NOTE

Romano v. Rockwell International: A Study in Undermining Federal Authority, Statutory Clarity, and the Function of the Department of Fair Employment and Housing in the Fight Against Employment Discrimination

TABLE OF CONTENTS

INTRODUCTION 1113
I. BACKGROUND 1114
A. *Limitations Statutes in FEHA and Their Purpose* . . . 1114
B. *FEHA* 1115
C. *The Split Among the California Courts of Appeal* . . . 1117
1. *Regents of University of California v. Superior Court*: Notice 1118
2. *Romano v. Rockwell International*: Actual Termination 1120
II. THE CALIFORNIA SUPREME COURT RESOLVES THE SPLIT 1121
A. *Facts and Holding* 1122
B. *The California Supreme Court's Rationale* 1122
III. AN ANALYSIS OF THE SUPREME COURT'S DECISION . . . 1126
A. *The Decision Comports with FEHA's Purpose of Protecting Employees* 1127

B. Actual Termination Does Not Eliminate Uncertainty 1128
C. The Court's Reasons for Avoiding Federal Authority Are Erroneous 1130
D. The Decision Conflicts with the Department's Function to Provide an Alternative to Litigation 1132
E. Future Impact of the Decision 1134
CONCLUSION 1136

INTRODUCTION

California's Fair Employment and Housing Act ("FEHA")[1] protects employees from discriminatory termination.[2] FEHA states that freedom from job discrimination is a civil right[3] and declares that employment discrimination is an unlawful practice contrary to public policy.[4] Further, FEHA creates the Department of Fair Employment and Housing ("Department"),[5] which investigates, conciliates, and seeks to redress claims of discrimination.[6]

FEHA requires that employees file discrimination claims with the Department within one year from the date of the alleged unlawful practice.[7] Until recently, California courts disagreed on what action prompts the starting date for the statute of limitations for discriminatory termination claims.[8] The California Court of Appeal for the Fourth District held that the unlawful practice occurs when employees receive notice of termination.[9]

---

[1] CAL. GOV'T CODE §§ 12900-12996 (West 1992 & Supp. 1998).

[2] *See id.* § 12920 (West Supp. 1998). Legislation protecting employees from discrimination was proposed in California in 1945, but the legislation did not pass. *See* Marjorie Gelb & JoAnne Frankfurt, *California's Fair Employment and Housing Act: A Viable State Remedy for Employment Discrimination*, 34 HASTINGS L.J. 1055, 1057 (1983). The following year, Initiative Measure No. 11 introduced similar protective legislation, but the California voters did not pass the measure. *See id.* The California voters and Legislature continued to reject legislation advocating protection from employment discrimination until 1959 when the California Legislature enacted the Fair Employment Practices Act ("FEPA") in 1959. *See* Commodore Home Sys. v. Superior Court, 32 Cal. 3d 211, 213, 649 P.2d 912, 913 (1982) (en banc). The original statute prohibited employment discrimination on the basis of race, creed, color, national origin, or ancestry. *See* David Benjamin Oppenheimer & Margaret M. Baumgartner, *Employment Discrimination and Wrongful Discharge: Does the California Fair Employment and Housing Act Displace Common Law Remedies?*, 23 U.S.F. L. REV. 145, 153 (1989). In 1980, the California Legislature recodified and consolidated FEPA with the Rumford Fair Housing Act to form FEHA. *See id.* Today, FEHA makes it illegal for employers to refuse to hire, employ, train, or discharge employees on the basis of "race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex . . . ." *See* CAL. GOV'T CODE § 12940(a). Employers also may not discriminate in compensation or in terms and conditions of employment. *See id.*; Gelb & Frankfurt, *supra*, at 1059-60.

[3] *See* CAL. GOV'T CODE § 12921.

[4] *See id.* §§ 12920, 12940.

[5] *See id.* § 12901.

[6] *See id.* § 12930.

[7] *See id.* § 12960 (West 1992).

[8] *See* discussion *infra* Part I.C.1-2 (discussing split between California courts of appeal).

