IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No.: S262699

BONNIE DUCKSWORTH et al.,
Plaintiffs and Petitioners,

v.

TRI-MODAL DISTRIBUTION
SERVICES, INC. et al.
Defendant and Respondents.

On Review From A Published Opinion of the Court of Appeal of the State of California,
Second Appellate District, Division 8, Case No. B294872,
Affirming Final Judgments On Orders Granting Summary Judgments

The Superior Court of Los Angeles County, Case No. BC676917
The Honorable Lia Martin, Presiding

PETITIONER'S OPENING BRIEF ON THE MERITS

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I. ISSUES PRESENTED FOR REVIEW

The *Fair Employment and Housing Act* ("*FEHA; Government Code* §§12900 *et seq.*), which protects employees from discrimination and harassment in the workplace, is among California's major civil rights laws. *Government Code* §12960(d)(now §12960(e))[1], *FEHA*'s statute of limitations, provides that the time for filing an administrative complaint with the Department of Fair Employment and Housing ("DFEH") begins to run at the time the discriminatory act "occurred." In light of *FEHA's* remedial purpose, this Court has interpreted §12960(d) liberally to promote resolution of *FEHA* claims on their merits. Specifically, in regard to discharge, this Court has held that a discharge occurs when the employer actually terminates the employee, not on an earlier date when the employer announces its intent to discharge that employee, because the discharge has yet to "occur." This Court has not addressed whether this rationale applies in the context of a promotion, specifically where the successful candidate is offered and accepts the promotion on a date certain, but the promotion does not take effect until a later date.

Government Code §12965(b) addresses costs incurred in a *FEHA* action. This Court has held that costs incurred at trial should not be awarded to a prevailing *FEHA* defendant, "unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so."

[1] By enacting *Government Code* §12960(e), the Legislature extended the statute of limitations to three years. That amendment is not relevant to this appeal.

Otherwise, the purpose of *FEHA* "to encourage persons injured by discrimination to seek judicial relief" would be completely undermined if plaintiffs in non-frivolous actions could suffer the imposition of costs if they lose. This Court has not determined if that rationale applies to costs on appeal under Rule 8.278(a)(1) of the *California Rules of Court.*

Against this backdrop and as specified in this Court's August 12, 2020 order granting review, the issues on review are:

1. In a cause of action alleging *quid pro quo* sexual harassment resulting in a failure to promote in violation of the *Fair Employment and Housing Act* did the statute of limitations to file an administrative complaint with the Department of Fair Employment and Housing begin to run when the successful candidate was offered and accepted the position, or when that promotion took effect if there is no evidence that Plaintiff was aware of that promotion on the earlier date?

2. Was it proper for the Court of Appeal to award costs on appeal under Rule 8.278 of the *California Rules of Court* against an unsuccessful *FEHA Claiman*t, in the absence of a finding that the underlying *FEHA* claims were objectively frivolous.[2]

II. INTRODUCTION AND SUMMARY OF ARGUMENTS

The issues presented by this Brief are matters of first impression and of paramount importance to California public policy, as announced by this Court, that *FEHA*'s statute of limitations be liberally construed and claims arising under *FEHA* be

[2] Plaintiff and Appellant BONNIE DUCKSWORTH has resolved the entirety of the claims alleged by her in the underlying action and therefore is not a party to this appeal.

litigated on their merits, without fear that non prevailing employees be subject to fees and costs where their claims are not objectively frivolous.

Issue 1 relates to Petitioner PAMELA POLLOCK's ("POLLOCK" or "Petitioner") claim of *quid pro quo* sexual harassment against Respondent MICHAEL KELSO ("KELSO"), Executive Vice President of her employer TRI-MODAL TRANSPORTATION SERVICES, INC., ABILITY TRI-MODAL TRANSPORTATIONS SERVICES, INC. and DECOY FREIGHT SYSTEMS, INC. (collectively "TRI-MODAL"), a trucking and warehouse business, where she has worked as a Customer Service Representative since September 13, 1995. POLLOCK claims that she was denied promotions by KELSO, because she refused to engage in a sexual relationship with him, in violation of *FEHA*, specifically *Government Code* §12940(j)(1), (3). Instead, KELSO promoted Leticia Gonzalez from Customer Service Representative to Account Manager. Gonzalez was offered and accepted the promotion in March 2017 but she was not placed in the new position and in TRI-MODAL's own words, Gonzalez' promotion "did not take effect", until May 1, 2017. POLLOCK filed her administrative complaint with the DFEH on April 18, 2018. Both the Superior Court and the Court of Appeal held that the then existing one year statute of limitations in *Government Code* §12960(d)(now §12960(e)) began to run when Martinez was offered and accepted the promotion in March 2017, because that is when it "occurred, not when

it took effect on May 1, 2017, some six weeks later. As such, POLLOCK's claim was time-barred.[3]

