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Statute of Limitations for FEHA Claims on the Verge of Extinction

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The California Fair Employment and Housing Act (FEHA) requires an employee to file an administrative complaint of discrimination, harassment, or retaliation within one year of the alleged unlawful employment practice. This statute of limitations provides employees with time to assert their claims. It also protects employers from stale claims, faded memories, and unavailable witnesses, and makes it easier for the administrative agency involved (the Equal Employment Opportunity Commission (EEOC) or the state Department of Fair Employment and Housing (DFEH)) to investigate, obtain documents, find witnesses, etc.

Two judicially created exceptions to the statute of limitations, the “continuing violation doctrine” and “equitable tolling,” extend the time for an employee to file a complaint. As the courts expand both doctrines, they are swallowing the rule and driving the FEHA statute of limitations to the brink of extinction.

The FEHA Statute of Limitations

The DFEH investigates complaints of discrimination, harassment, and retaliation under the FEHA. An employee must file a complaint with the DFEH before filing a civil lawsuit based on the same or similar claims. As stated, an employee has one year from the alleged unlawful act to file a complaint with the DFEH. The DFEH then investigates the claims and decides whether to prosecute

them. If the DFEH decides not to prosecute the claims, it must give the employee notice of his right to file a civil lawsuit. The employee has one year from receipt of the “right to sue” letter to file a lawsuit. This is a second statute of limitations.

The Continuing Violations Doctrine

A “continuing violation” occurs when the employer’s unlawful conduct begins before the limitations period and “continues” into the limitations period. In Richards v. CH2M Hill, Inc., a 2001 decision, the California Supreme Court described the continuing violation doctrine in response to an employee’s claim of disability harassment and failure to accommodate. The Court explained that when an employer engages in a continuing course of unlawful conduct under the FEHA by refusing reasonable accommodation or engaging in harassment, the statute of limitations does not begin to run when the employee first believes her rights may have been violated. Rather, the statute begins running when the course of conduct is brought to an end, for example, when an employee resigns, or when the employee is on notice that further efforts to end the unlawful conduct will be in vain.

The Richards court distinguished discrimination claims that involve a single discrete act such as a termination or demotion. The traditional limitations analysis will apply to those discrete acts. But, if

the violation consists of a course of discriminatory conduct against a single individual, as opposed to a single action in time, the claim may be timely even if most or nearly all of the objectionable conduct occurred outside the limitations period.

In 2005, in Yanowitz v. L’Oreal USA, Inc., the California Supreme Court expanded the continuing violation doctrine to apply to retaliation claims. Yanowitz refused her supervisor’s instructions to fire a female sales associate and replace her with someone more attractive. Yanowitz alleged her supervisor began criticizing her performance, including in written performance evaluations. Yanowitz was never fired or demoted; nor did she suffer a decrease in salary or benefits. Nevertheless, Yanowitz took disability leave because of stress she allegedly suffered as a result of her negative performance reviews.

More than one year after her supervisor’s criticisms of her work performance, Yanowitz filed a complaint with the DFEH claiming retaliation. Applying the Richards continuing violation analysis, the Yanowitz court found the supervisor’s unfavorable performance evaluations and criticisms of Yanowitz over time to be a continuing violation for the purpose of including that conduct within the limitations period. The Court explained there is no requirement that an employer’s retaliatory acts constitute one swift

blow, but rather may constitute a continuing pattern of conduct.

Most recently, on November 21, 2008, a California Court of Appeal in Dominguez v. Washington Mutual Bank applied the continuing violation doctrine to overturn summary judgment in favor of an employer, even though the employee failed to timely file a complaint of sexual orientation discrimination with the DFEH. A lesbian employee complained to her supervisors that a coworker repeatedly made offensive comments about her sexual orientation. The coworker stopped making the comments after Dominguez complained. According to Dominguez, however, the coworker started interfering with her work in other ways, such as by blocking Dominguez's access to her work station and by intentionally jamming the mail sorting machine Dominguez used.

Dominguez filed a complaint with the DFEH more than one year after the last offensive comment made by her coworker. The Court of Appeal held Dominguez's claims were not barred by the one-year statute of limitations. The court reasoned that her coworkers' interference with her work was similar enough to their verbal taunts so that the alleged harassment had not yet acquired a "degree of permanence," the standard for when the statute of limitations begins to run. Although the comments fell outside the one year statute of limitations, the court considered them to be part of a single, continuous violation and therefore within the limitations period.

