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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BONNIE DUCKSWORTH et al. Plaintiffs and Petitioners TRI-MODAL DISTRIBUTION SERVICES, INC. et al. Defendants and Respondents	Case No.:

After a Final 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

PETITION FOR REVIEW

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I.

PETITION FOR REVIEW

Pursuant to Rule 8.500(b)(1) of the *California Rules of Court,* Plaintiff and Appellant PAMELA POLLOCK ("Petitioner") petitions this Court to grant review of the final Opinion ("Opinion") of the Court of Appeal for the Second Appellate District, Division 8, filed and published on April 7, 2020, which affirmed final judgments in favor of Respondents, SCOTT'S LABOR LEASING, INC., PACIFIC LEASING, INC., and MICHAEL KELSO ("Respondents"). A copy of the Opinion is attached hereto as Exhibit A.[1]

II.

ISSUES PRESENTED FOR REVIEW

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 ("DFEH") begin to run when the successful candidate was offered and accepted the position, or when that promotion took effect, some six week later, where there is no evidence that Plaintiff was aware of that promotion on the earlier date? (*Romano v. Rockwell International, Inc.,* 14 Cal.4th 479, 491 (1996)).

2. Is it proper for the Court of Appeal to award costs on appeal pursuant to Rule 8.278 of the *California Rules of Court* against an unsuccessful *FEHA* Appellant,

[1] 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 Petition.

notwithstanding the absence of a finding that Appellant's underlying *FEHA* claims were objectively frivolous? (*Williams v. Chino Valley Independent Fire District,* 61 Cal.4th 979 (2015)).

III.

PROCEDURAL POSTURE

The Superior Court entered judgment in favor of Respondents (1) KELSO on November 20, 2018, and (2) SCOTT'S and PACIFIC on December 6, 2018, after having granted their motions for summary judgment. The Court of Appeal, Second Appellate District, Division 8, affirmed in a published Opinion filed on April 7, 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 denied the petition for rehearing by written order filed on April 22, 2020. Copies of the petition for rehearing and the order denying said petition are attached hereto as Exhibits B and C, respectively. The Opinion became final on June 8, 2020.

IV.

INTRODUCTION AND SUMMARY OF ARGUMENTS

The issues presented by this Petition are matters of first impression and of paramount importance to California public policy, as announced by this Court, that *FEHA* statutes of limitations be liberally construed and claims arising under *FEHA* be 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") 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. Gonzalez was offered and accepted the promotion in March 2017, but did not assume the position 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) began to run when Martinez was offered and accepted the promotion in March 2017, not when it took effect on May 1, 2017, some six weeks later. As such, POLLOCK's claim was time-barred.

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 occurs, not when it is announced, and (2) should be liberally construed to permit the resolution of *FEHA* claims on their merits. This is particularly true here, given that there is no evidence that POLLOCK was made aware of the Martinez promotion prior to Martinez assuming the position on May 1, 2017.

Issue 2 addresses the award of costs in favor of Respondents by the Court of Appeal, without a finding that Petitioner's claims were objectively frivolous. In *Williams v. Chino Valley Independent Fire District,* 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. Further, determination of this issue is of extreme importance. 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.

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V.

FACTS

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

POLLOCK is African American and has been employed as a customer service representative with TRI-MODAL since September 13, 1995. KELSO, who is white, is an Executive Vice President with TRIMODAL; POLLOCK works within KELSO's chain of command.

KELSO and POLLOCK commenced dating in or around August 2014. The relationship began when KELSO invited POLLOCK into his office. After a brief conversation, KELSO offered POLLOCK a glass of wine. When POLLOCK said she had to leave, KELSO grabbed POLLOCK and kissed her passionately. Up through June 2016, KELSO and POLLOCK dated outside of work 10 to 20 times, going to dinners and movies, and KELSO brought POLLOCK gifts when he travelled out of town. They would hug and kiss passionately on these dates, and KELSO would become erect. KELSO would come into POLLOCK's work area and hug and kiss her passionately. He also would sit next to POLLOCK at company meetings and rub her thighs under the table. KELSO sent some 296 pages of emails to POLLOCK on TRI-MODAL's computer, which KELSO admitted was against company policy. POLLOCK asked KELSO if their relationship was contrary to the company's rules, which forbade romantic relationships between superiors and subordinates. KELSO responded that those rules did not apply to him.

POLLOCK and KELSO never had sexual intercourse. KELSO wanted the relationship to become sexual. He offered to fly POLLOCK to Santa Barbara and other cities where he was travelling on business and stay in hotels with him. But, POLLOCK refused. KELSO continually told POLLOCK he "wanted more." Eventually, KELSO became impatient and jealous, demanding to know where POLLOCK had been when he was unable to contact her and why she had not returned his calls. 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." POLLOCK stopped communicating with KELSO and the dating relationship ceased in June 2016.

