Supreme Court Number S262699

In the Supreme Court of the State of California

BONNIE DUCKSWORTH, et al.,

Plaintiffs and Appellants,

v.

TRI-MODAL DISTRIBUTION SERVICES, et al.,

Defendants and Respondents.

After a Decision by the Court of Appeal
For the Second Appellate District
Second Civil Case Number B294872
Los Angeles County Superior Court Case No.
BC676917

ANSWER BRIEF ON THE MERITS

LEWIS BRISBOIS BISGAARD & SMITH LLP
*Lann G. McIntyre, SBN 106067
lann.mcintyre@lewisbrisbois.com
Tracy D. Forbath, SBN 292711
tracy.forbath@lewisbrisbois.com
701 B Street, Suite 1900
San Diego, California 92101
Telephone: 619.233.1006
Facsimile: 619.233.8627

LEWIS BRISBOIS BISGAARD & SMITH LLP
Jeffrey B. Ranen, SBN 224285
Jeffrey.Ranen@lewisbrisbois.com
Jack E. Jimenez, SBN 251648
jack.jimenez@lewisbrisbois.com
633 West 5th Street, Suite 4000
Los Angeles, California 90071
Telephone: 213.250.1800
Facsimile: 213.250.7900

Attorneys for Defendant and Respondent
MIKE KELSO

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutory Authorities

Rules and Regulations

Additional Authorities

ISSUES PRESENTED

The following issues are presented for review in this matter:

(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 ("FEHA"), 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 later took effect, if there is no evidence that the plaintiff was aware of the 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 claimant in the absence of a finding the underlying claims were objectively frivolous?

(Petition for Review ("PFR"), p. 1; see Cal. Rules of Court, rule 8.520(b)(2).)

INTRODUCTION

In her quid pro quo sexual harassment complaint, Pamela Pollock ("Pollock") alleged the unlawful employment act that caused her injury was the act of promoting another employee, rather than herself, to a position she was deserving of because she refused to engage in a sexual relationship with the vice-president of her employer, Mike Kelso ("Kelso"). Pollock did not dispute that the promotion she complained of was offered and

accepted more than one year before she filed her administrative complaint with the Department of Fair Employment and Housing ("DFEH"). Instead, Pollock contended her administrative complaint was timely because the promotion did not "take effect" until a date that placed her administrative complaint within the one year limitations period.

The Court of Appeal correctly decided that the limitations period for an unlawful failure to promote claim runs from when the employer informs another employee they have been given a promotion and the employee accepts, not when the promoted worker actually starts in the new position. The decision to promote or not promote is the injurious act. An unlawful employment act accrues and "occurs" on the date the decision to promote is made. At that point in time, all essential elements are present and the claim becomes actionable.

Further, the absence of evidence that the plaintiff was aware of the promotion on the date it was offered and accepted means affirmance of summary judgment as ordered by the trial court and affirmed by the Court of Appeal, is required. Once Kelso proved that Pollock's claimed harm—the offer and acceptance of a promotion to another employee because of Pollocks' refusal to have sex with Kelso—occurred more than one year before Pollock filed her DFEH administrative complaint, the burden shifted to Pollock to prove facts demonstrating when she first obtained knowledge of the facts of the alleged unlawful promotion. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th

826, 850.) Pollock did not assert delayed discovery of the promotion and did not produce any evidence of facts regarding when she knew, or reasonably should have suspected, the promotion had been offered and accepted. In the absence of such evidence, Pollock could not demonstrate a triable issue of fact regarding delayed discovery of the facts to defeat summary judgment.

Further, the award of costs on appeal to the respondents, who prevailed on appeal, was proper. The cost provision of Rules of Court, rule 8.278, is not supplanted by the cost provisions in Government Code section 12965, subdivision (b), applicable to FEHA actions. The cost award should be affirmed.

STATEMENT OF THE CASE

A. The Parties.[1]

Defendant Tri-Modal Distribution Services operates warehouses and ships freight by trucks. [1 Appellant's Appendix ("AA") 373.] Pollock has been employed as a Customer Service Representative at Tri-Modal since 1995. [*Ibid.*] Kelso has been Executive Vice President of Tri-Modal since 2009. [*Ibid.*]

---

[1] Other defendants were named in Ducksworth's and Pollock's complaint on various theories, none of whom are relevant to the issues on review. Ducksworth is not a party to the appeal. (Opening Brief on the Merits ("OBOM"), p. 5, fn. 2.) The factual and procedural background provided here is limited to Pollock's claim for quid pro quo sexual harassment against Kelso and any background relevant to that issue.

Kelso and Pollock began dating in 2014. [3 AA 625-626.] They saw each other until June 2016, when Pollock stopped communicating with him. [*Id.* at p. 626.]

B. The Lawsuit.

Pollock (and Ducksworth) sued all named defendants except Kelso for discrimination based on race. [1 AA 81-91.] Pollock, alone, sued all defendants for quid pro quo sexual harassment. [*Id.* at p. 88.] On July 19, 2017, Pollock and Ducksworth filed an administrative complaint with the DFEH alleging they had been denied promotions because of their race. [*Id.* at p. 86.]