Equitable Tolling

Like the continuing violation doctrine, equitable tolling of statutes of limitations is a judicially created principle. It is designed to prevent

unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has been satisfied. Broadly speaking, the doctrine of equitable tolling applies when an injured person has several legal remedies and, reasonably and in good faith, pursues one. Therefore, it may apply to FEHA claims where administrative remedies must be exhausted before a second action can proceed.

California Courts have long held that where exhaustion of an administrative remedy is mandatory prior to filing suit, equitable tolling is automatic. For example, where an employee files a complaint with the DFEH, the one year period for the employee to file a civil lawsuit is tolled until the DFEH completes its investigation. A recent string of California cases addressed whether an employee must use an employer's internal grievance procedures before filing suit against the employer and to what extent an employee's use of those procedures tolls the statute of limitations.

Earlier this year, in Ahmadi-Kashani v. Regents, the California Court of Appeal determined that employees are not required to utilize an employer's internal equal employment opportunity procedure before receiving a right-to-sue letter from the DFEH and pursuing a claim against the employer. In a previous case, Schifando v. City of Los Angeles, the California Supreme Court held that an employee who chose to participate in the employer's internal procedure had to see that procedure through to its completion and exhaust any judicial review process before pursuing a claim with the DFEH. The court in Ahmadi-Kashani decided that this rule applies only if the employer's

internal procedure provided the employee with a "quasi-judicial" hearing. A "quasi-judicial" hearing is one in which employees have adequate notice and opportunity to appear and present evidence supporting their claims.

Most recently, a California Court of Appeal in McDonald v. Antelope Valley Community College Dist. further expanded the equitable tolling doctrine to apply to an employee's voluntary pursuit of alternative remedies, even if the employee later decides to voluntarily abandon pursuit of her internal grievance. We wrote about the McDonald decision in a previous article. In short, an employee filed an internal grievance with the school district accusing it of failing to promote her based on her race. In the middle of the internal proceeding, the employee also filed a DFEH complaint—more than one year after she was denied the promotion. Nevertheless, because the employee had filed an internal complaint with the school district within one year of the denial of promotion, the court determined the school had sufficient notice of the claim. Therefore, the FEHA statute of limitations was tolled during the pendency of the district's internal proceedings.

An Effective EEO Policy and Complaint Procedure Can Provide More Certainty

Many employers already believe the one-year time period for employees to make complaints of unlawful conduct in the workplace is too long. In one year, documents may be lost and witnesses may have moved or their memories may have faded. By the time an employee makes a complaint, the employer may already be at a significant disadvantage in preparing the defense of its case. The continuing violation and

equitable tolling doctrines can operate to further broaden an employer's liability and to weaken an employer's defenses at the same time.

Continuing violations occur when employers fail to proactively deal with inappropriate conduct in the workplace or to follow up on employee complaints. It is not enough for employers simply to have an EEO policy that encourages employees to report claims of unlawful conduct. Employers should not wait for employees to complain or for obvious policy violations before acting. Odds are that similar conduct occurred before the complaint or policy violation. Moreover, although isolated instances of past misconduct may be insignificant, when taken together with present misconduct, they can turn a mole hill into a mountain. Employers therefore should train their supervisors to recognize subtle signs of discrimination, harassment, or retaliation and to take immediate

action. Moreover, even if an employer takes immediate and appropriate corrective action in response to an employee complaint, the employer must ensure the inappropriate conduct does not continue. Dominguez makes clear that rule applies to any "similar" inappropriate conduct in the future.

Employers with internal "grievance" or complaint procedures should consider how delay will affect future litigation. Equitable tolling can continue as long as the employer's internal proceedings continue without a final decision. Employers must therefore quickly and effectively investigate and resolve employee complaints. Common occurrences such as busy work schedules, employee vacations, turnover, and the like delay investigations. According to McDonald, any such delay may give an employee that much longer to file an administrative complaint with the DFEH.

An effective EEO policy and complaint procedure can operate to reduce or eliminate the uncertainty associated with the timely filing of employee complaints. They increase the likelihood an employer will have prompt notice and an opportunity to respond to employee complaints. Supervisors properly trained on an employer's internal EEO policy and complaint procedure can also assist to identify and respond to any pattern of inappropriate employee conduct that may lead to a continuing violation. An EEO policy can also dictate how and when the employer's internal proceeding comes to an end so that an employer has better control over when the statute of limitations begins running for an employee to file an outside complaint. With the new year coming, it is a good time for employers to review and update their internal policies and to train or retrain their supervisors to comply with internal EEO policies and procedures.

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