KELSO tried to keep his relationship with POLLOCK secret, but people at the office were suspicious. POLLOCK's superior, Terminal Manager Ricardo Velasquez, asked POLLOCK why KELSO was spending so much time in her office. The relationship was revealed when POLLOCK filed suit. TRI-MODAL then hired an investigator. As of the dates of the management depositions, no one was aware of the results of the investigation, and KELSO had not been disciplined. However, KELSO expected some discipline. When asked in deposition if he had been disciplined for engaging in the relationship with POLLOCK, KELSO responded, "not yet."

After POLLOCK terminated their relationship, KELSO promoted Leticia Gonzalez into a supervisory position. TRI-MODAL offered Gonzalez the position in March 2017 and she accepted. However, Gonzalez did not begin working in the

position until May 1, 2017. There is no evidence that POLLOCK became aware of the Martinez promotion until May 1, 2017.

On April 18, 2018, POLLOCK filed an administrative complaint against KELSO with the DFEH, alleging *quid pro quo* sexual harassment in violation of *FEHA.* The DFEH issued to POLLOCK a right to sue notice that same day.

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 Appellants' underlying claims, all of which allege violations of *FEHA,* are objectively frivolous.

VI.

WHY REVIEW SHOULD BE GRANTED

A. POLLOCK'S QUID PRO QUO CLAIM.[2]

The issue of whether the statute of limitations begins when the successful candidate is offered and accepts a promotion or when that 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 are contrary to this Court's holding in *Romano v. Rockwell International,*

[2] POLLOCK'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 subject to the instant Petition.

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.

There is no dispute that Gonzalez was offered and accepted the promotion in March 2017, outside the 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 was time barred.

This determination runs afoul of California public policy, as announced by this Court in *Romano v. Rockwell International, Inc.*, 14 Cal.4th 479, 491 (1996). *Romano* stands for the proposition that the ***FEHA* statute of limitations begins to run when the employment action at issue takes effect, not when it is announced**. *Ibid* (emphasis added).

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, 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 suggested that the earlier date should govern, because POLLOCK was made aware of the promotion at that time (Opinion at 14-15). But the record is devoid of any such evidence. As such, notions of fundamental fairness mandate that the later date must govern. *Cf. Holmberg v. Armbrecht,* 327 U.S. 392, 397 (1946).

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B. THE AWARD OF COSTS BY THE COURT OF APPEAL.

In *Williams v. Chino Valley Independent Fire District, supra,* 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. Further, determination of this issue is of extreme importance. 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 claims for fees and costs, a public policy on which this Court relied in its *Williams* opinion.

The Court of Appeal's award of costs absent a finding that Petitioner's underlying *FEHA* claims are objectively frivolous is incorrect, as a matter of law. 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 Petitioners' 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 Petitioners' position as a "close call" (Opinion at 13).

Absent a finding of "objectively frivolous", an award of costs to a prevailing defendant in a *FEHA* action is improper. As explained by this Court in *Williams, supra,*

> A prevailing defendant, however, should not be awarded fees and costs unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so.

Williams, supra, 61 Cal.4th at 115 (emphasis added).

Government Code § 12965(b) should take precedence over the general cost provision in Rule 8.278(a)(1) of the *California Rules of Court.* In *Williams, supra,* this Court analyzed the propriety of an award of 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, must 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).

To summarize, 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. The Court of Appeal's award of costs without the prerequisite finding of clear frivolousness should be reversed.

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VII

CONCLUSION

For the forgoing reasons, Petitioner respectfully requests that this Court grant their petition for review.

Respectfully submitted,

DATED: June 9, 2020 By: /s/*Kevin A. Lipeles*
Kevin A. Lipeles [SBN 244275]
Lipeles Law Group, APC

DATED: June 9, 2020 By: /s/*Thomas H. Schelly*
Thomas H. Shelly [SBN 217285]
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DATED: June 9, 2020 By: /s/ *Julian B. Bellenghi*
Julian B. Bellenghi [SBN 129942]
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Attorneys for Petitioner
Pamela Pollock

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.504(d) of the *California Rules of Court*, we hereby certify that this petition contains 3769 words. In making this certification, we have relied on the word count of the computer program used to prepare the petition.

DATED: June 9, 2020 By: /s/ *Kevin A. Lipeles*
Kevin A. Lipeles [SBN 244275]
Lipeles Law Group, APC

DATED: June 9, 2020 By: /s/ *Thomas H. Schelly*
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DATED June 9, 2020 By: */s/ Julian B. Bellenghi*
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EXHIBIT A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

BONNIE DUCKSWORTH et al., Plaintiffs and Appellants, v. TRI-MODAL DISTRIBUTION SERVICES et al., Defendants and Respondents.	B294872 (Los Angeles County Super. Ct. No. BC676917)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lia Martin, Judge. Affirmed.