The issue of whether the statute of limitations begins when the successful candidate is offered and accepts the position or when the promotion takes effect has not been addressed by this Court or any other Court of Appeal. As such, it presents a matter of first impression, and its resolution is of the utmost importance to the orderly resolution of *FEHA* claims.

The determinations of the Superior Court and the Court of Appeal that the earlier date governs is contrary to this Court's holding in *Romano v. Rockwell International, Inc.*, 14 Cal.4th 479, 491 (1996) that the *FEHA* statute of limitations (1) begins to run when the employment action at issue takes effect, not when it is announced, and (2) should be liberally construed to permit the resolution of *FEHA* claims on their merits.

[3] Petitioner's *quid pro quo* cause of action also challenges the promotions of employees Mitch Perez, Jaime Guevara, Maria Elizondo, Angel Mejia, Alejandra Gomez and Jessica Ramirez. Those promotions are not addressed here. In his declaration supporting KELSO's summary judgment motion, Tri-Modal Vice President Timothy Mullaney testified that Perez and Gomez were not promoted and the Guevara, Elizondo Ramirez and Mejia promotions were outside the statute of limitations (AA268:1-10). Petitioner objected to that testimony as hearsay, because Mullaney specifically testified that he obtained this information from these persons' personnel files, which were not in evidence (AA267:12-15, 267:27-268:10, 660:24-661:9). The Court of Appeal affirmed the Superior Court overruling these objections based on Mullaney's general averment at the beginning of his declaration that his testimony was based on his personal knowledge (AA267:8-9). The Court of Appeal characterized its ruling as a "close call" and cautioned "litigators: know your Evidence Code when working with declarations." (Opinion at 14; *Ducksworth v. Tri-Modal Distribution Services,* 47 Cal.App.5th 532, 545 (2020)). Petitioner maintains that the rulings of the Superior Court and the Court of Appeal are erroneous and her objections should have been sustained.

Further, consistent with settled norms of statutory interpretation, the plain meaning of "occurred" is when an adverse employment action takes effect. Consistent with this notion, both TRI-MODAL Vice President of Operations Timothy Mullaney and Carson Street Terminal Manager John Severs, who was to be Gonzalez' new supervisor, testified that Gonzalez' promotion did not "take effect" until the later date, May 1, 2017, when TRI-MODAL actually placed Gonzalez in the position.

The absence of evidence that POLLOCK was aware of Gonzalez being offered and accepting the promotion in March 2017 precludes summary judgment that the promotion "occurred" on the earlier date. That a claim is barred by the statute of limitations is an affirmative defense. An essential element of that defense is evidence that the plaintiff had actual or constructive knowledge that "someone has done something wrong" on the date defendant claims that the statute of limitations began to run. There is no such evidence in this record.

Issue 2 addresses the award of costs in favor of Respondents KELSO, SCOTTS LABOR LEASING COMPANY, INC. and PACIFIC LEASING COMPANY, INC., by the Court of Appeal, without a finding that Petitioner's claims were objectively frivolous. In *Williams v. Chino Valley Independent Fire District*, 61 Cal.4th 97, 105 (2015), this Court held that the general costs provisions in *Code of Civil Procedure* §1032(b) are supplanted by those costs provisions in *Government Code* §12965(b), which are specific to *FEHA*, and therefore costs should be awarded to a prevailing *FEHA* defendant only upon a finding that the underlying action was objectively frivolous. This Court never has addressed whether its rationale applies to costs on appeal

under Rule 8.278 of the *California Rules of Court* and therefore, this is an issue of first impression. Determination of this issue is of extreme importance.