Pollock alleged that throughout her employment and up to and including one year immediately preceding the filing of the First Amended Complaint, including as recently as May 2018, when supervisory positions became vacant, Kelso denied her promotions into those positions, despite Pollock being most the qualified. [1 AA 87.] Pollock alleged Kelso and Tri-Modal had engaged in quid pro quo sexual harassment in denying her the promotions in violation of Government Code section 12940. [*Id.* at pp. 88-89.] She alleged her refusal to engage in a sexual relationship with Kelso was a substantial motivating factor in the decisions to deny Pollock promotions. [*Id.* at p. 88.] The promotions she claimed to have been denied, she alleged, were described in paragraph 24 of the First Amended Complaint as promotions having occurred throughout Pollock's employment, up to and including "the year immediately preceding the filing of

this action." [*Id.* at pp. 87-88.] She further alleged that on April 18, 2018, she filed an administrative complaint against Kelso with the DFEH, alleging quid pro quo sexual harassment in violation of FEHA and was issued a right-to-sue notice the same day. [*Id.* at p. 89.]

C. Summary Judgment Motion.

Kelso moved for summary judgment. [1 AA 248-257.] Kelso demonstrated Pollock's quid pro quo harassment claim was time barred. Government Code section 12960, former subdivision (d), required Pollock to file an administrative complaint with the DFEH within one year after the alleged unlawful practice occurred. [*Id.* at p. 253.][2] Pollock filed her DFEH claim on April 18, 2018. [*Id.* at p. 89.] Only those acts occurring on or after April 18, 2017 could serve as the basis for her claim. [*Ibid.*]

Kelso produced evidence that none of the five promotions Pollock claimed to have been unlawfully denied either (1) in fact occurred, or (2) that they occurred before April 18, 2017 and were therefore time barred. [1 AA 266-274, 295.]

---

[2] On October 10, 2019, Governor Newsom signed into law AB 9, which extends the limitations period to file a DFEH complaint from one year to three years. Government Code section 12960, subdivision (d), was renumbered to subdivision (e). The act prohibits its provisions from being interpreted to revive lapsed claims and is not applicable to this lawsuit. (Stats. 2019, ch. 709, § 1 (AB 9); OBOM, p. 4, fn. 1).)

With respect to Leticia Gonzalez's promotion, Kelso's separate statement set forth as an undisputed fact that she "was not promoted or hired into/offered a supervisory position by Tri-Modal on or after April 18, 2017." [3 AA 627.] In response, Pollock contended "Ms. Gonzalez's promotion took effect on May 1, 2017, which is within the statutory time period." [*Ibid*.]

Pollock argued Ms. Gonzalez, who was less qualified than Pollock, was promoted within the one-year limitations period because although Ms. Gonzalez was offered and accepted a promotion in March 2017, the promotion did not *take effect* until May 1, 2017. [3 AA 621.] Pollock did not argue the limitations period was delayed because she was not aware of the promotion. [1 AA 346.] Pollock did not provide evidence regarding when she became aware of the Gonzalez promotion. [3 AA 627-632.] Pollock relied solely on the contention that as a matter of law, the limitations period began to run when the promotion took effect. [1 AA 346.]

The trial court granted summary judgment in favor of Kelso. [4 AA 791-797.] The court concluded there was no triable issue of fact as to Kelso's statute of limitations defense as to Ms. Gonzalez's promotion. Pollock did not dispute that Gonzalez was promoted in March 2017. "The fact that the promotion did not take effect until May 2017 does not change the fact that the decision to promote Gonzalez occurred earlier." [*Id.* at p. 796.] The trial court concluded the alleged harm—the failure to

promote—occurred in March 2017 "when the defendants offered and Gonzalez accepted her promotion." [*Ibid.*]

D. Appellate Court Opinion.

In a published opinion, the Court of Appeal affirmed the summary judgment in favor of Kelso. The Court evaluated the trial court's use of the March 2017 date, which was when Gonzalez was offered and accepted the promotion, as the date the one-year statute of limitations period began to run. Ultimately, the Court concluded the date of offer and acceptance of the promotion was the correct date to use. (*Ducksworth v. Tri-Modal Distrib. Servs.* (2020) 47 Cal.App.5th 532, 546 ("*Ducksworth*").) The Court of Appeal reasoned that, "an employer injures the employee by denying a deserved promotion as an instrument of sexual harassment. That moment 'occurred' when Tri-Modal allegedly did not promote the deserving Pollock because of sexual harassment. That was in March 2017." (*Ibid.*) Accordingly, the Court concluded, "Pollock's injury 'occurred' in March 2017, according to the plain meaning of the word 'occurred.'" (*Ibid.*)

The Court of Appeal also addressed Pollock's reliance on *Romano v. Rockwell International, Inc.* (1996) 14 Cal.4th 479 ("*Romano*"). The Court of Appeal agreed with the holding of the opinion that a "discharge occurs when you are off the payroll," but the Court explained the *Romano* holding "has nothing to do with this case, which does not involve a discharge." (*Ducksworth, supra,* 47 Cal.App.5th at p. 547.)

Because Pollock's claims accrued in March 2017, and she did not file her DFEH complaint within one year of March 2017, the Court of Appeal agreed with the trial court that Government Code section 12960, former subdivision (d), barred her claims. (*Ducksworth, supra,* at p. 547.)

E. The Court of Appeal Awards Costs to Respondents.

The Court of Appeal affirmed the judgment and awarded costs to Scotts, Pacific, and Kelso. (*Ducksworth, supra,* at p. 547.)

LEGAL ARGUMENT

I. The FEHA Statute of Limitations For Filing an Administrative Complaint Runs from the Date the Allegedly Unlawful Promotion Was Given, Not When It Was Effective.