Lipeles Law Group, Kevin A. Lipeles, Thomas H. Schelly, and Julian Bellenghi for Plaintiffs and Appellants.

Larson & Gaston, Daniel K. Gaston, and Gloria G. Medel for Defendants and Respondents Scotts Labor Leasing Company, Inc. and Pacific Leasing, Inc.

Lewis Brisbois Bisgaard & Smith, Jack E. Jimenez, Lann G. McIntyre, and Tracy D. Forbath for Defendant and Respondent Mike Kelso.

A.

Bonnie Ducksworth and Pamela Pollock are customer service representatives at Tri-Modal Distribution Services. Tri-Modal promoted others but, for decades, never promoted them. Ducksworth and Pollock believed this was due to discrimination against African-Americans. They sued.

In addition to her discrimination claim, Pollock also sued about sexual harassment. Tri-Modal's executive vice president Mike Kelso began "a dating relationship" with Pollock. Pollock refused Kelso's request to make the relationship more sexual. Pollock ultimately ended the relationship. After she dumped him, Kelso blocked her promotions at Tri-Modal, Pollock alleged.

These contentions implicated employer Tri-Modal, but it is not involved in this appeal. Rather three different defendants are our sole concern, as follows.

Two of these other defendants are two staffing agencies called Scotts Labor Leasing Company, Inc., and Pacific Leasing, Inc. Scotts and Pacific supplied employees, including Ducksworth and Pollock, to Tri-Modal. The trial court granted summary judgment for Scotts and Pacific because they were uninvolved in Tri-Modal's decisionmaking about whom to promote. We affirm this ruling for the staffing agencies.

The third defendant is Kelso. The trial court granted a separate summary judgment for Kelso because the statute of limitations barred Pollock's claim against him. Pollock appeals this ruling on two grounds. First, she says the court erred at summary judgment in overruling her hearsay objection to a key part of Kelso's evidence. Second, she argues the court miscalculated the statute of limitations by running the clock from the date the employer *offered* a competitor the promotion and the competitor *accepted* the promotion rather than the later date when the competitor *began working* at the new position. We affirm this summary judgment ruling for Kelso.

I

Five of the key actors are Ducksworth, Pollock, Tri-Modal, Scotts, and Pacific. (The appellate briefs and record do not spell Pollock's name consistently. We use the spelling that is more common in the papers.)

In the first cause of action, Ducksworth and Pollock sued Scotts, Pacific, and Tri-Modal for racial discrimination under subdivision (a) of Government Code section 12940, which is part of California's Fair Employment and Housing Act. Some call this statute FEHA. We refer to it as the Act.

Ducksworth's and Pollock's theory was racial discrimination explained why they have never been promoted.

What is Tri-Modal? It describes itself as a transportation logistics, warehousing, and distribution services company, while Ducksworth and Pollock call it simply a trucking company. Gregory Owen owns Tri-Modal. Kelso has been its executive vice president since 2009.

Scotts and Pacific are companies engaged in what the parties call "labor leasing." These two companies provide Tri-Modal, and only Tri-Modal, with staffing and administrative services for leased employees, including Ducksworth and Pollock.

The parties do not use the same terminology to refer to Scotts and Pacific. These companies describe themselves as "professional employer organizations i.e. employment leasing/staffing companies." Ducksworth and Pollock disputed this description and instead, in their pleading, called them "staffing agencies." No party explains to us what difference labeling might make, so we use the shorter "staffing agencies." (Cf. *Jimenez v. U.S. Continental Marketing, Inc.* (2019) 41 Cal.App.5th 189, 192, fn. 2 [nomenclature about temporary staffing entities varies in case law].)

Ducksworth applied through Scotts for an open position with Tri-Modal in 1996. Scotts hired her that year and leased her to Tri-Modal from 1996 to 2006.

Similarly, the following year, in 1997, Pollock applied for a position with Tri-Modal through Scotts. Scotts hired her and leased her to Tri-Modal from 1997 to 2006.

Both Ducksworth and Pollock worked continuously at Tri-Modal from their start dates through the time of summary judgment, which was in late 2018. In 2006, however, after a two-week interlude by a third staffing company not involved here, Pacific took over the role Scotts formerly

performed regarding Ducksworth and Pollock. Pacific provides the same services to Tri-Modal as did Scotts.

For Ducksworth and Pollock and similar employees leased to Tri-Modal, Scotts and Pacific tracked and processed payroll, health insurance, workers compensation, vacation, holiday, sick pay, tax, and social security payments. The name on these employees' paychecks was either Scotts or Pacific.