Statutory attorney fee and cost provisions are interpreted to apply to attorney fees and costs on appeal unless the statute provides otherwise. *Government Code* §12965(b) contains no language specifically excluding appeals from the statutory authorization of costs. Thus, *Government Code* §12965(b), which is specific to *FEHA* and permits an award of costs only where the court finds the underlying action frivolous, must supplant the general cost provision in *CRC* 8.278(a)(1). If permitted to stand, the Court of Appeal's determination will chill the rights of California employees to pursue discrimination actions without fear of oppressive awards for fees and costs, a public policy on which this Court relied in its *Williams* opinion.

III. PROCEDURAL POSTURE AND STATEMENT OF APPEALABILITY

Petitioner's First Amended Complaint ("FAC"), the operative pleading, alleges two causes of action: the First Cause of Action for failures to promote based on race, and the Second Cause of Action for *quid pro quo* sexual harassment, both in violation of *FEHA* (Appellant's Appendix ("AA") 81-89). The Superior Court entered judgment in favor of Respondents (1) KELSO on November 20, 2018, and (2) SCOTT'S LABOR LEASING, COMPANY, INC. and PACIFIC LEASING, INC., the entities that purportedly leased Petitioner to TRI-MODAL, on December 6, 2018, after having granted their motions for summary judgment (AA 791-798). These judgments are final and appealable under §904.1(a)(1) of the *Code of Civil Procedure*.

The Court of Appeal, Second Appellate District, Division 8, affirmed in a published Opinion filed on April 7, 2020 (*Ducksworth v. Tri-Modal Distribution Services*, 47 Cal.App.5th 532 (2020)). On April 10, 2020, Petitioner filed a petition for rehearing in the Court of Appeal, addressing the award of costs. The Court of Appeal summarily denied the petition for rehearing by written order filed on April 22, 2020. Petitioner filed her petition for review with this Court on June 11, 2020, which this Court granted on August 12, 2020.

TRI-MODAL also filed a motion for summary judgment on August 30, 2018, which the Superior Court denied on December 19, 2018 (AA 63). On January 9, 2019, the Superior Court issued a discretionary stay of Petitioner's claims against TRI-MODAL, pending resolution of her appeal (AA 61-62).

IV. FACTS

A. POLLOCK'S *QUID PRO QUO* CLAIM.

1. POLLOCK's Corporate Employer

TRI-MODAL is an active California corporation, with its principal place of business in Carson, California (AA 372 - Fact No. 64). TRI-MODAL's business is the operation of warehouses and the shipment of freight by trucks (AA 373 - Fact No. 69).

2. POLLOCK's Employment History at TRI-MODAL

POLLOCK has been employed as a Customer Service representative ("CSR") at TRI-MODAL, since September 13, 1995 (AA 373 – Fact No. 71). She is one of only two African American CSR's at TRI-MODAL (AA 373 – Fact No. 72).

During the entirety of POLLOCK's career, TRI-MODAL never has promoted an African American into a supervisory position and customarily has promoted lesser qualified non-African Americans into those positions (AA87:12-18).

3. The Chain of Command at TRI-MODAL

POLLOCK reports to Assistant Terminal Manager Angel Elizondo, who in turn reports to Terminal Manager Ricardo Velasquez (AA 373 - Fact No 73). Elizondo and Velasquez are Hispanic (AA 373- Fact No. 74). Velasquez reports directly to Vice President of Operations Timothy Mullaney, who reports to Executive Vice President and Respondent KELSO (AA 373 - Fact No. 75). Mullaney and KELSO are white (AA 373 - Fact No. 76).

4. KELSO Approaches POLLOCK

In or around August 2014, KELSO invited POLLOCK into his office at TRI-MODAL (AA 625-626 – Fact No. 4). After a brief conversation, KELSO offered POLLOCK a glass of wine (*Id.*). When POLLOCK said she had to leave, KELSO grabbed POLLOCK and kissed her passionately (*Id.*). Up through around June 2016, KELSO and POLLOCK saw each other outside of work 10 to 20 times, going to dinners and movies, and KELSO brought POLLOCK gifts when he travelled out of town, usually tee shirts with the logos of the cities where he had business meetings (*Id.*; AA658:5-6). They would hug and kiss passionately on these dates, and KELSO would become erect (AA 625-626 – Fact No. 4). KELSO would come into POLLOCK's work area and hug and kiss her passionately (*Id.*). He also would sit next to POLLOCK at company meetings and rub her thighs under the table (*Id.*). KELSO sent some 296 pages

of emails to POLLOCK on TRI-MODAL's computer, which KELSO admitted was against company policy (*Id.*). POLLOCK asked KELSO if his actions were contrary to the company's rules, which forbade romantic relationships between superiors and subordinates. KELSO responded that those rules did not apply to him (*Id.*).