[9] *See* Regents of Univ. of Cal. v. Superior Court, 33 Cal. App. 4th 1710, 1713, 39 Cal.

The California Court of Appeal for the Second District, however, determined that the unlawful practice occurs at actual termination.[10] The California Supreme Court's ruling in *Romano v. Rockwell International* ("*Romano II*")[11] resolved the split between the appellate courts by holding that the statute of limitations begins to run when employees are actually terminated.[12]

This Note examines the California Supreme Court's decision in *Romano II.* Part I describes the legal background, including the relevant statute and the opposing courts of appeal opinions. Part II examines the supreme court's decision and accompanying rationale in *Romano II.* Part III analyzes the new decision's impact and discusses whether the decision comports with policy concerns. Finally, Part III concludes that although the court's decision properly furthered FEHA's antidiscriminatory objectives, its reasoning was gravely flawed. The result is an opinion that rejects settled federal authority, perpetuates ambiguity in the application of FEHA, and undermines the Department's role in limiting unnecessary litigation.

I. BACKGROUND

A. Limitations Statutes in FEHA and Their Purpose

Statutes of limitation serve an important judicial function by barring lawsuits that plaintiffs fail to file within the allocated time period.[13] By forcing plaintiffs to pursue fresh claims,[14] statutes of limitations promote stability and shield defendants from stale claims.[15]

Rptr. 2d 919, 919 (Ct. App. 1995).

[10] *See* Romano v. Rockwell Int'l, 46 Cal. Rptr. 2d 77, 82 (Ct. App. 1995).

[11] 14 Cal. 4th 479, 926 P.2d 1114 (1996).

[12] *See id.* at 501, 926 P.2d at 1123.

[13] *See* Teeters v. Currey, 518 S.W.2d 512, 515 (Tenn. 1974) (recognizing that statutes of limitations promote stability and avoid uncertainties associated with defending stale claims). The statutes promote justice because plaintiffs cannot surprise defendants by reviving a claim after the parties lose evidence, memories fade, and witnesses disappear. *See* Adams v. Paul, 11 Cal. 4th 583, 592, 904 P.2d 1205, 1211 (1995) (quoting Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 348-49 (1944)).

[14] *See* Jolly v. Eli Lilly & Co., 44 Cal. 3d 1103, 1117, 751 P.2d 923, 928 (1988).

[15] *See Teeters*, 518 S.W.2d at 515; *see also* Delaware State College v. Ricks, 449 U.S. 250, 256-57 (1980) (stating that limitations periods protect employers from defending old employment decisions).

Under FEHA, courts will dismiss plaintiffs' claim as time-barred if they file claims with the Department one year after the alleged unlawful practices occurred.[16] Moreover, plaintiffs who fail to timely file under FEHA may not refile lawsuits under other legal theories for the same unlawful conduct.[17] Therefore, FEHA's statute of limitations carries the strict penalty of completely barring plaintiffs from relief when they fail to timely file under FEHA.[18] Moreover, further evaluation of FEHA's overall statutory scheme reveals additional administrative considerations plaintiffs must examine before filing claims in California.

B. FEHA

By establishing freedom from job discrimination as a civil right, FEHA protects the right and opportunity of individuals to seek, obtain, and hold employment free from discrimination.[19] The California Legislature recognized that employment discrimination creates domestic strife, hinders the state's development, and adversely affects the public interest.[20] Accordingly, FEHA declares such discrimination against public policy[21] and an un-

---

[16] *See* Santos v. Todd Pac. Shipyards Corp., 585 F. Supp. 482, 483 (C.D. Cal. 1984) (stating that claim barred unless filed with Department within one year of unlawful practice).

[17] *See id.* at 486 (stating that summary judgment issued for failure to file timely complaint with Department functions as adjudication on merits for res judicata purposes). Under California law, res judicata bars subsequent lawsuits if the earlier proceeding created a final judgment on the merits, the claims were or might have been litigated and decided in the earlier proceeding, and the parties in the subsequent suit were parties or privies to the previous action. *See id.* at 484. For a description of other claims employees may bring at common law besides those provided by FEHA, see Oppenheimer & Baumgartner, *supra* note 2, at 148-52 (describing common-law claims of tortious discharge, breach of employment contract, and bad-faith discharge).