Tom Scott formed Scotts in 1996 when he closed down another company called Marine Glass Company, was unemployed, and then spoke with Greg Owen, whom Scott knew. Scott formed Pacific in 1997.

Scotts and Pacific provide their services only to Tri-Modal and not for any other company. Tom and Sheri (or Cheri—we thus refer to her as Ms. Scott) Scott are married and are the sole owners of Scotts and Pacific. Ms. Scott works at Tri-Modal one and a half to two hours a week. Her work is to pay truck drivers.

At the time of Tom Scott's deposition, 44 people worked at Scotts and nine worked at Pacific. All were leased to Tri-Modal. Up to and ending in 2006, Scotts leased Ducksworth and Pollock to Tri-Modal. At the time of Scott's deposition, it was Pacific that leased Pollock and Ducksworth to Tri-Modal. Tom Scott considered both Pollock and Ducksworth to be employees of Pacific because "our name is on their paycheck." In addition to these people, Tom Scott himself (but not Ms. Scott) is an employee of Scotts.

Tom Scott testified that he is not employed by Tri-Modal, but that Scotts leases him, Tom Scott, to Tri-Modal, where he has been compliance safety director continuously since 1998. This compliance safety work involves running background checks on drivers, orienting and training drivers, maintaining their qualification files, and such. Tom Scott supervises no one. Tom Scott's paycheck comes from Scotts Labor Leasing.

Tom Scott, Scotts, and Pacific were not involved with the day-to-day supervision of Ducksworth and Pollock at Tri-Modal. Tom Scott knew Pollock "is a clerk of some type" at Tri-Modal, and he knew Ducksworth is "in the customer service department" there. But Tri-Modal rather than Scotts or Pacific set work schedules for Ducksworth and Pollock. Pollock would go to

Tri-Modal, not Scotts or Pacific, for work assignments or if she were running late or asking for a day off.

The decision to give a raise to any employee leased by Scotts or Pacific to Tri-Modal was made solely by Tri-Modal, with no input from Scotts or Pacific.

Ducksworth and Pollock rarely interacted with Scotts and Pacific. Pollock did not interact with Tom Scott on a daily basis and did not see him on a monthly or weekly basis. Ducksworth would not see Tom Scott during the course of a week, except perhaps to say "hi" if they did happen to see each other. If Pollock had any interaction with Tom Scott, it would be about insurance or benefits.

Pollock never went to Scotts about a work related complaint, but instead would take it to Tri-Modal. Pollock never discussed raises or promotions with Tom Scott. Similarly, Ducksworth never went to Scotts to request a raise or promotion. Scotts had no input about raises or promotions at Tri-Modal.

Tom Scott never disciplined Pollock or Ducksworth during their employment. Scotts never supervised or trained Pollock or Ducksworth.

Scotts and Pacific moved for summary judgment.

The following quotation is from Fact 16 in the separate statement for this summary judgment motion.

"The decision to promote an employee leased to by [*sic*] Scotts or Pacific to Tri-Modal is made solely by Tri-Modal. Scotts or Pacific do not provide any input, have any authority or make any decision regarding the promotion of any employees leased to Tri-Modal."

Ducksworth and Pollock told the trial court they did not dispute Fact 16.

On December 6, 2018, the trial court found the undisputed Fact 16 entitled the staffing agencies to summary judgment.

We now recount some facts about Pollock and Kelso in particular.

Kelso began dating Pollock in 2014. The relationship involved passionate kissing. Kelso wanted sexual intercourse but Pollock did not, according to Pollock. Pollock ended the relationship in 2016. In the second cause of action, Pollock and not Ducksworth sued Kelso and Tri-Modal for

quid pro quo sexual harassment in violation of subdivisions (j)(1) and (j)(3) of Government Code section 12940, which is part of the Act.

On November 20, 2018, the trial court granted summary judgment for Kelso based on the statute of limitations.

Ducksworth and Pollock appealed the summary judgments in favor of Scotts, Pacific, and Kelso.

II

In this section, we review the summary judgment in favor of the staffing agencies. The trial court ruled undisputed Fact 16 exonerated the staffing agencies according to the governing precedent of *Bradley v. Dept. of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1612, 1628–1629 (*Bradley*). The trial court was right. Scotts and Pacific basically were innocent bystanders in this case of alleged discrimination by Tri-Modal. We affirm because Scotts and Pacific were not involved with the promotions Ducksworth and Pollock attack. A company that has not discriminated cannot be liable for discrimination.

