve of the individual defendants in this case occurred
8 well before January 18, 1995. In fact, the last wrongful act alleged against each of these twelve
9 defendants is as follows:

- 10 • Sergeant Gary Baker-- December, 1995 (FAC, ¶ 105),
- 11 • Lieutenant Coulter -- August 4, 1994 (FAC, ¶ 93),
- 12 • Captain Dial -- January 6, 1994 (FAC, ¶ 80),
- 13 • Lieutenant Dunkin -- September 1993 (FAC, ¶ 53.),
- 14 • Captain Gonzales -- October 6, 1993 (FAC, ¶¶ 61-63),
- 15 • Lieutenant Graves -- February 22, 1994 (FAC, ¶ 84),
- 16 • Captain Maislin -- August 15, 1994 (FAC, ¶ 95),
- 17 • Sergeant McKinley -- January 2, 1994 (FAC, ¶ 78),
- 18 • Commander Moran -- September 23, 1993 (FAC, ¶ 58),
- 19 • Lieutenant Tatreau -- July 14, 1994 (FAC, ¶ 90),
- 20 • Commander Watson -- October 15, 1993 (FAC, ¶ 65), and
- 21 • Lieutenant Weaver -- January 11, 1994 (FAC, ¶ 82).

22 If plaintiff suffered a constitutional injury under Section 1983, it occurred in a clear and
23 concrete fashion on the dates identified above as to each of the individual defendants. Accordingly,
24 the fourth, fifth, and sixth causes of action under Section 1983 are time-barred as to these twelve
25 defendants. The Court should strike their names from the fourth, fifth, and sixth causes of action.

26 **2. Additionally, Any Acts That Occurred Before January 18, 1995, Are**
27 **Time-Barred**

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In addition, all claims against all defendants arising out of allegations that occurred before January 18, 1995 are time-barred for the same reasons discussed above, to wit, by the one year statute of limitations for causes of action under Section 1983. Plaintiff can recover, if at all, only for claims occurring after January 18, 1995. This Court should, therefore, dismiss all claims which arose prior to January 18, 1995 as to the third, fourth, and fifth causes of action, and strike paragraphs 31-111 of the FAC from the fourth, fifth, and sixth causes of action.

c. **THE NINTH CAUSE OF ACTION IS BARRED BY PLAINTIFF'S FAILURE TO EXHAUST HIS ADMINISTRATIVE REMEDIES**

i. **Plaintiff Never Filed A Complaint With The DFEH Against Defendant Constance Dial, And, Thus, The Ninth Cause Of Action Must Be Dismissed As To Her**

The ninth cause of action asserts a violation of California’s Fair Employment and Housing Act (“FEHA”), found at Government Code Sections 12940 et seq. In order to assert a cause of action under the FEHA, a plaintiff must first exhaust his or her administrative remedies by filing a complaint with the Department of Fair Employment and Housing (“DFEH”). Government Code § 12960; Valdez v. City of Los Angeles, 231 Cal.App.3d 1043, 1052 (1991).

The complaint filed with the DFEH must name each individual who is a defendant to a lawsuit. Government Code § 12960;⁷ Valdez, supra, 231 Cal.App.3d at 1060-1061 (failure to name defendant is “fatal to the right to bring an action against” that defendant and justifies dismissal).

In the present case, plaintiff never filed any complaint with the DFEH against defendant Constance Dial. (FAC, ¶ 144 and Exhibit F attached thereto.) As such, the ninth cause of action must be dismissed against defendant Dial. The Court should strike her name from the ninth cause of action.

ii. **The Ninth Cause Of Action Is Time-Barred As To Lieutenant Coulter,**

⁷ Government Code Section 12960 states that such a complaint “shall state the name and address of the person. . . alleged to have committed the unlawful practice complained of and. . . shall set forth the particulars thereof. . .” (Emphasis added.)

Lieutenant Dunkin, Captain Gonzales, Sergeant McKinley, Commander Moran, Lieutenant Tatreau, Commander Watson, Lieutenant Weaver, and Lieutenant Graves

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A mandatory prerequisite to bringing a cause of action under FEHA is the timely filing of a complaint with the DFEH. Romano v. Rockwell International, Inc., 14 Cal.4th 479, 492 (1996). Such a complaint must be filed within one year of the time the allegedly discriminatory action occurs. Government Code § 12960; Fisher v. San Pedro Peninsula Hosp., 214 Cal.App.3d 590, 614 n. 9 (1989). Any failure to comply with these requirements amounts to a failure to exhaust administrative remedies, and constitutes a jurisdictional bar to the plaintiff's FEHA claims. Fisher, supra, at 614.