[18] *See supra* notes 20-21 and accompanying text (stating that plaintiffs who fail to file timely complaint with Department lose their right to refile claim or other claims arising out of same unlawful conduct).

[19] *See* CAL. GOV'T CODE §§ 12920-12921 (West Supp. 1998); *see also* Robinson v. Fair Employment & Hous. Comm'n, 2 Cal. 4th 226, 242, 825 P.2d 767, 776 (1992) (en banc) (stating that FEHA expresses legislative policy to protect and safeguard employees' right to "seek, obtain, and hold employment" free from discrimination); Usher v. American Airlines, Inc., 20 Cal. App. 4th 1520, 1524, 25 Cal. Rptr. 2d 335, 338 (Ct. App. 1993) (stating that legislature enacted FEHA to protect employees from employment discrimination).

[20] *See* CAL. GOV'T CODE § 12920.

[21] *See id.*

lawful employment practice.[22] Additionally, FEHA provides effective remedies to eliminate unlawful discriminatory practices.[23]

FEHA created the Department "[t]o receive, investigate, and conciliate complaints" that allege unlawful employment practices.[24] Persons who believe that they have claims against their employers must file complaints with the Department.[25] If the Department determines that a complaint is valid, it immediately tries to eliminate the unlawful employment practice through conference, conciliation, and persuasion.[26]

---

[22] *See id.* § 12940 (West Supp. 1998).

[23] *See id.* § 12970 (West Supp. 1998).

[24] *See id.* § 12930 (West Supp. 1998).

[25] *See id.* § 12960 (West 1992); *see also* Balloon v. Superior Court, 39 Cal. App. 4th 1116, 1124, 46 Cal. Rptr. 2d 161, 163 (Ct. App. 1995) (stating that FEHA plaintiff must timely file administrative complaint and exhaust administrative remedies before filing civil suit); Bennett v. Borden, Inc., 56 Cal. App. 3d 706, 709-10, 128 Cal. Rptr. 627, 628-29 (Ct. App. 1976) (granting summary judgment because FEPA supplied administrative remedy for employee's claim, which she failed to pursue). Before complaining employees can file actions in the courts, they must first exhaust the available administrative remedies. *See id.* at 709, 128 Cal. Rtpr. at 628. The California Court of Appeal acknowledged that FEPA provides a well-defined administrative remedy that employees must exhaust before filing civil actions with the court. *See id.* FEHA also requires the Department to promptly investigate complaints. *See* CAL. GOV'T CODE § 12963 (West 1992).

[26] *See* CAL. GOV'T CODE § 12963.7; Commodore Home Sys. v. Superior Court, 32 Cal. 3d 211, 213, 649 P.2d 912, 913 (1982) (stating that when Department decides claim is valid, it seeks to resolve claim through conference, conciliation, and persuasion). The Department holds these actions in confidence, and disclosure by a member of the Department is a misdemeanor. *See* CAL. GOV'T CODE § 12963.7(b). If elimination of the unlawful practice through conference, conciliation, or persuasion fails or seems inappropriate, the Department may issue an accusation (the administrative equivalent of a civil suit), which the Fair Employment and Housing Commission ("Commission") hears. *See* CAL. GOV'T CODE § 12965(a) (West Supp. 1998); *see also Commodore Home Sys.*, 32 Cal. 3d at 213, 649 P.2d at 913 (stating that Commission hears administrative actions). The Department acts as prosecutor and argues the aggrieved person's case before the Commission. *See* CAL. GOV'T CODE § 12969 (West 1992); *see also* Oppenheimer & Baumgartner, *supra* note 2, at 156 (noting that once Department issues accusation, it acts as employee's advocate). The Commission then determines whether an accused employer violated FEHA. *See Commodore Home Sys.*, 32 Cal. 3d at 213, 649 P.2d at 913. In the event of a violation, the Commission must issue an order compelling the violator to cease and desist the unlawful practice. *See id.* The remedies available to the Commission include ordering the employer to hire, reinstate, or upgrade employees with or without back pay, actual damages not exceeding $15,000 and administrative fines, and prospective relief. *See* CAL. GOV'T CODE § 12970. If the Department decides not to prosecute the case, the Department must issue a "right to sue" letter to the complainant. *See* CAL. GOV'T CODE § 12965(b) (West Supp. 1998); *Commodore Home Sys.*, 32 Cal. 3d at 213-14, 649 P.2d at 913. FEHA requires the Department to give the aggrieved person a "right to sue" letter if an accusation is not issued within 150 days after the filing of the complaint. *See* CAL. GOV'T