As the trial court ruled, *Bradley* is the leading precedent on the pertinent issue. (See *Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 499 [Supreme Court majority cites *Bradley*]; *id.* at pp. 504 & 507 [Supreme Court dissent also cites *Bradley*]; *Martinez v. Combs* (2010) 49 Cal.4th 35, 50, fn. 16 [citing *Bradley*]; *State ex rel. Dept. of California Highway Patrol v. Superior Court* (2015) 60 Cal.4th 1002, 1008, fn. 2 [citing *Bradley*].)

Bradley held an employee can sue its "contracting employer," like Tri-Modal in this case, without suing the employee's "staffing agency." (*Bradley*, *supra*, 158 Cal.App.4th at p. 1629.) In *Bradley*, a worker named Sallie Mae Bradley at a state prison brought sexual harassment and retaliation claims against the California Department of Corrections and Rehabilitation—the "department"—under Government Code section 12940. (*Id.* at p. 1617.) Bradley proved a prison chaplain sexually harassed her, and then the prison fired *her* when she complained. (*Id.* at pp. 1618–1623.)

Bradley had a contract with a staffing agency, which in turn had a contract with the department for Bradley to work at the prison. (*Bradley*, *supra*, 58 Cal.App.4th at p. 1618.) We use the term "staffing agency" while the court in *Bradley* used the label "temporary service agency" to describe the

entity tracking Bradley's hours and issuing her paychecks. (*Id.* at p. 1624.) Bradley sued the department and not the staffing agency. (*Id.* at pp. 1617–1618.)

The *Bradley* decision discussed a California state regulation issued by the Fair Employment and Housing Commission, which is the agency charged with interpreting Government Code section 12940. (*Bradley*, *supra*, 158 Cal.App.4th at p. 1629.)

This regulation specifies "[a]n individual compensated by a temporary service agency for work to be performed for an employer contracting with the temporary service agency is an employee of that employer for such terms, conditions and privileges of employment under the control of that employer. Such an individual also *is an employee of the temporary service agency with regard to such terms, conditions and privileges of employment under the control of the temporary service agency*." (Cal. Code Regs., tit. 2, § 11008, subd. (c)(5), italics added [definition previously in Cal. Code Regs., tit. 2, § 7286.5, subd. (b)(5)].)

The *Bradley* decision rejected the department's argument that, under this governing regulation, the staffing agency had to be liable for the prison chaplain's misconduct. (*Bradley*, *supra*, 158 Cal.App.4th at pp. 1628–1629.) The staffing agency was not an indispensable party to Bradley's suit because there were no allegations in the complaint and no evidence to suggest liability rested on *terms, conditions, or privileges of employment under the control of the staffing agency*. To the contrary, all allegations related to matters under the department's control. (*Id.* at p. 1629.)

In short, *Bradley* held the staffing company was not liable for harassment with which it was entirely uninvolved. (Cf. *Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174, 1180, 1182–1184 [a temporary employment agency can be liable for harassment at a client's workplace if employee is required to, and does, report problems at the client's workplace to the agency].)

The trial court here properly applied the regulation and reasoning in *Bradley* to Scotts and Pacific. Undisputed Fact 16 conclusively established Scotts and Pacific did "not provide any input, have any authority or make any decision regarding the promotion of any employees leased to Tri-Modal."

Under *Bradley*, Scotts and Pacific were not involved and are not liable and thus are out of the suit.

The *Bradley* decision makes good sense to us. Ducksworth and Pollock do not criticize it as wrongly decided.

Rather Ducksworth and Pollock make a passing effort to distinguish *Bradley*, but their opening brief confines their effort to a short paragraph. This paragraph asserts their case differs from *Bradley* "in two respects."

Neither proposed distinction has force.

Ducksworth's and Pollock's first proposed distinction fails. It consists of one sentence, which is their *complaint* "attributes liability" to the staffing company. Evidence, however, eclipses mere pleading allegations, and here, according to Fact 16, undisputedly "[t]he decision to promote an employee leased to by [*sic*] Scotts or Pacific to Tri-Modal is made solely by Tri-Modal. Scotts or Pacific do not provide any input, have any authority or make any decision regarding the promotion of any employees leased to Tri-Modal." This undisputed fact overwhelms and refutes the allegations in their complaint. This first attempt to distinguish *Bradley* is unsuccessful.

Ducksworth's and Pollock's second proposed distinction builds on two other facts: the fact the staffing agencies' employee handbook guaranteed equal opportunity and freedom from harassment, and the fact the staffing agencies' president Tom Scott attended a meeting Tri-Modal called to address Pollock's allegations. Were it not for Fact 16, these two other facts might create inferences about whether the staffing agencies had input, authority, and decisionmaking power over promotions at Tri-Modal. But Fact 16 settled the issue because Ducksworth and Pollock agreed Fact 16 was undisputed. That agreement trumped contrary inferences.