A. The unlawful promotion was the injurious act that occurred more than one year before the untimely administrative complaint was filed.

Before bringing a lawsuit for FEHA violations, an aggrieved employee must exhaust administrative remedies by timely filing an administrative complaint with the DFEH and receiving a right-to-sue notice. (Gov. Code, §§ 12960, subd. (b), 12962, subd. (c).) Exhaustion of administrative remedies is "a jurisdictional prerequisite to the courts. [Citation omitted.] The administrative complaint must be filed with the DFEH within one year of the date on which the alleged unlawful practice occurred. (Gov. Code, § 12960, subd. (d).)" (*Wassmann v. South Orange County Community College Dist.* (2018) 24 Cal.App.5th

825, 850; *Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1402 ["ordinarily, a plaintiff cannot recover for acts occurring more than one year before the filing of the DFEH complaint"].)

Pollock sued Kelso and Tri-Modal for "quid pro quo" sexual harassment. [1 AA 81.] The "unlawful practice" she identified was defendants' denial of promotions to her when supervisory positions became vacant. [*Id.* at p. 87.] According to Pollock, on each occasion, defendants promoted lesser qualified employees into those vacant positions. [*Ibid.*] She alleged her refusal to engage in a sexual relationship with Kelso was a substantial motivating factor in defendants' decisions to deny Pollock the promotions. [*Id.* at p. 88.] Pollack further alleged defendants' conduct in refusing to promote her because she would not engage is a sexual relationship with Kelso was conduct warranting an award of punitive damages. [*Id.* at p. 37.]

Black's Law Dictionary defines quid pro quo as: "An action or thing that is exchanged for another action or thing of more or less equal value; a substitute." (Black's Law Dict. (9th ed. 2009) p. 1367, col. 2.) As Pollock's allegations make clear, the "action or thing" that was unlawfully exchanged was the failure to promote her when she declined Kelso's offer to engage in a sexual relationship. The injurious practice she complained of was the action of not being offered the promotion. A fortiori, the failure to offer Pollock the promotion occurred on the day someone else was offered it instead, which occurred in March 2017.

The failure to promote is considered a "discrete act" that happens on a particular day. "A discrete act consists of an unlawful practice that 'occurred' on the day it 'happened,' which includes, for example, 'termination, failure to promote, denial of transfer, or refusal to hire.'." (*Yonemoto v. Shinseki* (D. Haw. 2014) 3 F.Supp.3d 827, 842; see also *Nat'l R.R. Passenger Corp. v. Morgan* (2002) 536 U.S. 101, 111, 114 [153 L.Ed.2d 106].) The failure to promote that Pollock contended was the unlawful practice "happened" on the day she was denied the promotion for unlawful reasons. Pollock did not dispute that the date of that discrete act—the promotion (and conversely, failure to promote)—occurred in March 2017.

A discrimination claim based on failure to promote accrues when the employer makes the decision not to promote the plaintiff. (*Johnson v. United Cont'l Holdings, Inc.* (N.D. Cal. June 27, 2014, No. C-12-2730 MMC) 2014 U.S. Dist. LEXIS 88225, at *18, citing *Lyons v. England* (9th Cir. 2002) 307 F.3d 1092, 1106-1107.) It is at that moment that all essential elements are present and a claim becomes legally actionable. (*Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1029.) In looking at when an act occurs for statute of limitations purposes, we look at when the "operative decision" occurred, not when the decision was carried out. (*Eng v. County of L.A.* (C.D. Cal. June 14, 2006, No. CV 05-02686 MMM (SSx)) 2006 U.S. Dist. LEXIS 111024, at *29, fn. 99.)

The moment in time when a promotion is offered and accepted is when there is a denial of that same promotion to another employee. Such an interpretation is consistent with the plain meaning of the term "occurred" used in Government Code section 12960, subdivision (b). The one year limitation period would not run from the "effective" date of the promotion because the unlawful practice of failing to promote the aggrieved employee already occurred.

Pollock relies heavily on the *Romano* decision as a case that "announced" California's public policy that the limitations period under the FEHA begins to run when the employment action "takes effect, not when it is announced." (OBOM, p. 15.) Pollock misreads *Romano* and misapplies it to this case.

In *Romano,* this Court concluded the statute of limitations for alleged unlawful discharge from employment runs from the actual termination, not the earlier date of notification of future termination. (*Romano, supra,* 14 Cal.4th at p. 493.) Romano was notified by his employer that his employment would be terminated in two and a half years. (*Id.* at p. 484.) During the two and a half year interval between notification and termination, the employee hoped to be able to have the termination decision reversed, (*Id.* at p. 485.)