Pursuant to FEHA's requirements, aggrieved employees must notify the Department about discriminatory practices by filing administrative complaints with the Department[27] within one year of the alleged unlawful practices.[28] The California Court of Appeal for the Second District concluded that this provision constituted a statute of limitations.[29] In discriminatory termination cases, however, courts have not consistently determined the starting point for this statute of limitations.[30]

C. The Split Among the California Courts of Appeal

Prior to the *Romano II* decision, a split between the California district courts of appeal arose regarding the commencement of the statute of limitations.[31] The conflicting cases each involved a plaintiff employee who filed a complaint with the Department more than one year after notification of termination but within a year from the employee's last day of work.[32] The California Court of Appeal for the Fourth District, using notice as the

---

CODE § 12965(b). Only then may an employee sue in superior court under FEHA. *See Balloon*, 39 Cal. App. 4th at 1120, 46 Cal. Rptr. 2d at 163 (stating that FEHA plaintiff must file administrative complaint and exhaust administrative remedies before filing civil action); *Bennett*, 56 Cal. App. 3d at 708, 128 Cal. Rptr. at 628-29 (affirming grant of summary judgment in favor of employer because employee failed to exhaust administrative remedy available under FEPA).

[27] *See* CAL GOV'T CODE § 12960; *see also* Oppenheimer & Baumgartner, *supra* note 2, at 155 (discussing how employees who believe they are victims of discrimination may file complaint with Department).

[28] *See* CAL GOV'T CODE § 12960.

[29] *See* International Union of Operating Eng'rs v. Fair Employment Practice Comm'n, 276 Cal. App. 2d 504, 509-10, 81 Cal. Rptr. 47, 51 (1969) (determining that § 1422 of California's Labor Code, now § 12960 of Government Code, operates as statute of limitations). Therefore, the statute bars employees from seeking a remedy if they do not file a complaint with the Department within a year of the unlawful employment practice. *See supra* notes 20-21 and accompanying text (discussing how FEHA's statute of limitations bars untimely complaints).

[30] *See supra* text accompanying notes 9-10 (outlining how one court of appeal used termination notice to start statute of limitations while another used actual termination as starting point).

[31] *See* discussion *infra* Part I.C.1-2 (discussing split among California courts of appeal).

[32] *See* Romano v. Rockwell Int'l, Inc., 46 Cal. Rptr. 2d 77, 79-81 (Ct. App. 1995) (involving situation where employee received notice on December 6, 1988, left work on May 31, 1991, and filed complaint on December 9, 1991); Regents of Univ. of Cal. v. Superior Court, 33 Cal. App. 4th 1710, 1714, 39 Cal. Rptr. 2d 919, 920-21 (Ct. App. 1995) (involving situation where employee received notice in March 1992, left on June 30, 1993, and filed complaint with Department on July 12, 1993).

triggering date for the statute of limitations, found the complaint untimely, while the California Court of Appeal for the Second District, using the discharge date, allowed a similar complaint.