POLLOCK and KELSO never had sexual intercourse (AA 625-626 - Fact No. 4). KELSO wanted the relationship to become sexual (*Id.*). He offered to fly POLLOCK to Santa Barbara and other cities where he was travelling on business and stay in the hotels with him (*Id.*). But POLLOCK refused. KELSO continually told POLLOCK he "wanted more" (*Id.*). Eventually, KELSO became impatient with and somewhat jealous of POLLOCK, demanding to know where she had been when he was unable to contact her and why she had not returned his calls (*Id.*). KELSO began making racially insulting statements to POLLOCK. On three occasions during dates, when POLLOCK told KELSO she needed to go home, KELSO told her, "go home and cook collard greens" (*Id.*). POLLOCK stopped communicating with KELSO and the dating relationship ceased in June 2016 (*Id.*).

KELSO tried to keep his relationship with POLLOCK secret, but people at the office were suspicious (AA 625-626 - Fact No. 4). POLLOCK's superior, Terminal Manager Ricardo Velasquez, asked POLLOCK why KELSO was spending so much time in her office (*Id.*). The relationship was revealed when POLLOCK filed suit (*Id.*). TRI-MODAL then hired an investigator (*Id.*). As of the dates of the management depositions, no one was aware of the results of the investigation, and KELSO had not been disciplined (*Id.*). However, it appears that KELSO expects some discipline. When

asked in deposition if he had been disciplined for engaging in the relationship with POLLOCK, KELSO responded, "not yet" (*Id.*).

5. The Promotion of Leticia Gonzalez

KELSO promoted Leticia Gonzalez from CSR to Account Manager (AA 628:20-27). Gonzalez was offered and accepted the promotion in March 2017, but TRIMODAL did not place Gonzalez in the position, and in TRI-MODAL's own words, the promotion "did not take effect", until May 1, 2017 (AA 268:11-26).

6. POLLOCK Files An Administrative Complaint With DFEH Challenging the Gonzalez and Other Promotions.

On April 18, 2018, POLLOCK filed an administrative complaint against KELSO with the DFEH, alleging *quid pro quo* sexual harassment in violation of *FEHA* by which she challenged the promotions of Gonzalez, Mitch Perez, Jaime Guevara, Maria Elizondo, Angel Mejia, Alejandra Gomez and Jessica Ramirez (AA 626:11-16, Fact No. 5). The DFEH issued to POLLOCK a right to sue notice that same day (*Id.*).

B. THE COURT OF APPEAL AWARDS COSTS TO RESPONDENTS.

In its April 7, 2020 published Opinion, the Court of Appeal awarded costs to Respondents. There is no finding in the Opinion that Petitioner's underlying claims, all of which allege violations of *FEHA*, are objectively frivolous (Opinion at p. 16; *Ducksworth, supra,* 47 Cal.App.5th at 546).

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V. ARGUMENT

A. SOUND PUBLIC POLICY AS ANNOUNCED BY THIS COURT AND NORMS OF STATUTORY CONSTRUCTION MANDATE THAT THE GONZALEZ PROMOTION "OCCURRED" WHEN IT "TOOK EFFECT" ON MAY 1, 2017, NOT WHEN GONZALEZ WAS OFFERED AND ACCPETED THE POSITION IN MARCH 2017.

Government Code §12960(d)(now §12960(e)), *FEHA*'s statute of limitations, provides that the time for filing an administrative complaint with the "DFEH begins to run at the time the discriminatory act "occurred." Where the discriminatory act is a failure to promote, the issue of whether the statute of limitations begins when the successful candidate is offered and accepts the position or when the promotion takes effect has not been addressed by this Court or any other Court of Appeal. As such, it presents a matter of first impression, and its resolution is of the utmost importance to the orderly resolution of *FEHA* claims.

1. The Public Policy Announced By This Court in *Romano v. Rockwell* Mandates That The Gonzalez Promotion Occurred on May 1, 2017.