After Romano was terminated and filed suit, his employer sought summary judgment on the ground that Romano's claims were time barred. (*Romano, supra,* at p. 485.) The trial court granted summary judgment, declaring the applicable limitations

period began to run "at the time that the employer said, 'we're going to fire you.'" (*Id.* at p. 486.) The Court of Appeal reversed, concluding the limitations period begins to run upon actual termination, not when the employee is notified unequivocally that discharge is inevitable. (*Ibid.*)

The court reasoned that the one year limitation period in Government Code section 12960 for filing a complaint with the DFEH expires one year after the unlawful practice "occurred." (*Romano,* supra, at p. 492.) The unlawful practice was the "discharge" of Romano on forbidden grounds. (*Id.* at p. 493.) The court noted the usual and ordinary import of the term "discharge" is to terminate employment. (*Ibid.*) The Court held, "the statute of limitations must run from the time of actual termination." (*Ibid.*) Since the one-year time period runs from when the unlawful practice occurred, it "would not run from the earlier date of notification of discharge, because on that date the unlawful practice (that is, the discharge) had not yet 'occurred.'" (*Ibid.*)

Here, the unlawful practice was the denial of a promotion. The date on which Gonzalez started working in the position is of no import. When, or even if, Gonzalez's new position "took effect" would not alter the fact that Pollock was denied the promotion in the first instance. Indeed, that is the unlawful practice Pollock alleges harmed her. Unlike in *Romano,* where the unlawful act did not occur until plaintiff was actually terminated, whether or when Gonzalez started in the position or when the promotion was

"effective" are irrelevant to the date on which the unlawful practice actually occurred. Pollock's alleged injury or damage occurred when she was not given the promotion in March 2017.

The trial court and Court of Appeal's interpretation of the accrual date triggering the limitations period as the date the promotion was offered and accepted is consistent with the *Romano* decision and does not implicate any of the policy concerns discussed in *Romano*.

In *Romano,* the court started with an interpretation of the plain meaning of the statutory language by considering the meaning of the term "discharge." (*Romano, supra*, 14 Cal.4 at pp. 492-493.) In this case, Pollock alleges a violation of Government Code section 12940, subdivision (j)(1) and (3), which makes it an "unlawful employment practice" for an employer, because of sex, to harass an employee.[3]

Interpreting the plain language of the statute in light of Pollock's allegations, the harassment "occurred" when Pollock was denied the promotion because she refused to engage in a sexual relationship with Kelso. As in *Romano,* so too, here, the plain meaning of the statute establishes that the unlawful employment practice (harassment) occurred when the promotion was offered to and accepted by another employee. The later date

---

[3] Pollock's allegations elaborated that Government Code section 12940 makes it unlawful for an "employer and/or an individual to make the terms and conditions of an employee's employment contingent on her engaging in a sexual relationship." [1 AA 89.]

when the other employee actually starts the job "occurs" *after* the unlawful practice had already occurred, and could not be the triggering date. (*Romano, supra,* 14 Cal.4th at p. 493.) The Court of Appeal engaged in the same statutory interpretation as did the court in *Romano* and correctly concluded "logically and textually," the plain meaning of Government Code section 12960 required that the limitations period began to run in March 2017 when Pollock's injury "occurred."

In *Romano*, the court addressed the concern that the statutory interpretation might be likely to bar meritorious claims because most employees would not take legal action until after a dismissal has occurred. (*Romano, supra,* 14 Cal.4th at pp. 493-494.) There is no such concern here because the nature of the harassment—denial of a promotion—sufficiently allows employees to be aware of and to begin to pursue their legal remedies. Most employees would not wait for the promotion they were denied to "take effect" to understand they had been harmed and had a potentially actionable claim.

On the other hand, a rule allowing an aggrieved employee to wait until the promotion took effect could impose an undue burden on employers by forcing them to defend stale claims and by creating uncertainty regarding the triggering date for application of the statute of limitations. As was the case in *Romano,* there could be a long period of time between when a promotion is offered and accepted and when the promotion actually takes effect. In Gonzalez's case, the effective date of her

promotion was delayed while her employer found a qualified employee to take her former position. Labor market conditions and other factors often dictate the interval between offering a promotion and its effective date . [1 AA 271.] The period of time between when the promotion is announced or offered and when an employee can actually start in the position is not always within the employer's control. Use of the "effective date" of a promotion could lead to the prosecution of stale claims, thus defeating one of the beneficial purposes of the statute of limitations on FEHA claims. (*Ellis v. U.S. Security Associates* (2014) 224 Cal.App.4th 1213, 1221-1222 [one purpose of statute of limitations is to protect parties from "'defending stale claims where factual obscurity through the loss of time, memory or supporting documentation may present unfair handicaps.'"] Statute of limitations "promote justice through preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." (*Duty v. Abex Corp.* (1989) 214 Cal.App.3d 742, 748-749.) Thus, "even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitations." (*Id.* at p. 749.) As this Court has indicated, the right to be free of stale claims in time comes to prevail over the right to prosecute them. (*Adams v. Paul* (1995) 11 Cal.4th 583, 592; see also *Telegraphers v. Ry. Express Agency* (1944) 321 U.S. 342, 348-349 [88 L.Ed. 788, 792].) A rule that promotes diligent pursuit of employment claims by applying the one-year statute of limitations to the date a promotion is offered promotes

justice and strikes an appropriate balance between the employer's need for repose and the employee's right to pursue a claim.

In addition, application of the statute of limitations to the date the promotion was denied would not promote premature claims because at the point the promotion is denied, the harm has occurred. (*Romano, supra,* 14 Cal.4th at p. 494.) Unlike in *Romano,* where use of the mere notification of a future termination as the triggering date would require the filing of a complaint when harm has not yet occurred, failure to promote claims accrue when the promotion is given to another employee. At that point in time the harm is done and a claim is not premature.

Further the effective date of a promotion can be subjective and difficult for aggrieved employees to determine. The more clear cut act of offer and acceptance of promotion promotes certainty for employers and employees alike.

Both principles of statutory interpretation and the policies behind the statute of limitations require use of the date of offer and acceptance of the promotion as the date from which the limitations period should run.