1. *Regents of University of California v. Superior Court*: Notice

In *Regents of University of California v. Superior Court*,[33] the California Court of Appeal for the Fourth District concluded that the statute of limitations for discriminatory termination cases starts when employees receive notice of termination.[34] In *Regents*, the plaintiff was a general surgery resident.[35] In March 1992, the chair of surgery informed the plaintiff that her performance was unsatisfactory[36] and required that she either repeat her third year or leave the program.[37] On June 30, 1993, the plaintiff left the residency program.[38] On July 12, 1993, she filed a claim with the Department alleging sexual harassment and sex discrimination.[39] The California Court of Appeal for the Fourth District dismissed all of the plaintiff's claims because more than one year had passed from the date she received notice.[40]

To reach its conclusion, the *Regents* court embraced federal precedent outlined in *Delaware State College v. Ricks*.[41] California

---

[33] 33 Cal. App. 4th at 1710, 39 Cal. Rptr. 2d at 919.

[34] *See id.* at 1716, 39 Cal. Rptr. 2d at 922-23.

[35] *See id.* at 1713, 39 Cal. Rptr. 2d at 920.

[36] *See id.*

[37] *See id.* at 1714, 39 Cal. Rptr. 2d at 920. The chair confirmed the conversation in an April 27, 1992 letter. *See id.* The letter gave the plaintiff the option of working in a laboratory for the next academic year, but advised her that she would have to repeat her third year if she wanted to continue the residency. *See id.* Rather than repeat her third year, the plaintiff worked in the laboratory. *See id.*

[38] *See id.*

[39] *See id.* The plaintiff filed suit in superior court on August 23, 1993. *See id.* The defendants filed a motion for summary judgment asserting that the plaintiff failed to file a complaint with the Department within the limitations period. *See id.* at 1715, 39 Cal. Rptr. 2d at 921. The trial court denied the defendant's motion. *See id.*

[40] *See id.* at 1723, 39 Cal. Rptr. 2d at 926.

[41] *See id.* at 1719, 39 Cal. Rptr. 2d at 922. The leading federal case interpreting the statutory language is *Delaware State College v. Ricks*, 449 U.S. 250 (1980). Here, the United States Supreme Court held that the statute of limitations begins to run when the employee receives notice. *See id.* at 259. Ricks was a member of the faculty at Delaware State College.

courts often use federal authority interpreting title VII of the 1964 Civil Rights Act to interpret analogous provisions of FEHA because the two statutes have identical antidiscriminatory objectives.[42] In *Delaware State College*, the United States Supreme Court reasoned that the timing of discriminatory acts is the proper focus for title VII claims rather than the time the consequences of such acts become the most painful to employees.[43] Consequently, the Court determined that alleged discriminatory acts occur when employees receive notice, even if they lose their positions at a later date.[44] Thus, the Court held that, under title VII, the statute of limitations starts when employees receive notice of adverse employment decisions.[45]

See id. at 252. In February 1973, the tenure committee denied Ricks tenure, but agreed to reconsider its decision the next year. *See id.* Again, in March 1974, the tenure committee denied Ricks tenure. *See id.* Ricks filed a grievance with the Educational Policy Committee. *See id.* On June 26, 1974, the tenure committee offered Ricks a one year "terminal" contract. *See id.* at 253. On April 28, 1975, the Equal Employment Opportunity Commission ("EEOC") accepted Ricks's complaint and two years later issued a "right to sue" letter. *See id.* at 254. On September 9, 1977, Ricks filed a lawsuit in district court alleging national origin discrimination under title VII and 42 U.S.C. § 1981. *See id.* at 254. On appeal, the Supreme Court noted that in order to determine the timeliness of Ricks's complaint, it must identify the unlawful employment practice giving rise to the claim. *See id.* at 257. The Court determined the unlawful practice was the denial of tenure. *See id.* at 258. The Court did not recognize the termination as an unlawful act because Ricks did not allege any discriminatory acts occurring after the denial of tenure. *See id.* at 257. The Court stated that the termination was "a delayed, but inevitable, consequence of the denial of tenure." *See id.* at 257-58. The Court reiterated a Ninth Circuit decision stating that the proper focus is upon the date of the discriminatory acts, not upon the time when the plaintiff suffers the most from the acts. *See id.* at 258 (quoting Abramson v. University of Haw., 594 F.2d 202, 209 (9th Cir. 1979)). Thus, the Court concluded that the limitations period began when Ricks received notice of the adverse tenure decision. *See Delaware State College*, 449 U.S. at 259.