Fact 16 is paramount and conclusive in this case. The point of a separate statement in the summary judgment process is to identify and to isolate factual issues and thus to facilitate decisionmaking by trial judges. The summary judgment process itself is highly desirable. The separate statement is one of its core features. This process, vital to everyday life in the trial courts, would break down entirely if parties were free to walk away from or to adjust the separate statement once they discovered the court's legal analysis was not going their way.

Because Ducksworth and Pollock cannot distinguish *Bradley*, that sound case validates the trial court's decision regarding the staffing agencies. The court correctly granted summary judgment for Scotts and Pacific because they were not involved in the Tri-Modal decisions Ducksworth and Pollock would condemn.

III

We now turn to Kelso, Tri-Modal's executive vice president. He moved for summary judgment because the statute of limitations barred Pollock's claims. The trial court correctly granted Kelso's motion.

The claim against Kelso involved Pollock and not Ducksworth because Kelso had a dating relationship only with Pollock. Ducksworth does not figure in this aspect of the case.

Pollock's theory in her second cause of action was Kelso began to date her, but then wanted their relationship to be more sexual. Pollock did not want that. Kelso also insulted her with remarks about "collard greens." Pollock ended the dating relationship, and then Kelso and thus Tri-Modal punished Pollock by denying her promotions at Tri-Modal she deserved and by instead promoting five other employees less qualified than Pollock.

The trial court's analysis of the statute of limitation issue was as follows. Pollock filed her sexual harassment complaint with the Department of Fair Employment and Housing on April 18, 2018. So the one-year clock began to run for Pollock on April 18, 2017. The court ruled, however, Kelso established the events about which Pollock complained—the promotion of the five others over her—either did not occur at all, or else occured before April 18, 2017. These facts, and particularly the precise dates of the various promotions, were vital in the court's analysis.

We return to the precision of these dates in just a moment, for they play a prominent role in a hearsay issue we tackle.

Pollock objected to the source of these facts and dates. This source of evidence was the "Mullaney declaration." The court overruled Pollock's evidentiary objections to the Mullaney declaration.

On appeal, Pollock makes two arguments about the statute of limitations: the trial court improperly overruled Pollock's hearsay objection to the Mullaney declaration, and the court miscalculated the statute of

limitations by selecting the wrong date on which to start the clock. Both arguments err. We take up each in turn.

A

We start with Pollock's hearsay argument. Pollock objected to the Mullaney declaration, which Kelso offered to support his motion for summary judgment. The trial court overruled the objection. This ruling was not an abuse of discretion.

1

We add more facts for context.

Pollock's theory in her second cause of action was, because of sexual harassment, Kelso and Tri-Modal promoted five specific employees instead of her. In response, Kelso offered evidence about whether and when Tri-Modal did promote those five other employees. Kelso claimed, for one of these five people, there was no promotion at all, and for the other four people, their promotions were so long ago as to create a time bar blocking Pollock's claim against Kelso.

Kelso's source for his factual assertions about these promotions was a declaration from Tri-Modal's vice president of operations, Timothy Mullaney. The hearsay dispute is entirely about Mullaney's declaration.

We summarize Mullaney's declaration. As we do, bear in mind the key limitations date is April 18, 2017: complaints about actions before that date would be time-barred and would dictate victory for Kelso.

Mullaney began his declaration by swearing he had personal knowledge of everything in the declaration. He then declared he had been Tri-Modal's vice president of operations since 2009. In that role, Mullaney supported managers who were the ones making final hiring and promotion decisions. He sometimes provided recommendations. And he "open[ed] positions to be filled." Mullaney did not specify what it meant to "open positions." Mullaney also had access to employee personnel files, and he had reviewed some of those files.

Mullaney next stated specific facts and dates about the five promotions Pollock challenged. The point of these specific facts and dates was to establish the basis for Kelso's two key defenses: (1) that Tri-Modal had not

promoted one of the five employees at all, and (2) that the promotions of the other four triggered clocks barring Pollock's harassment claim as tardy.

Mullaney declared Tri-Modal never promoted the first of these five employees at all.

Mullaney then gave specifics about the promotion dates for the other four employees.

According to Mullaney, Tri-Modal did not promote the second and third employees into supervisory positions on or after July 19, 2016, and did not promote the fourth employee on or after April 18, 2017. The company offered the fifth employee—one Leticia Gonzalez, to whom we shall return—a promotion in March 2017. Gonzalez's promotion "t[oo]k effect" May 1, 2017.

(The difference between these two dates for Gonzalez—March 2017 versus May 1, 2017—created an issue we address shortly. Recall the limitations date of April 18, 2017, which falls in between these dates and which animates the issue to which we return below.)

In sum, Mullaney's specific facts were essential for Kelso's defense about the statute of limitation. On the basis of these facts, Kelso maintained Mullaney's declaration showed Pollock's suit was misguided and untimely.