B. Plaintiff had the burden to and failed to produce evidence of delayed discovery to avoid summary judgment.

An additional element of the issue presented for review is which triggering date applies "*if there is no evidence that Plaintiff*

was aware of that promotion on the earlier date?" (PFR, p. 5, italics added.) In petitioning for review, Pollock contended the "Court of Appeal suggested that the earlier date should govern, because POLLOCK was *made aware of* the promotion at that time." (PFR, p. 13, italics added.)[4] According to Pollock, the record is "devoid of such evidence," and "notions of fundamental fairness mandate that the later date must govern." (*Ibid.*)

Pollock neither defended the summary judgment motion on the basis of lack of her awareness in the trial court or urged reversal on that basis in the Court of Appeal. Pollock did not assert a delayed discovery exception applied at all. Nor does Pollock accurately portray the Court of Appeal's decision as "suggesting" Pollock knew of the earlier date of promotion.

The Court of Appeal held that "[t]he statute of limitations for a failure to promote runs from when the employer tells employees they have been given (or denied) a promotion. That date is key, and not the date when the promoted worker actually starts the new work." (*Ducksworth, supra,* 47 Cal.App.5th at p. 546.) As the court correctly reasoned, "an employer injures the employee by denying a deserved promotion as an instrument of sexual harassment. That moment 'occurred' when Tri-Modal allegedly did not promote the deserving Pollock because of sexual harassment." (*Id.* at p. 546.)

---

[4] Pollock fails to identify with any greater specificity the "suggestion" made by the Court of Appeal other than to refer to pages 14-15 of the typed opinion. (PFR, p. 13.)

The Court then used a hypothetical example to "doublecheck" its analysis:

> In this hypothetical, Kelso would tell Pollock, "Today I am giving this promotion to someone else, even though you deserve it, because you rejected my sexual advances." Such a candid admission would describe grossly illegal discrimination that 'occurred' in March 2017, when Kelso denied Pollock a benefit she deserved because Kelso wanted sex from her and she would not give it. So that date triggered the one-year clock.

(*Ducksworth, supra,* at p. 547.)

Perhaps it is this hypothetical to which Pollock refers when claiming the Court of Appeal "suggested" that the earlier date should govern because that was when Pollock was told about it. The Court of Appeal's discussion, however, is nothing more than a hypothetical that is neither the rationale or the holding of the court. Furthermore, it does not "suggest" that Pollock was made aware of the earlier promotion, or that such awareness was an element of the Court's analysis. The hypothetical illustrated the Court of Appeal's analysis of the triggering date or "occurrence" of the unlawful practice as the date when Kelso denied Pollock a promotion for unlawful reasons.

In the case of the one-year limitation period to file an administrative complaint for a FEHA violation, the Legislature has provided a remedy for delayed discovery of unlawful discriminatory employment acts. Government Code section 12960, subdivision (e)(1), provides an additional 90 days to file an

administrative complaint "if a person allegedly aggrieved by an unlawful practice first obtained knowledge of the facts of the alleged unlawful practice during the 90 days following the expiration of the applicable filing deadline."

Pollock made no mention of this exception in the trial court, in the Court of Appeal, or in her opening brief on the merits in this court. Instead, Pollock now contends the statute of limitations is an affirmative defense and an element of that affirmative defense is evidence plaintiff knew or should have known of the unlawful act on the date defendant claims the statute of limitations commenced. (OBOM, p. 20.) According to Pollock, there is no such evidence in the record. (*Id.* at p. 21.)

Even if it is true that the statute of limitations is an affirmative defense and defendants must prove that the plaintiff's claim is untimely, a plaintiff seeking to establish a triable issue of material fact regarding the affirmative defense has the burden of producing evidence to create a dispute. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850 [once party moving for summary judgment makes prima facie case showing nonexistence of any triable issue of material fact, burden shifts to opposing party to show a triable issue of material fact]; CACI Nos. 454-455.)

Once Kelso proved that Pollock's claimed harm accrued before the one-year limitation period, the burden shifted to Pollock to prove that she did not have knowledge, did not discover, and did not know of facts that would cause a reasonable

person to suspect she has suffered harm that was caused by someone's wrongful conduct. (*Glue-Fold, Inc. v. Slautterback Corp., supra,* 82 Cal.App.4th at p. 1029.)

The burden shifting to plaintiff is explained to the jury in negligence actions by the Judicial Council of California Civil Jury Instructions ("CACI") instruction on delayed discovery:

> If defendant proves that plaintiff's claimed harm occurred before [date], plaintiff's lawsuit was still filed on time if *plaintiff proves* that before that date, plaintiff did not discover, and did not know of facts that would have caused a reasonable person to suspect, that she had suffered harm that was caused by someone's wrongful conduct.

(CACI No. 455.)

Pollock, however, made no attempt to rely on the delayed discovery rule either in the trial court or on appeal. Kelso's summary judgment motion established that Pollock's claim was untimely because the allegedly unlawful promotion was offered to and accepted by Gonzalez in March 2017 and it was undisputed Pollock did not file her DFEH complaint until April 18, 2018—more than one year later. [1 AA 271.]