There is no dispute that Gonzalez was offered and accepted the promotion at issue in March 2017, outside the then existing one-year *FEHA* statute of limitations, but that promotion did not take effect until May 1, 2017, within one year of POLLOCK filing her DFEH complaint. Both the Superior Court and the Court of Appeal held that the earlier date controls and accordingly POLLOCK's claim is time barred.

The determinations of the Superior Court and the Court of Appeal that the earlier date governs runs afoul of California public policy, as announced by this Court in *Romano v. Rockwell International, Inc.*, 14 Cal.4th 479, 491 (1996) that the *FEHA* statute of limitations (1) begins to run when the employment action at issue takes effect, not when it is announced, and (2) should be liberally construed to permit the resolution of *FEHA* claims on their merits.

This Court's holding was premised on (1) the clear language of *Government Code* §12960, and (2) the established underlying remedial public policy that *FEHA* claims be litigated on their merits:

> [B]y the terms of Government Code section 12960 the limitations period applicable to administrative claims begins to run "after" the unlawful employment practice … "occurred." If the administrative complaint must be filed within one year "after" the unlawful practice … occurred, then for the purpose of the complaint, the administrative cause of action must accrue and the statute of limitations must run from the time of **actual termination.** It would not run from earlier date of notification of discharge, because on that date the unlawful practice … has not yet "occurred."
>
> Such an interpretation is consistent with the plain meaning of the statutory language. It is also consistent with the remedial purpose of the FEHA to safeguard the employee's right to seek, obtain and hold employment without experiencing discrimination.

The FEHA itself requires that we interpret its terms liberally in order to accomplish that stated legislative purpose. In order to carry out the purpose of the FEHA to safeguard employee's rights to hold employment without experiencing discrimination, **the limitations period set out in the FEHA should be interpreted so as to promote resolution of potentially meritorious claims on the merits** … **[I]n addition to being consistent with the plain meaning of the statute …a construction of the limitation period that favors adjudication on the merits is more consistent with the remedial purposes of the law than one likely to bar potentially meritorious claims.**

Further … such a rule does not impose an undue burden on employers by forcing them to defend stale claims. First, the period between notification and termination usually is short. Second, both dates are within the employer's control, and the employer may secure or retain evidence in case a claim should arise…Further, a holding that the statute of limitations on a claim under the FEHA runs from the time of notification … would promote premature and potentially destructive claims, in that the employee would be required to institute a complaint with the Department …for a harm that has not yet occurred… Such a rule would reduce sharply any chance of conciliation between the employer and employee and draw the Department into investigations that might have been avoided through informal conciliation.

Romano, supra, 14 Cal.4th at 493-95 (emphasis added; citations omitted).

It is inconsistent with *FEHA*'s remedial policy to require POLLOCK to have administratively challenged the Gonzalez promotion during the approximate 60 days between Martinez being offered and accepting the position in March 2017 and it taking effect on May 1, 2017. A challenge during that period would have been premature. During this 60-day window, Respondents could have rescinded the offer, or Gonzalez might have withdrawn her acceptance, or the position might have been eliminated, among other things. Simply put, the actual damage to POLLOCK did not occur until the promotion became effective on May 1, 2017. Further, as *Romano* noted, this brief period could not have rendered POLLOCK's claim stale.

The Court of Appeal's rational also is contrary to this Court' *Romano* opinion in another respect. The Court of Appeal held that the statute of limitations commenced on the earlier March 2017 when KELSO offered Gonzalez the promotion and she accepted, because that is "when Pollock's injury 'occurred.'" (Opinion at 15; *Ducksworth, supra,* 47 Cal.App.5th at 546). But, as this Court held, notification without implementation does not trigger the statute of limitations, because the unlawful practice "had not yet 'occurred.'" *Romano, supra,* 14 Cal.4th at 493.

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2. The Testimony of TRI-MODAL Management And The Plain Meaning Of "Occurred" Support The Notion That The Gonzalez Promotion "Occurred" on May 1, 2017.

That Gonzalez' promotion "occurred" on the later date, May 1, 2017, is supported by the declaration testimony offered by KELSO in support of his motion for summary judgment. TRI-MODAL's Vice President of Operations Timothy Mullaney testified that he is "familiar with the hiring and promotion process" at TRI-MODAL (AA 267:14-16). Although Mullaney recounted that Gonzalez was offered and accepted the Account Manager position in March 2017, **he acknowledged that the promotion "did not take effect until May 1, 2017**" (AA268:25-26; emphasis added). Similarly, Carson Street Terminal Manager John Severs, who was to be Gonzalez' new supervisor, testified that her promotion "**did not take effect until May 1, 2017**." (AA 271:20-21; emphases added).