In the present case, plaintiff filed a complaint with the DFEH against, among others, defendants Coulter, Lieutenant Dunkin, Captain Gonzales, Sergeant McKinley, Commander Moran, Lieutenant Tatreau, Commander Watson, Lieutenant Weaver, and Lieutenant Graves. (FAC, ¶ 144.) That complaint was filed on September 20, 1995. (Id.) Under the one-year statute of limitations, all of the allegations must have occurred after September 20, 1994. As such, any allegations that occurred before September 20, 1994 are time-barred.

Here, all the allegations against eight of the individual defendants occurred before September 20, 1994 and, thus, are not timely. Specifically, the last wrongful act alleged against each of these eight defendants is as follows:

- Lieutenant Coulter -- August 4, 1994 (FAC, ¶ 93),
- Lieutenant Dunkin -- September 1993 (FAC, ¶ 53),
- Captain Gonzales -- October 6, 1993 (FAC, ¶¶ 61-63),
- Sergeant McKinley -- January 2, 1994 (FAC, ¶ 78),
- Commander Moran -- September 23, 1993 (FAC, ¶ 58),
- Lieutenant Tatreau -- July 14, 1994 (FAC, ¶ 90),
- Commander Watson -- October 15, 1993 (FAC, ¶ 65), and

1 • Lieutenant Weaver -- January 11, 1994 (FAC, ¶ 82).

2 In addition to the eight defendants above, plaintiff filed a separate complaint with the DFEH
3 on September 28, 1995 against, inter alia, defendant Lieutenant Graves. (FAC, ¶ 144.) That
4 complaint is also untimely. Because the DFEH complaint was filed on September 28, 1995, any
5 allegations that occurred before September 28, 1994 are barred by the one-year statute of limitations
6 as to Lieutenant Graves. Here, the last alleged wrongdoing by Lieutenant Graves occurred on
7 February 22, 1994, and, therefore, the ninth cause of action is time-barred as to him.

8 Accordingly, this Court should dismiss the ninth cause of action as to defendants
9 Lieutenant Coulter, Lieutenant Dunkin, Captain Gonzales, Sergeant McKinley, Commander Moran,
10 Lieutenant Tatreau, Commander Watson, Lieutenant Weaver, and Lieutenant Graves, and strike their
11 names therefrom.

12 iii. **All Claims Except One Giving Rise To The Ninth Cause Of Action**
13 **Should Be Dismissed As To Chief Williams Because Plaintiff Failed To**
Exhaust His Administrative Remedies

14 The ninth cause of action is also defective as to Chief Williams. As stated in the preceding
15 section, plaintiff is required to exhaust his administrative remedies before bringing a cause of action
16 under FEHA. As part of that exhaustion requirement, the plaintiff must identify each claim that he
17 is asserting against a particular defendant in his complaint with the DFEH. Okoli v. Lockheed
18 Technical Operations Co., 36 Cal.App.4th 1607, 1615 (1995). Any factual claim not mentioned in
19 the complaint filed with the DFEH cannot be asserted in a subsequent civil action under FEHA. Id.
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21 In Okoli, supra, the court held that a plaintiff who filed a DFEH complaint alleging that his
22 supervisor had denied him a promotion and made derogatory comments to him could not pursue a
23 retaliation cause of action because he had failed to exhaust his administrative remedies with respect
24 to that claim. Quoting its prior decision in Martin v. Lockheed Missiles and Space Co., 29
25 Cal.App.4th 1718 (1994), the court explained that: "[t]o exhaust his or her administrative remedies
26 as to a particular act made unlawful by the Fair Employment and Housing Act, the claimant must
27 specify that act in the administrative complaint, even if the complaint does specify other cognizable
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1 wrongful acts." Id. at 1615 (emphasis added). The court determined that the DFEH had been put
2 on notice of only these specific charges, holding that "the more specific the original charge, the less
3 likely that expansion into other areas will be allowed." Id. at 1617 (citations omitted); see also,
4 Shah v. Mt. Zion Hospital and Medical Ctr., 642 F.2d 268, 271 (9th Cir. 1981) (employee barred
5 from pursuing race discrimination claim when EEOC complaint alleged only sex and national origin
6 discrimination).