In response, Pollock did not dispute that the promotion was offered to and accepted by Gonzalez in March 2017. Pollock's separate statement made evidentiary objections not relevant here and asserted "[a]lso, Ms. Gonzalez's promotion took effect on May 1, 2017, which is within the statutory time period." [3 AA 627.] Pollock further asserted as an additional undisputed material fact, that "Leticia Gonzalez's promotion did not take effect until

May 1, 2017." [*Id.* at p. 631.] No additional facts or evidence were presented by Pollock regarding her knowledge of Gonzalez's promotion or what she discovered or could not discover regarding the offer to and acceptance by Gonzalez of the promotion. [*Id.* at pp. 623-632.]

Pollock highlights her failure to meet her burden of proving she was entitled to application of the delayed discovery rule when she says unequivocally in her opening brief, "[t]he 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." (OBOM, p. 21.) The absence of evidence of Pollock's awareness of the promotion confirms no disputed question of material facts exists that Pollock's claim was time-barred and summary judgment was properly granted.

Pollock cites *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, for the proposition that an element of the affirmative defense that a claim under the FEHA is barred by the limitations period is that plaintiff "knew or should have known of defendant's unlawful act on the date defendant claims the statute of limitations commenced." (OBOM, pp. 20-21.) The *Cucuzza* case, however, does not stand for that proposition or address that issue at all. In *Cucuzza,* the court addressed the continuing violation doctrine, the same issue addressed in the then-recently decided case of *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798—whether the employer's conduct occurring outside the

limitations period is sufficiently linked to unlawful conduct within the limitations period that the employer should held liable for all of it. (*Cucuzza, supra,* 104 Cal.App.4th at p. 1042; *Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 375, fn. 31 [*Cucuzza* emphasizes exactly what *Richards* decided and adds nothing more].) The *Cucuzza* opinion is devoid of any discussion of when the limitations period for filing a complaint with the DFEH should commence where there is no evidence of plaintiff's awareness of the date of an unlawful promotion being offered and accepted. Significantly, Pollock did not assert the continuing violation doctrine to avoid application of the statute of limitations in the trial court or on appeal.

Pollock's reliance on *Brown v. Bleiberg* (1982) 32 Cal.3d 426, 439, for the notion that an element of a statute of limitations affirmative defense is that plaintiff knew or should have known of defendant's unlawful act on the date the limitations period is claimed to commence is mistaken. (OBOM, p. 20.) *Brown* addressed the tolling of the limitations period on a medical malpractice claim where a podiatrist allegedly misrepresented the nature of the operation he performed and prevented plaintiff from discovering the negligent cause of her injuries. (*Brown, supra,* at pp. 437-438.)

The issue presented here involves no concealment. Rather, Pollock asks the court to resolve the issue whether the date a promotion is offered and accepted, or the date the promotion takes effect is the operative date for commencement of the

limitation period, *if there is no evidence that plaintiff was aware of that promotion on the earlier of the two dates.* This case does not involve a claim that defendants concealed anything from Pollock. Nor does *Brown* address the burden of proving entitlement to a delayed discovery exception to the one-year limitations period, which rested squarely with Pollock.

Plaintiffs failed to meet their burden of establishing a triable issue of material fact regarding the limitations period and cannot rely on the delayed discovery rule for the first time now.

C. The delayed discovery exception should not be considered because Pollock forfeited the issue by failing to raise it below.

Pollock's only defense to Kelso's summary judgment motion in the trial court and on appeal was that as a matter of law, the date the promotion took effect, not the date it was offered and accepted, was the date the one-year statute of limitations began to run. Pollack never contended defendants failed to demonstrate an element of their statute of limitations defense. Pollack never raised the argument that Kelso failed to show Pollock knew or should have known of the promotion on the date it was offered and accepted.

Regardless of who had the burden of proof, Pollock forfeited the argument because she never raised it in the summary judgment proceedings or in the Court of Appeal. (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 28-29 [alternate basis of liability not raised by appellant in

opposing summary judgment motion below will not be considered on appeal]; accord *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 412 [failure to raise issue or argument in the trial court results in forfeiture on appeal]; see also *Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 988-989 [party may not change theory of a cause of action on appeal and raise issue not presented in opposition to summary judgment].) This court should not consider this issue as it was not raised below.

II. An Award of Costs On Appeal Pursuant to Rule 8.278 in a FEHA Action Does Not Require a Finding the Action Was Objectively Frivolous.

Pollock contends the costs recoverable on appeal should not be awardable in a case involving a FEHA claim absent a finding the underlying action was objectively frivolous. (OBOM, pp. 22-23.) According to Pollock, Government Code section 12965, subdivision (b), "supplants" the cost provisions of Rules of Court, rule 8.278, which applies to costs on appeal. Pollock is mistaken.

Government Code section 12965, subdivision (b), provides that a prevailing defendant in a FEHA action may recover reasonable attorney's fees and costs if the court finds the action was frivolous, unreasonable, or groundless:

> In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees, except that, notwithstanding Section 998 of the Code of Civil Procedure, a prevailing defendant shall not be awarded attorney's fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when

> brought, or the plaintiff continued to litigate after it clearly became so.

In *Williams v.* Chino *Valley Independent Fire District* (2015) 61 Cal.4th 97, 99 ("*Williams*"), this Court addressed the interplay between Code of Civil Procedure section 1032, subdivision (b), which provides prevailing defendants are entitled as a matter of right to recover their costs, "*except as otherwise expressly provided by statute,"* and Government Code section 12965, subdivision (b), which makes a cost award discretionary in FEHA actions.