This Court consistently has held that "we interpret statutory language according to its usual and ordinary import, keeping in mind the apparent purpose of the statute. *Romano, supra,* 14 Cal.4th at 493 (underline in original) *quoting Dyna-Med, Inc. v. Fair Employment & Housing Commission,* 43 Cal.3d 1379, 1386-87 (1987); *see also Coalition of Concerned Communities, Inc. v. City of Los Angeles,* 34 Cal.4th 733, 737 (2004); *Torres v. Parkhouse Tire Service, Inc.,* 26 Cal.4th 995, 1003 (2001).

The plain meeting of "occurred" supports the notion that the later May 1, 2017 date governs. "Takes place" is synonymous with "occur" (The American Heritage Dictionary of the English Language (Third Edition) at p. 1251; The Webster Reference

Dictionary of the English Language, Encyclopedic Edition, Volume I at p. 656(1981); www. free thesaurus.com). Petitioner can conceive of no material distinction between the time an event "takes place" and it "take[s] effect", the term used by Vice President Mullaney and Supervisor Severs, and there is none. Simply put, the Gonzalez promotion could not have "occurred" on any date, other than May 1, 2017, when, as described by KELSO's own witnesses, it took effect.

In summary, as this Court held in *Romano, supra* sound notions of public policy and the plain meaning given to statutory terms mandate that *FEHA*'s statute of limitations begins not when an lawful practice is announced, but when it **actually** is implemented, because before implementation, the unlawful practice has "not yet occurred". Here, that was on May 1, 2017, when in the words of KELSO's own witnesses, Gonzalez' promotion "took effect." As such, POLLOCK's *quid pro quo* sexual harassment claim is not time-barred and the Court of Appeal's Opinion should be reversed.

3. The Absence of Evidence That Petitioner Knew, Or Should Have Known, That Gonzalez Was Offered and Accepted the Promotion In March 2017 Precludes Summary Judgment That The Promotion "Occurred" On That Date.

Even if POLLOCK were aware of the events of March 2017, to hold that her claim is time-barred based on that knowledge would be inconsistent with this Court's *Romano* opinion. To reiterate, in *Romano* the employer notified the employee months in advance of his future termination. Yet this Court held that said notification was of no

import, because the discharge did not "occur" until the later date when the employee's termination actually was implemented. There exists no reason that this rationale should not apply to promotions.

Regardless, even if POLLOCK's knowledge is material, there is no evidence that POLLOCK was aware of Gonzalez being offered and accepting the promotion in March 2017. The absence of such evidence precludes summary judgment that the promotion "occurred" on the earlier date.

Whether the Superior Court properly granted summary judgment is subject to this Court's *de novo* review. *Samara v. Matar*, 5 Cal.5th 322, 228 (2018). "[W]e take the facts from the record that was before the trial court when it ruled on that motion. We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained. We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." *Hampton v. County of San Diego,* 62 Cal.4th 340, 347 (2015); *Hartford Casualty Insurance Company v. Swift Distribution, Inc.,* 59 Cal.4th 277, 286 (2014)(citations omitted).

That a claim is barred by the statute of limitations is an affirmative defense. *Brown v. Bleiberg,* 32 Cal.3d 426, 439 (1982). An element of that defense is evidence that the plaintiff knew or should have known of defendant's unlawful act on the date defendant claims the statute of limitations commenced. *Brown v. Bleiberg, supra,* 32 Cal.3d at, 439; *Jolly v. Eli Lilly & Company,* 44 Cal.3d 1103, 1111(1988); *Acosta v. Glenfed Development Corporation,* 128 Cal.App.4th 1278, 1292 (2005). Put another

way, the statute of limitations begins to run when the plaintiff suspects or should suspect that someone "has done something wrong." *Id.* This rule applies to claims arising under *FEHA. Cucuzza v. City of Santa Clara*, 104 Cal.App.4th 1031, 1040, 1043 (2002)(employer entitled to summary judgement in that undisputed evidence established the employee knew or should have known of gender discrimination outside statute of limitations).