7 Here, plaintiff filed a DFEH complaint against Chief Williams in which he asserted one very
8 specific claim: Chief Williams allegedly retaliated against plaintiff in his attempt to organize a
9 public memorial in "early 1995". (FAC, at p. 147, ¶ R.) This claim was very specific as to
10 Chief Williams' conduct (*i.e.*, retaliation in connection with a particular memorial) and as to the date
11 (*i.e.*, "in early 1995"). This single DFEH claim corresponds to an identical allegation in plaintiff's
12 complaint. (See FAC, ¶¶ 112, 113). Other than this single claim, there is no other allegation
13 against Chief Williams in the DFEH complaint.

14 In the present civil case, however, plaintiff alleges numerous other independent and unrelated
15 acts of wrongdoing against Chief Williams. In particular, plaintiff alleges that Chief Williams
16 failed to take disciplinary action against an officer for allegedly discriminatory acts in February of
17 1994 (FAC, ¶59), that Chief Williams authorized disciplinary proceedings against plaintiff in three
18 Board of Rights hearings in June of 1995 (FAC, ¶ 121, 125, 129), that Chief Williams advised
19 plaintiff to "utilize existing channels. . . to register his complaints" in October 1994 (FAC, ¶¶ 99,
20 100, 102), and that Chief Williams allegedly made a personnel decision not to allow the plaintiff to
21 meet with media in October 1993. (FAC, ¶ 67.)

22 Not a single one of alleged acts in the preceding paragraph by Chief Williams was contained
23 in plaintiff's DFEH charge. Plaintiff's DFEH complaint makes no mention of Chief Williams'
24 alleged failure to take disciplinary action (FAC, ¶59), alleged authorization of disciplinary
25 proceedings against plaintiff (FAC, ¶ 121, 125, 129), alleged advice to plaintiff to "utilize existing
26 channels. . . to register his complaints" (FAC, ¶¶ 67, 99, 100, 102), and alleged personnel decision
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1 not to allow the plaintiff to meet with media. (FAC, ¶ 67.) Plaintiff has, therefore, failed to
2 exhaust his administrative remedies with respect to any such claims, and is barred from pursuing
3 them in this lawsuit. Okoli, supra, 36 Cal.App.4th at 1617.

4 As such, all claims in support of the ninth cause of action as to Chief Williams should be
5 dismissed and stricken from that cause of action except as to the single claim at paragraphs 112 and
6 113 of the FAC.

7 //

8 iv. **The Ninth Cause Of Action Should Be Dismissed As To All Defendants**
9 **Because The Plaintiff Did Not Allege That He Received The Requisite**
10 **Right To Sue Letter From The DFEH**

11 In addition to the above grounds, the ninth cause of action is barred as to all defendants on
12 the ground that he did not allege the requisite receipt of the right-to-sue letter. In order to bring an
13 action under FEHA, the plaintiff must first receive a right-to-sue letter from the DFEH.

14 Government Code § 12965(b); Martin v. Lockheed Missiles & Space Co., supra, 29 Cal.App.4th
15 at 1724. The failure to obtain that letter prevents plaintiff from bringing a cause of action under
16 FEHA. Id.

17 Here, the plaintiff only alleges that he requested the right-to-sue letters from the DFEH.
18 FAC, ¶ 144.) Plaintiff does not, however, allege that he has actually received right-to-sue letters.
19 As such, the ninth cause of action is barred for failing to exhaust his administrative remedies.

20 Martin, supra, 29 Cal.App.4th at 1724. The Court should strike it from the FAC.

21 d. **ALL OF THE STATE LAW TORT CAUSES OF ACTION AGAINST CHIEF**
22 **WILLIAMS ARISING OUT HIS DECISION TO INVESTIGATE AND**
23 **DISCIPLINE POLICE OFFICERS ARE BARRED BY THE IMMUNITY**
24 **UNDER GOVERNMENT CODE SECTION 821.6**

25 Government Code Section 821.6 grants public employees immunity from liability for
26 initiating or implementing any administrative proceedings. Kemmerer v. County of Fresno, 200
27 Cal.App.3d 1426, 1436-37 (1988). Government Code Section 821.6 provides as follows:

28 “A public employee is not liable for injury caused by his instituting or



1 prosecuting any . . . administrative proceeding within the scope of his
2 employment, even if he acts maliciously and without probable cause.”

3 Specifically, Section 821.6 immunizes individuals who initiate or participate in proceedings
4 relating to public employee discipline. Kemmerer, supra, 200 Cal.App.3d at 1436-37; Summers v.
5 City of Cathedral City, 225 Cal.App.3d 1047, 1064-65 (1990). In addition, any "investigation"
6 which leads to the institution of disciplinary proceedings against a public employee is also cloaked
7 with immunity. Kemmerer, supra, at 1436-37.