The court held Government Code section 12965, subdivision (b), is an "express exception" to Code of Civil Procedure section 1032, subdivision (b):

> We conclude Government Code section 12965, subdivision (b), governs cost awards in FEHA actions, allowing trial courts discretion in awards of both attorney fees and costs to prevailing FEHA parties. We further conclude that in awarding attorney fees and costs, the trial court's discretion is bounded by the rule of *Christiansburg*: an unsuccessful FEHA plaintiff should not be ordered to pay the defendant's fees or costs unless the plaintiff brought or continued litigating the action without an objective basis for believing it had potential merit.

(*Williams,* supra*,* at pp. 99-100.)

Unlike Code of Civil Procedure section 1032, subdivision (b), the recovery of appellate costs does not allow for exceptions provided by statute. The Legislature charged the Judicial Council with the responsibility of establishing separate rules regarding

recovery of appellate costs. (Code Civ. Proc., § 1034, subd. (b) ["The Judicial Council shall establish by rule allowable costs on appeal and the procedure for claiming those costs"].) Pursuant to that charge, the Judicial Council established Rules of Court, rule 8.278(a) to govern the rules for recovery of costs on appeal:

> *Except as provided in this rule*, the party prevailing in the Court of Appeal in a civil case other than a juvenile case is entitled to costs on appeal.

(Rules of Court, rule 8.278, subd. (a)(1), italics added.)[5]

In the appellate court, a prevailing party is defined as "the respondent if the Court of Appeal affirms the judgment without modification or dismisses the appeal." (Rules of Court, rule 8.278(a)(2).) The Court of Appeal also has the power to award or deny costs in the interests of justice, as it deems proper. (Rules of Court, rule 8.278(a)(5).) With regard to recovery of attorney's fees, rule 8.278(d)(2) specifies that "[u]nless the court orders otherwise, an award of costs neither includes attorney's fees on appeal nor precludes a party from seeking them under rule 3.1702."

---

[5] The costs recoverable on appeal are limited to costs such as filing fees, the amount paid for the record, the cost to produce additional evidence on appeal, the costs to notarize, serve, mail and file the record, briefs and any other papers, the cost to print and reproduce briefs, and costs associated with bonds on appeal. (Rules of Court, rule 8.278(d)(1).)

In the case of an award of costs on appeal, there is no basis for concluding Government Code section 12965, subdivision (b), is an exception to the Rules of Court regarding recovery of appellate costs. The court's conclusion in *Williams* that the FEHA statute governing recovery of costs in the trial court proceedings governs cost awards in FEHA cases was premised on the statutory language in Code of Civil Procedure section 1032, subdivision (b), which allowed for exceptions set forth by statute: "*Except as otherwise expressly provided by statute,* a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (Code Civ. Proc., § 1032, subd. (b), italics added.) The court in *Williams* concluded Government Code section 12965 is a statute expressly providing otherwise. (*Williams, supra,* 61 Cal.4th at p. 105.)

In contrast, no such allowance for exceptions is contained in rule 8.278(a)(1) governing appellate costs. The only exceptions allowed by rule 8.278(a)(1) are those set forth i*n that rule:* "*Except as provided in this rule*, the party prevailing in the Court of Appeal in a civil case other than a juvenile case is entitled to costs on appeal." (Italics added.)

The appellate cost rule is unique in its clear statement that the only exception to the rule are those found in the rule itself. For instance, Federal Rule of Appellate Procedure, rule 39, addresses the taxing of costs on appeal, and states, "the following rules apply *unless the law provides* or the court orders otherwise."

(Fed. Rules App. Proc., rule 39(a).) Rule 8.278 contains no such express exception.

As Pollock points out, Government Code section 12965, subdivision (b), is silent regarding its application to costs on appeal. (OBOM, p. 24.) Indeed, section 12965 only addresses recovery of costs in the trial court. Rule 8.287 allows no exception to its cost allocation requirements other than those stated in the rule itself. There is no indication the Legislature or the Judicial Council intended the appellate cost rules to be subject to a different standard for awarding costs than the rule itself sets forth.

A contrary rule would incentivize FEHA plaintiffs who do not prevail in the trial court to appeal nonetheless, even in appeals that arguably lack merit, knowing that they will likely not be responsible for paying the ordinary costs of an appeal. There is no reason for this added layer of protection to FEHA plaintiffs where the ordinary costs of an appeal are predictable, and small. While in *Williams* the court was not persuaded by the argument that costs, as opposed to attorney fees, in trial court proceedings are generally much smaller than attorney fees, the court's reasoning in *Williams* was that costs in the trial court can sometimes be considerable. (*Williams, supra,* at p. 113.) Recoverable trial costs are much more expansive than the limited recoverable appellate costs. A trial cost award can include such big ticket items as jury fees, deposition costs, travel expenses, expert witness fees, service fees, ordinary witness fees, exhibits

and their electronic presentation at trial. (Code Civ. Proc., § 1033.5, subd. (a).) Appellate costs, in contrast, are limited and ordinarily not substantial. Thus, a cost award on appeal would not have the same potentially discouraging effect on FEHA plaintiffs as an award of trial costs could have.

Finally, the allocation of costs on appeal remains subject to the appellate court's discretion to allocate costs differently than the general allocation rules contained in rule 8.278, which may be exercised in the interests of justice, as it deems proper. (Rules of Court, rule 8.278(a)(5).) That retained discretion provides adequate protection to FEHA plaintiffs should the ordinary cost allocation on appeal require adjustment. The clear expression of cost allocation regarding appellate costs must be honored and the appellate courts trusted to adjust cost awards on appeal where justice requires, as the Legislature and Judicial Council intended. No finding of objective frivolousness should be imposed on the existing appellate costs rules.