In response, Pollock raised a hearsay objection to Mullaney's declaration. She said Mullaney's testimony was hearsay because its source was not Mullaney's personal knowledge but rather came from his reading of personnel files, which were out-of-court documents, were not in evidence, and were nothing but hearsay.

The trial court overruled Pollock's hearsay objection. On appeal, Pollock renews this objection.

2

We must determine the standard of review for this hearsay issue. There is controversy here.

In *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535 (*Reid*), the Supreme Court approved of independent review when the trial court entirely *failed to rule* on evidentiary objections in connection with a summary judgment motion. But what about when the trial court *has* made an evidentiary ruling, as here? *Reid* declined to decide that question. (*Ibid.*)

The vast majority of courts of appeal since *Reid* have applied the abuse of discretion standard in this situation. (See, e.g., *Schmidt v. Citibank, N.A.* (2018) 28 Cal.App.5th 1109, 1118; *Pacific Gas and Electric Co. v. Superior Court* (2018) 24 Cal.App.5th 1150, 1169; *Duarte v. Pacific Specialty Ins. Co.* (2017) 13 Cal.App.5th 45, 52; *O'Neal v. Stanislaus County Employees' Retirement Assn.* (2017) 8 Cal.App.5th 1184, 1198–1199; *Ryder v. Lightstorm Entertainment, Inc.* (2016) 246 Cal.App.4th 1064, 1072; *Jones v. Wachovia Bank* (2014) 230 Cal.App.4th 935, 951; *Serri v. Santa Clara Univ.* (2014) 226 Cal.App.4th 830, 852; *Ahn v. Kumho Tire U.S.A., Inc.* (2014) 223 Cal.App.4th 133, 143–144; *Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 181; cf. *Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1122–1123 (conc. opn. of Turner, P. J.) (*Howard*) [listing 13 decisions and stating the "unanimous" decisions from 2006 to 2012 applied abuse of discretion standard].)

Apparently two courts have disagreed. (See *Pipitone v. Williams* (2016) 244 Cal.App.4th 1437, 1450–1452 [interpreting "*Reid's* practical effect" to mandate independent review]; *Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, 226 [standard of review varies depending on the type of evidentiary objection].)

We join with the vast majority and its embrace of abuse of discretion as the proper standard. The weight of this massed authority is impressive.

The logic supporting this mass view also is impressive. Experienced trial judges tend to agree, first, evidence law is surpassingly intricate and, second, the need for dispatch is pressing. Moreover, a single summary judgment motion can bring with it hundreds of written objections. (E.g., *Cohen v. Kabbalah Centre Internat., Inc.* (2019) 35 Cal.App.5th 13, 20 [197 written objections in one summary judgment motion].) In trial, too, a judge may have to rule on dozens of objections per hour, hour after hour, day after day, week after week. Each objection commonly contains within it many different grounds: foundation, relevance, 352, hearsay, and so forth. Each ground calls for a different evidentiary analysis. And lawyers can, and do, make evidentiary objections entirely at will. Few *and perhaps none* of these evidentiary objections may be of any ultimate importance. (See *id.* at pp. 20–21.)

Because of the daunting complexity, volume, and pace of this decisionmaking task, the latitude implied by the abuse-of-discretion standard thus does make "great sense." (*Howard*, *supra*, 208 Cal.App.4th at p. 1123 (conc. opn. of Turner, P. J.).)

We thus review the trial court's hearsay ruling to see if the court abused its discretion.

3

The court did not abuse its discretion by overruling Pollock's hearsay objection.

The hearsay question in this case was a close call. Mullaney recited a series of promotion dates. He said certain employees were not promoted "on or after" specific dates and said Gonzalez was promoted in March 2017. One wonders: was Mullaney just reading and reciting those dates off documents in personnel files? If so, that *would* be hearsay, unless the declaration established some proper way around the hearsay rule, which it did not. (Cf. Evid. Code § 1271 [reciting four foundational facts to establish the business records exception].) Or was Mullaney reciting this series of dates *from personal knowledge*, thus avoiding the hearsay problem?

Under an abuse of discretion standard, we could affirm whichever ruling the trial court might make in this factual situation. The facts were in equipoise. We illustrate.

It would have been reasonable for the court to conclude there was a fatal hearsay problem, because paragraph nine of Mullaney's declaration stated "I have reviewed the personnel files" of the five employees. Immediately after that, in paragraphs 10 through 18, Mullaney recounted the crucial dates. This close sequence of assertions could support a reasonable inference Mullaney merely read the dates from the files: "I looked at the personnel files. The promotion dates were before X date or were in Y month." The immediacy with which sentence two follows sentence one is context. That context could support the inference Mullaney knew the promotions were before X date or were in Y month because he just read those dates from the files. That recitation from documents would be merely hearsay, unless there were a valid exception, which the declaration did not establish.