In light of the foregoing, summary judgment is proper only if there is evidence in the record establishing that plaintiff knew or should have known of the alleged wrong committed at the time it allegedly occurred. *Brown v. Bleiberg, supra,* 32 Cal.3d at 439; *Jolly, supra,* 44 Cal.3d at 1112. Indeed, the Court of Appeal's Opinion is consistent with this notion: "[T]he statute of limitations for failure to promote runs from when an employer tells employees they have been given **(or denied**) a promotion." (Opinion at 15; *Ducksworth, supra,* 47 Cal.App.5th at 546; emphasis added).

"A trial court properly grants a motion for summary judgment where all the papers submitted show that there is no triable issue as to any material fact **and that the moving party is entitled to judgment as a matter of law.**" *Hampton, supra,* 62 Cal.4th at 347 (emphasis added; citation omitted). Here the record is devoid of any evidence that in March 2017, POLLOCK knew or suspected, or should have known or suspected that Gonzalez had been offered and accepted the promotion to Account Manager. As such, the evidence before the Superior Court does not, and could not, establish that KELSO was entitled to summary judgment because POLLOCK was aware of, or should have been aware, that she was a victim of discrimination on the earlier date.

Indeed, KELSO never has argued that POLLOCK knew or should have known of the events of March 2017, including in the Court of Appeal (AA253:26-254:5, 752:22-753:3). Rather, based on the declaration testimony of Vice President Mullaney and Terminal Manager Severs, KELSO simply maintained that the promotion "occurred" in March 2017, because Gonzalez was offered and accepted the position at that time (AA261:15-23, Fact No. 5; AA762:23-28, Fact No. 5).[4] However, as this Court held in *Romano*, the adverse employment action "occurs" upon implementation, in this case May 1, 2017. [5]

B. THIS COURT SHOULD REVERSE THE COURT OF APPEAL'S AWARD OF COSTS BASED ON ITS *WILLIAMS* OPINION.

In *Williams v. Chino Valley Independent Fire District*, *supra*, this Court held that the general trial costs provisions in *Code of Civil Procedure* §1032(b) are supplanted by those costs provisions in *Government Code* §12965(b), which are specific to *FEHA*, and therefore costs should be awarded to a prevailing *FEHA* defendant only upon a finding

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[4] Ironically in the Superior Court and at the Court of Appeal, KELSO ignored the testimony of these same witnesses that the promotion" did not take effect" until May 1, 2017 (AA 268:25-26; 271:20-22).

[5] The Superior Court also held that the undisputed evidence established that KELSO was not involved in any of the promotions at issue. The Court of Appeal did not address this issue, even though it was briefed by the parties. Petitioner maintains that she established a triable issue of fact. Petitioner testified that KELSO historically has been involved in promotional decisions, based on representations made to her to that effect by Vice President Mullaney and Terminal Manager Velasquez (AA647:14-649:11). KELSO filed written objections to this testimony, which the Superior Court overruled(AA774-775-Objections 2, 3; AA 795). Petitioner offered similar testimony regarding the Gonzalez promotion, but the Superior Court sustained KELSO's objection(AA646:2-19; AA 773, 775 – Objections 1, 4; AA 795). The Superior Court's ruling is erroneous, as a matter of law. Petitioner's testimony is premised on the representations of Tri-Modal managers Mullaney and Velasquez (*Id.*). Therefore, that testimony is neither hearsay nor lacking in foundation.

that the underlying action was objectively frivolous. This Court never has addressed whether its rationale applies to costs on appeal under Rule 8.278 of the *California Rules of Court* and therefore, this is an issue of first impression.

Petitioner urges this Court to hold that costs on appeal are governed by *Government Code* §12965(b), not the general cost provision in Rule 8.278(a)(1) of the *California Rules of Court* and reverse the Court of Appeal's award of costs to Respondents for three reasons. First, the rationale employed by this Court in *Williams* is equally applicable to appellate costs. In *Williams*, this Court analyzed the propriety of an award of trial costs to a prevailing *FEHA* defendant under *Code of Civil Procedure* §1032(b). This Court specifically held that the general cost provisions of §1032(b) are supplanted by those in *Government Code* §12965(b), which are specific to *FEHA.*

> We conclude that Government Code section 12965(b) is an express exception to Code of Civil Procedure section 1032(b) and the former, rather than the latter, therefore governs cost awards in FEHA cases. The FEHA statute expressly directs the use of a different standard than the general costs statute: Costs that would be awarded as a matter of right to the prevailing party under Code of Civil Procedure section 1032(b) are instead awarded in the discretion of the trial court under Government Code section 12965(b). By making a cost award discretionary rather than mandatory, Government Code section 12965(b) expressly excepts FEHA actions from Code of Civil Procedure section 1032(b)'s mandate for a cost award to a prevailing party.