III. Conclusion

The trial court and Court of Appeal correctly determined the date the promotion was offered and accepted is the date the statute of limitations to file an administrative complaint with the DFEH begins to run, not the later date the promotion takes effect. Furthermore, the award of costs on appeal are not altered by Government Code section 12965 and do not require a finding the FEHA claims were objectively frivolous. For the foregoing reasons, the judgment of the Court of Appeal should be affirmed.

DATED: November 2, 2020 LEWIS BRISBOIS BISGAARD & SMITH LLP

By: */s/ Lann G. McIntyre*
Lann G. McIntyre
Jeffrey B. Ranen
Jack E. Jimenez
Tracy D. Forbath
Attorneys for Defendant and Respondent MIKE KELSO

CERTIFICATE OF COMPLIANCE WITH RULE 8.204

I, the undersigned, Lann G. McIntyre, declare that:

1. I am a partner in the firm of Lewis, Brisbois, Bisgaard & Smith LLP, counsel of record for defendant and respondent Mike Kelso.

2. This certificate of compliance is submitted in accordance with rule 8.204 of the California Rules of Court.

3. This brief was produced with a computer. It is proportionately spaced in 13-point Century Schoolbook typeface. The brief contains 7,069 words, including footnotes.

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

Executed at San Diego, California, on November 2, 2020.

/s/ Lann G. McIntyre
Lann G. McIntyre

PROOF OF SERVICE

Ducksworth et al. v. Tri-Modal Distribution Services, et al..
Supreme Court Number S262699

I, Janis Kent state:

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 550 West C Street, Suite 1700, San Diego, California 92101.

On November 2, 2020, I served the following document described as **ANSWER BRIEF ON THE MERITS** on all interested parties in this action through TrueFiling, addressed to all parties appearing on the electronic service list for the above-titled case. The service transmission was reported as complete and a copy of the TrueFiling Receipt/Confirmation will be filed, deposited or maintained with the original document in this office.

On November 2, 2020, I served the following document described as **ANSWER BRIEF ON THE MERITS** by placing a true copy enclosed in a sealed envelope addressed as stated on the attached service list. I am readily familiar with the firm's practice for collection and processing correspondence for regular and overnight mailing. Under that practice, this document will be deposited with the Overnight Mail provider and/or U.S. Postal Service on this date with postage thereon fully prepaid at

San Diego, California to addresses listed on the attached service list in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 2, 2020, at San Diego, California.

/s/ *Janis Kent*
Janis Kent

SERVICE LIST

Ducksworth, et al. v. Tri-Modal Distribution Services, et al..
Supreme Court Number S262699

Kevin A. Lipeles
Thomas H. Schelly
LIPELES LAW GROUP
880 Apollo Street, Suite 336
El Segundo, CA 90245
Attorneys for Plaintiffs and appellants, Bonnie Ducksworth and Pamela Pollock
(*Via TrueFiling)*

Marital Savin
Littler Mendelson, P.C.
2050 Main Street, Suite 900
Irvine, CA 92614
Attorneys for Defendants and Respondents, Tri-Modal Distributions Services, Ability Tri-Modal Transportation Services, Inc., and Decoy Freight Systems
(*Via TrueFiling*)

Daniel K. Gaston
Larson & Gaston, LLP
200 S. Los Robles Ave., Suite 530
Pasadena, CA 91101
Attorneys for Defendants and Respondents, Scotts Labor Leasing Company, Inc., and Pacific Leasing Inc.
(*Via TrueFiling*)

Los Angeles County Superior Court
The Honorable Lia Martin, Dept 016
111 North Hill Street
Los Angeles, CA 90012
(*Via Overnight Mail*)

California Court of Appeal
Second District Court of Appeal, Division Eight
Ronald Reagan State Building
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013
(*Via Overnight Mail*)

4833-9883-7456

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**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **lann.mcintyre@lewisbrisbois.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	Ducksworth - Answer Brief on the Merits - Final 11.2.2020

Service Recipients:

Person Served	Email Address	Type	Date / Time
Gloria Medel Larson & Gaston 199462	gloria.medel@larsongaston.com	e-Serve	11/2/2020 8:05:58 PM
Lann Mcintyre Lewis Brisbois Bisgaard & Smith LLP 106067	lann.mcintyre@lewisbrisbois.com	e-Serve	11/2/2020 8:05:58 PM
Kevin Lipeles The Law Office of Kevin A Lipeles 244275	kevin@kallaw.com	e-Serve	11/2/2020 8:05:58 PM
Tracy Forbath Lewis, Brisbois, Bisgaard & Smith LLP 292711	tracy.forbath@lewisbrisbois.com	e-Serve	11/2/2020 8:05:58 PM
Jack Jimenez Lewis Brisbois Bisgaard & Smith 251648	jack.jimenez@lewisbrisbois.com	e-Serve	11/2/2020 8:05:58 PM
Elena Monroy Lipeles Law Group, APC	elena@kallaw.com	e-Serve	11/2/2020 8:05:58 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

11/2/2020
Date

/s/Janis Kent
Signature

McIntyre, Lann (106067)

Last Name, First Name (PNum)

Lewis Brisbois Bisgaard & Smith, LLP

Law Firm