But the opposite ruling also would have been reasonable. The trial court fairly could have ruled as it did: to overrule Pollock's hearsay objection to Mullaney's declaration. Mullaney did establish a plausible basis for his own personal knowledge of these dates. Mullaney was at Tri-Modal the whole time and was deeply involved in Tri-Modal's personnel process. The first paragraph of Mullaney's declaration asserted he had "personal knowledge of each of the facts set forth herein . . . ." The trial judge did not abuse her discretion by accepting that statement at face value in this context.

Under the abuse of discretion standard, when more than one inference reasonably can be deduced from the facts, we will not substitute our deductions for those of the trial court. (*In re Marriage of Rothrock* (2008) 159 Cal.App.4th 223, 230.) The trial court's admission of the Mullaney declaration thus was not an abuse of discretion.

There is a lesson here for litigators: know your Evidence Code when working with declarations. It was risky business to omit the foundation for the business records exception in Mullaney's declaration. Adding that foundation probably would have taken little effort. Why walk so near the cliff's edge when the view is just as fine at a safer distance?

4

In sum, the trial court properly admitted the Mullaney declaration. Kelso could use the declaration to support his motion for summary judgment.

B

We now address the second part of Pollock's argument about the statute of limitations. This argument requires a legal choice between two dates. Tri-Modal gave Leticia Gonzalez a promotion in March 2017, but Gonzalez did not start work in this new role until May 1, 2017. Which date should trigger the clock: when Tri-Modal *offered* and Gonzalez *accepted* the promotion, or when she *started* the new job? The interval in between straddles the limitations start date, so the earlier date means victory for Kelso, while the later date means victory here for Pollock.

The trial court used the earlier date, which was the date Gonzalez was *offered and accepted* the position over Pollock. Pollock maintains the limitations period began to run only later, when the other employee's promotion *took effect*. The trial court was right. Pollock's claims were barred.

We independently review this question of law. (*Sahadi v. Scheaffer* (2007) 155 Cal.App.4th 704, 713–714.)

By law, Kelso is right. The 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.

This result follows as a matter of statutory interpretation, so we turn our gaze to the precise statutory language.

The governing statutes are sections 12940 and 12960 of the Government Code. All statutory citations are to this code.

Subdivision (j)(1) of section 12940 makes it illegal for an employer to "harass" employees on account of sex and gender. And, as pertains to Pollock's suit, former subdivision (d), now subdivision (e), of section 12960 set a one-year clock for complaints about harassment. (The statute changed effective January 1, 2020, but that change is not pertinent here.)

The governing statutory language used the key word "occurred": "No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate *occurred*." (Gov. Code § 12960, former subd. (d), italics added.)

In this case, the alleged quid pro quo sexual harassment "occurred" when Kelso supposedly punished Pollock at work for refusing his demand to make their relationship more sexual.

Logically and thus textually, 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. So Pollock's injury "occurred" in March 2017, according to the plain meaning of the word "occurred."

This definition of "occurred" is simple and straightforward and thus desirable and correct.

We can double-check this analysis with a hypothetical example. Pollock's allegation is Kelso offered the promotion to Gonzalez instead of Pollock in retribution for Pollock's refusal to submit to Kelso's demand to make their relationship more sexual. For purposes of analysis, suppose Kelso

had been candid about his allegedly harassing decision. 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. That Kelso allegedly was less than candid would not change anything fundamental about this analysis.

Pollock argues for a contrary conclusion based on her misunderstanding of the *Romano* decision. (See *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479 (*Romano*).)

Romano construed a different statutory word: "discharge." *Romano* held, essentially, that discharge occurs when you are off the payroll. (*Romano*, *supra*, 14 Cal.4th at pp. 491–500.) That simple holding seems obviously correct and is binding law but has nothing to do with this case, which does not involve a discharge. *Romano* thus does not govern here.

The trial court correctly concluded that Government Code section 12960, former subdivision (d) bars Pollock's claims because she did not file her administrative complaint within one year of March 2017, the time that those claims accrued. Summary judgment on this ground was proper.

DISPOSITION

We affirm and award costs to Scotts, Pacific, and Kelso.

WILEY, J.

We concur:

BIGELOW, P. J.

GRIMES, J.

PROOF OF SERVICE

I, Elena Monroy, 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):

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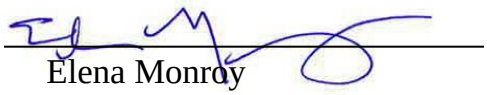
I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed on June 11, 2020 at El Segundo, California 90245.



Elena Monroy

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 6/11/2020 by Tao Zhang, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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