[42] *See* Mixon v. Fair Employment & Hous. Comm'n., 192 Cal. App. 3d 1306, 1310-12, 37 Cal. Rptr. 884, 890 (Ct. App. 1987) (noting identical objectives of FEHA and title VII and how California courts rely on federal law to interpret analogous provisions); City of San Francisco v. Fair Employment & Hous. Comm'n, 191 Cal. App. 3d 976, 984, 236 Cal. Rptr. 716, 721-22 (Ct. App. 1987) (noting that disparate impact standards established by Commission are identical to federal standards under title VII).

[43] *See Delaware State College*, 449 U.S. at 258 (citing Abramson v. University of Haw., 594 F.2d 202, 209 (9th Cir. 1979)). The *Delaware State College* court uses the term "most painful" and does not explain what it means. *See id.* at 258. The implication is that, although employees feel the brunt of the discrimination when they no longer receive compensation from their employers, the discrimination truly occurs when employers give the employees notice. *See id.*

[44] *See id.*

[45] *See id.* at 259.

Following the United States Supreme Court's reasoning, the *Regents* court focused on the timing of the discriminatory act.[46] Subsequently, the *Regents* court held that the statute of limitations begins to run when plaintiffs receive notice of termination.[47] However, unlike the court in *Regents*, the California Court of Appeal for the Second District rejected the notice method and opted instead to use actual termination as the starting date.[48]

2. *Romano v. Rockwell International*: Actual Termination

In *Romano v. Rockwell International* ("*Romano I*"),[49] the California Court of Appeal for the Second District concluded that the date of actual termination triggers the statute of limitations.[50] On December 6, 1988, Romano's supervisor notified him that management had decided to fire him from his position as director of human resources.[51] In order to qualify for early retirement, Romano continued to work for Rockwell in a teaching fellowship through June 5, 1991.[52] On September 18, 1991, Romano filed a complaint with the Department.[53] On December 9, 1991, Romano filed a civil suit under FEHA alleging wrongful termination in violation of public policy and age discrimination.[54] Romano argued that his supervisor had fired him because of his age and for protesting illegal and unethical personnel decisions.[55] Overruling the lower court's dismissal of Romano's claim as time-barred, the court of appeal denied Rockwell's motion for summary judgment.[56]

---

[46] *See* Regents of Univ. of Cal. v. Superior Court, 33 Cal. App. 4th 1710, 1717, 39 Cal. Rptr. 2d 919, 922 (Ct. App. 1995).

[47] *See id.* at 1710, 39 Cal. Rptr. 2d at 919.

[48] *See* Romano v. Rockwell Int'l, 46 Cal. Rptr. 2d 77, 82 (Ct. App. 1995).

[49] *Id.* at 77.

[50] *See id.* at 82.

[51] *See id.* at 79. Romano understood that his employment would not terminate until he was eligible for early retirement. *See id.*

[52] *See id.* at 80. On June 5, 1991, Romano signed retirement forms and collected his final paycheck. *See id.* The Human Resources Director proposed that Romano agree to a teaching fellowship until he qualified for early retirement. *See id.*

[53] *See* Romano v. Rockwell Int'l, 14 Cal. 4th 479, 485, 926 P.2d 1114, 1117 (1996).

[54] *See Romano*, 46 Cal. Rptr. at 80.

[55] *See id.* at 78.

