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GUEST COLUMN

For whom the statute tolls

By Aaron L. Osten

Fair Employment and Housing Act (FEHA) claims alleging discrimination under a protected class first require administrative exhaustion through the Cal. Civil Rights Department (CRD) before filing suit. (The CRD is formerly known as the Department of Fair Employment and Housing.) Govt. Code §12960 was amended by the passage of Assembly Bill 9 in October of 2019, requiring litigants to file a verified complaint with the CRD within three years of the last discriminatory act. Prior to the passage of Assembly Bill 9, which took effect January 2020, litigants had one year to file a verified complaint.

The exhaustion of administrative remedies is a jurisdictional prerequisite to a civil action under FEHA, and the failure to timely exhaust subjects FEHA claims to dismissal. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70.) But do not despair. There may still be arguments as to why a FEHA complaint filed outside the three-year statute is not necessarily doomed.

Verified FEHA complaints are much different than complaints filed by plaintiffs in other contexts in at least one significant respect, which directly bears on the application of the statutes of limitations. Unlike in other contexts where the filing of a complaint is within the plaintiff's control, with respect to an administrative FEHA claim, the plaintiff is dependent on the CRD to draft the complaint that he or she will then verify. (Cal. Code Regs., tit. 2, § 10009(a) ["The department shall draft the language of each complaint filed for investigation on a complaint form prescribed by the department."]) Accordingly, law-



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makers have enacted legislation empowering Courts to permit claims to still proceed to Court under certain circumstances even if they were filed beyond the three-year limitation period.

In addition to lengthening the statute of limitations to three years, the Legislature also amended Government Code section 12960 to include a new subsection (b), which provides that an untimely verified complaint will be interpreted to "relate back" to the initial filing of

an "Intake Form" should the latter have been filed within the three-year window.

Intake forms are the first step the claimant-employee takes in the CRD filing process. Under that step, the claimant completes and submits a multiple page form providing specific information detailing their claim, such as date(s) and type of harm, identity of wrongdoers, and adverse actions suffered. Due to its comprehensiveness, claimants are often led to believe

that the completion of this intake form actually satisfies the filing deadline. But the intake form does not constitute a verified complaint, nor does it satisfy the exhaustion requirement. While it remains the law that the filing of a verified complaint is necessary to satisfy the statute under §12960 (*Cole v. Antelope Valley Union High School District* (1996) 47 Cal.App.4th 1505, 1515), the recent amendment to §12960(b) may serve to resuscitate a FEHA complaint that appears un-

timely by relating back to a timely intake form. And there are other avenues that may lead to the same result.

Under California Code of Regulations section 10018, Courts are also empowered to equitably excuse a claimant from timely filing a verified complaint when there is evidence that a claimant, who through no fault of their own, has been misled by the CRD as to the filing requirements, or when there is evidence the CRD committed errors in processing the complaint. *See Holland v. Union Pacific Railroad Co.* (2007) 154 Cal.App.4th 940, 945; Cal. Code Regs., § 10018 [“The one-year time limit for filing a complaint of discrimination...may be tolled...where [DFEH] misleads the complainant about filing obligations, commits errors in processing the complaint, or improperly discourages or prevents the complainant from filing at all”]; *Denney v. Universal City Studios, Inc.* (1992) 10 Cal.App.4th 1226, 1233-1234, overruled on other grounds in *City of Moorpark v. Sup. Ct.* (1998) 18 Cal.4th 1143, 1156.)

This Regulation was promulgated under Government Code section 12930(e) which authorized the DFEH to “adopt, promulgate, amend, and rescind suitable procedural rules and regulations to carry out the investigation, prosecution, and dispute resolution functions and duties

of the department pursuant to this part.” The Regulation is also consistent with the Supreme Court’s observation in *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 493–494: “The FEHA itself requires that we interpret its terms liberally in order to accomplish the stated legislative purpose. [Citations.] In order to carry out the purpose of the FEHA to safeguard the employee’s right to hold employment without experiencing discrimination, the limitations period set out in the FEHA should be interpreted so as to promote the resolution of potentially meritorious claims on the merits.”

Such evidence of errors or misleading conduct by the CRD may not be readily apparent and may need to be uncovered by the claimant’s counsel when he or she retains one. In order to uncover this evidence, discovery into the administrative process (something that ordinarily does not take place) may be necessary. Claimants are often unrepresented, attempting to navigate a less than clear process while unbeknownst to them, statutory deadlines are running. This Regulation recognizes that, once a Claimant contacts the CRD, a CRD representative is assigned to the claim and the ball is in the CRD’s court to prepare and file a timely verified complaint or issue a right to sue notice.

As recently observed by the Court in *Clark v. Superior Court* (2021) 62 Cal.App.5th 289, 293: “FEHA’s exhaustion requirement should not be interpreted as a ‘procedural gotcha’” (*People v. Matthews* (2019) 32 Cal.App.5th 792, 798, 244 Cal.Rptr.3d 331) . . . This is particularly true in a case such as this, in which the plaintiff’s error could not possibly have hampered any administrative investigation or prejudiced the defendant in any judicial proceedings.” If a Claimant is misled about the filing requirements by the CRD, then a conclusion that the Claimant is nevertheless barred under the applicable statute of limitations is nothing more than such a “procedural gotcha.”

Yet another argument that a Claimant may have to preserve an otherwise untimely claim is the equitable tolling described in *McDonald v. Antelope Valley Cmty. Coll. Dist.* (2008) 45 Cal. 4th 88, which states at p.107: “[N]othing in the text of the FEHA suggests an implicit legislative intent to preclude equitable tolling.” See also *Saint Francis Memorial Hospital v. State Dept. of Public Health* (2020) 9 Cal.5th 710, 719-720. [There is a presumption that statutory deadlines are subject to equitable tolling.]

One such example of equitable tolling is a “continuing violation” which is “found when a corporate

policy is initiated before the limitations period but continues in effect within that period to the detriment of the employee.” *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 813; see 2 CCR § 10018.) Importantly, whether or not the continuing violation doctrine applies is a question of fact. (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1401; CACI 2508.)

In short, a FEHA claim that may appear untimely on its face may still have life! The moral of this story is do not necessarily be deterred until you have looked under every stone. This article describes three such stones.

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