Williams, supra, 61 Cal.4th at 105 (underlining in original).

Statutory attorney fee and cost provisions are interpreted to apply to attorney fees and costs on appeal unless the statute provides otherwise." *Marcos v. Board of Retirement*, 51 Cal.3d 924, 929 (1990). *Government Code* §12965(b) contains no language specifically excluding appeals from the statutory authorization of costs. Thus, *Government Code* §12965(b), which is specific to *FEHA* and permits an award of costs only where the court finds the underlying action frivolous, should supplant the general cost provision in *CRC* 8.278(a)(1). *Marcos, supra*, 51 Cal.3d at 929; *Boyle v. City of Redondo Beach*, 70 Cal.App.4th 1109, 1121 (1999).

Second, holding that *Government Code* §12965(b) supplants Rule 8.278(a)(1) would be consistent with the public policy this Court announced in *Williams* that the purpose of *FEHA "*to encourage persons injured by discrimination to seek judicial relief" would be completely undermined if plaintiffs in non-frivolous actions could suffer the imposition of costs if they lose. *Williams, supra,* 61 Cal.4th at 112. *Government Code* §12965(b) provides protection that such a result does not occur. *Id.*

Third, the Court of Appeal made no finding (nor could it have) that Petitioner's underlying *FEHA* claims, or the appeal of the judgment, was objectively frivolous. For example, in addressing Petitioner's objections to the declaration of Timothy Mullaney, which if sustained, would have disposed of Respondent KELSO's statute of limitations defense, the Court of Appeal characterized Petitioner's position as a "close call" (Opinion at 13; *Ducksworth, supra,* 47 Cal.5th at 544).

VI. CONCLUSION

For the forgoing reasons, Petitioner respectfully requests that this Court reverse the Court of Appeal's opinion that (1) her *quid pro quo claim* is barred by the statute of limitations, and (2) Respondents are entitled to costs.

Respectfully submitted,

LIPELES LAW GROUP, APC

DATED: September 1, 2020

By: /s/ *Kevin A. Lipeles*
Kevin A. Lipeles [SBN 244275]

DATED: September 1, 2020

By: /s/ *Thomas H. Schelly*
Thomas H. Shelly [SBN 217285]

DATED: September 1, 2020

By: /s/ *Julian B. Bellenghi*
Julian B. Bellenghi [SBN 129942]
Attorneys for Petitioner
PAMELA POLLOCK

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.520(c) of the *California Rules of Court*, we hereby certify that this petition contains 6131 words. In making this certification, we have relied on the word count of the computer program used to prepare the petition.

DATED: September 1, 2020

By: /s/ *Kevin A. Lipeles*
Kevin A. Lipeles [SBN 244275]
Lipeles Law Group, APC

DATED: September 1, 2020

By: /s/ *Thomas H. Schelly*
Thomas H. Shelly [SBN 217285]
Lipeles Law Group

DATED September 1, 2020

By: */s/ Julian B. Bellenghi*
Julian B. Bellenghi [SBN 129942]
Lipeles Law Group, APC

Attorneys for Petitioner
Pamela Pollock

PROOF OF SERVICE

I, Vicky Daniels, certify and declare that I am over the age of 18 years and not a party to this action and that my place of employment is in the County of Los Angeles, State of California, located at 880 Apollo St., Suite 336, El Segundo, California 90245.

On this date hereon, I served a true copy of the following document(s):

PETITIONER'S OPENING BRIEF ON THE MERITS

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I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed on September 1, 2020 at El Segundo, California 90245.

/s/ Vicky Daniels
Vicky Daniels

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **DUCKSWORTH v. TRI-MODAL DISTRIBUTION SERVICES**
Case Number: **S262699**
Lower Court Case Number: **B294872**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

9/1/2020

Date

/s/Kevin Lipeles

Signature

Lipeles, Kevin (244275)

Last Name, First Name (PNum)

Lipeles Law Group, APC

Law Firm