8 Kemmerer, supra, is dispositive. In Kemmerer, the plaintiff, a social worker with the
9 County of Fresno, sued the County and his supervisors, the director, and the assistant director of the
10 department of social services. The plaintiff alleged that the defendants had engaged in wrongdoing
11 in connection with their initiation and investigation of misconduct charges against him. The
12 defendants demurred to the plaintiff's complaint, contending that they were immune from liability
13 under Government Code Section 821.6 because their actions were undertaken in connection with an
14 "administrative proceeding."

15 The court in Kemmerer held that the director was immune for his act of instituting the
16 disciplinary process under Government Code Section 821.6. In addition, the court determined that
17 the assistant director was immune in connection with his investigation of the plaintiff's alleged
18 misconduct, because that investigation was "an essential step to the institution of the disciplinary
19 proceeding ..." Id. at 1436-37. In so doing, the court defined the term "administrative proceeding"
20 in Section 821.6 broadly to encompass not only the plaintiff's civil service and pre-disciplinary
21 ("Skelly") hearings, but also the defendants' conduct in preparation therefore, including their
22 investigation of the plaintiff. Id. at 1431, 1436.

23 A similar result was reached by the California Supreme Court in Hardy v. Vial, 48 Cal.2d
24 577 (1957). In that case, the defendant school officials aided private citizens in filing affidavits
25 containing false charges against a professor. The court held that the defendants were immune from
26 liability for their actions under the common law predecessor to Government Code Section 821.6, in
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1 that they occupied positions which would ordinarily embrace duties relating to the investigation of
2 charges which could lead to the discipline or dismissal of school employees. Id. at 583.

3 Furthermore, the courts have been unanimous in holding that the term "judicial or
4 administrative proceeding" is to be liberally construed, and encompasses all actions up to imposition
5 of the ultimate penalty, including any investigation conducted in connection with that proceeding.
6 See, Amylou R. v. County of Riverside, 28 Cal.App.4th 1205, 1209-1210 (1994) (police officers
7 immune from tort claim brought by victim of crime in connection with officer's conduct towards
8 victim while investigating crime; Section 821.6 applies to actions taken in preparation for judicial or
9 administrative proceeding, including investigation); Jenkins v. County of Orange, 212 Cal.App.3d
10 278, 283 (1989) (social worker who refused to consider evidence and misrepresented information
11 during an administrative proceeding entitled to Section 821.6 immunity because acts took place
12 during the investigative and disciplinary phases of her job); Cappuccio v. Harmon, 208 Cal.App.3d
13 1496, 1500 (1989) (coverage of Section 821.6 is expansive and includes the entire period up to the
14 imposition of the penalty).

15 These authorities conclusively establish that Chief Williams' is entitled to immunity in
16 connection with his decision to institute a disciplinary proceedings against certain police officers.
17 Specifically, in his FAC, plaintiff alleges that Chief Williams failed to take disciplinary action
18 against an officer for allegedly discriminatory acts. (FAC, ¶59.) Plaintiff also alleges that Chief
19 Williams authorized disciplinary proceedings against plaintiff in three Board of Rights hearings.
20 (FAC, ¶¶ 121, 125, 129.) All of these allegations pertain to the decision to institute disciplinary
21 proceedings against a public employee. These alleged decisions were made by the highest ranking
22 official in the Los Angeles Police Department, who is clearly the type of governmental official
23 entitled to make decisions on these issues. The investigations were all part of an "administrative
24 proceeding" as defined by Kemmerer, supra, and other legal authorities as discussed above. As
25 such, Chief Williams is immune from any liability in connection with his action of investigating and
26 disciplining police officers as alleged in paragraphs 59, 121, 125, and 129 of the FAC, which should
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1 be stricken from the state law causes of action.

2 e. **ALL OF THE STATE LAW CAUSES OF ACTION AGAINST DEFENDANT**
3 **MAISLIN SHOULD BE DISMISSED UNDER THE IMMUNITY PROVIDED**
4 **BY GOVERNMENT CODE SECTION 821.6**

5 For the same reasons discussed in the preceding section, defendant, Captain Maislin, should
6 be dismissed under the immunity provided by Government Code Section 821.6.

7 Plaintiff asserts one, and only one, allegation against Captain Maislin: that Captain Maislin
8 decided not to investigate certain complaints of wrongdoing by fellow officers. (FAC, ¶ 95.) This
9 alleged decision by Captain Maislin occurred during the course and scope of his employment, and
10 pertained to the decision of whether or not to conduct an investigation or institute disciplinary
11 proceedings against other officers.

12 This is precisely the type of conduct immunized under Section 821.6 as a matter of law.
13 Kemmerer, supra, 200 Cal.App.3d at 1436-37 (decision of whether or not to investigate or institute
14 disciplinary proceedings against a public employee is cloaked with immunity); Amylou R. v. County
15 of Riverside, supra, 28 Cal.App.4th at 1209-1210 (police officers immune in connection with
16 investigating crime); Johnson v. Pacifica, 4 Cal.App.3d 82 (1970) (immunity for negligent police
17 investigation).

18 Moreover, the law is well-settled that the "failure" to act (i.e., an omission) is equally
19 protected by the discretionary immunity. See, e.g., Roseville Community Hosp. v. State, 74
20 Cal.App.3d 583 (1977) (sustaining demurrer on ground that attorney general was immune for failing
21 to allocate scarce resources); Ronald S. v. County of San Diego, 16 Cal.App.4th 887, 896 (1993)
22 (holding that Government Code Section 820.2 immunized the county for its failure to conduct a
23 proper evaluation); McCarthy v. Frost, 33 Cal.App. 3d 872 (1979) (police decision not to investigate
24 barred by discretionary immunity).

25 As such, all of the state law causes of action against Captain Maislin are barred by the
26 immunity under Government Code Section 821.6. The Court should strike Captain Maislin's name
27 and paragraph 95 of the FAC from the state law causes of action.

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1 **4. CONCLUSION**

2 In a “throw in the kitchen sink” mentality, plaintiff’s prolix complaint asserts fourteen causes
3 of action against eighteen defendants. This case should be streamlined. Many of the claims, causes
4 of action, and defendants should be dismissed on the grounds of untimeliness, failure to exhaust
5 administrative remedies, and statutory immunities.

6 For all of the foregoing reasons, the defendants respectfully requests that this Court grant
7 their motion to strike in its entirety.

8 DATED: April __, 1999 LeBOEUF, LAMB, GREENE & MacRAE,
9 LLP

10
11 By: _____
12 Richard R. Terzian
13 Attorneys for Defendants CITY OF LOS ANGELES, WILLIE
14 WILLIAMS, DANIEL WATSON, JOHN DUNKIN, JOHN
15 MORAN, RICH GONZALEZ, LARRY MCKINLEY,
16 CONSTANCE DIAL, MICHAEL CHAMBERS, ERIC
17 COULTER, TAMMY TATREAU, JOHN WEAVER,
18 JOSEPH PRIEBE, WALLACE GRAVES,
19 STUART MAISLIN, CORRIE MALINKA, MARK SAVALA,
20 and RALPH MCCOMB

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PROOF OF SERVICE

I declare that I am employed in the County of Los Angeles, California. I am over the age of eighteen years and not a party to the within case; my business address is: LeBoeuf, Lamb, Greene & MacRae, L.L.P., 725 South Figueroa Street, Suite 3600, Los Angeles, California 90017-5436.

On **April 6, 1999**, I served the following document(s) described as:

**DEFENDANTS' NOTICE OF MOTION AND MOTION TO STRIKE
PORTIONS OF PLAINTIFF'S FIRST AMENDED COMPLAINT;
MEMORANDUM OF POINTS AND AUTHORITIES**

on the following interested parties in this action:

PLEASE SEE ATTACHED SERVICE LIST

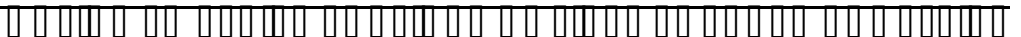
(BY TELEFACSIMILE TRANSMISSION) at approximately
: [] AM [] PM, from the telefacsimile transmitting machine at the offices of LeBoeuf,
Lamb, Greene & MacRae, L.L.P., 725 South Figueroa Street, Suite 3600, Los Angeles,
California 90017-5436 [facsimile number (213) 955-7399], to the attention of the following
interested parties in this action, at addressee's facsimile no.:

This transmission was reported as complete and without error.

(BY MAIL) **(BY CERTIFIED MAIL)** by placing a true copy thereof (*printed on recycled paper*) in a sealed envelope with postage fully prepaid. I am readily familiar with the business practice of LeBoeuf, Lamb, Greene & MacRae, L.L.P. for collection and processing of correspondence for mailing with the United States Postal Service, and the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

I declare, under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed on **April 6, 1999** at Los Angeles, California.

Laura L. Jones



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