[56] *See id.* at 82-84. The trial court held that the statute of limitation began to run upon

Reasoning that notice of discharge may never in fact result in actual termination, the *Romano I* court held that the limitations period did not begin to run until actual termination.[57] In further support of its decision, the court explained that employers and employees could negotiate reinstatement between the notice date and the last day of employment.[58] Permitting negotiation, the court noted, conserves judicial resources by allowing employers and employees to avoid litigation.[59] The court stated that it did not want to encourage litigation that may chill the negotiation process.[60]

Additionally, the court wanted to avoid forcing employees to file lawsuits immediately after receiving termination notices because employees could risk losing the continued benefits of working.[61] Further, the court reasoned that the employees' last day provided a solid bright line as the trigger for the statute of limitations.[62] Unlike the *Regents* court, therefore, the *Romano I* court held that the statute of limitations does not begin to run until actual termination.[63] The split between the California courts of appeal remained until the California Supreme Court resolved the issue on appeal in *Romano II*.

II. THE CALIFORNIA SUPREME COURT RESOLVES THE SPLIT

In 1996, the California Supreme Court resolved the split among the lower courts when it reviewed the Court of Appeal for the Second District's *Romano I* decision in *Romano II*.[64] The

---

notice of termination and, therefore, granted summary judgment for defendant. *See id.* at 81.

[57] *See id.* at 82.

[58] *See id.* (stating that if appellant had filed his complaint at time of notice, respondent would not likely give him another chance at successful employment).

[59] *See id.* at 83.

[60] *See id.* at 82 (indicating intent to discourage litigation that exacerbates situation as opposed to waiting for final decision).

[61] *See id.* at 83 (stating that courts should not deem that employee waived statute of limitations by keeping job with good benefits rather than filing lawsuit at mention of possible termination).

[62] *See id.* (arguing that termination date is more certain than date of notification, which may be disguised).

[63] *See id.* at 84. The court distinguished *Regents* by stating that the resident there knew that termination was inevitable when she failed to repeat her third year. *See id.* However, unlike the resident in *Regents*, Romano did not receive and did not fail to meet a condition of keeping his employment. *See id.*

[64] *See* Romano v. Rockwell Int'l, 14 Cal. 4th 479, 503, 926 P.2d 1114, 1129 (1996) (af-

supreme court examined the rationale of the court of appeal in addition to providing its own analyses of the statute of limitations issue.[65] The supreme court then affirmed the court of appeal's finding that the statute of limitations does not begin to run until the date of actual termination.[66]

A. Facts and Holding

In *Romano II*, the supreme court began its opinion by listing the critical dates involved in the case.[67] Plaintiff Romano had worked for twenty-nine years as director of human resources for Rockwell's Digital Communications Division.[68] On December 6, 1988, Romano received notice of his termination.[69] In accordance with the options that Rockwell presented to him, Romano first agreed to work in a teaching fellowship until he became eligible for early retirement and then retire.[70] Romano worked in the fellowship for two years and retired on May 31, 1991.[71] Romano filed an administrative complaint with the Department on September 18, 1991, and on December 9, 1991, he filed a complaint in superior court.[72] The appellate court held that the statute did not begin to run until Romano's retirement on May 31, 1991, which made his administrative complaint timely.[73]

B. The California Supreme Court's Rationale

After highlighting the facts of the case, the California Supreme Court provided a number of reasons supporting the actual termination date as the proper trigger for the statute of

---

firming appellate court's decision); Romano v. Rockwell Int'l, 46 Cal. Rptr. 2d 77, 82 (Ct. App. 1995) (holding that statute of limitations begins to run from employee's actual termination).

[65] *See* discussion *infra* Part II.B (discussing California Supreme Court's rationale).

[66] *See Romano*, 14 Cal. 4th at 494, 926 P.2d at 1123; *see also supra* notes 54-59 and accompanying text (discussing facts of Romano's claim).

[67] *See Romano*, 14 Cal. 4th at 483-89, 926 P.2d at 1116-18 (discussing facts and procedural history of case).

[68] *See id.* at 484, 926 P.2d at 1116.

[69] *See id.*

[70] *See id.*

[71] *See id.* at 485, 926 P.2d at 1117.

[72] *See id.*

[73] *See id.* at 486, 926 P.2d at 1118.

limitations.[74] First, the court interpreted the statutory language of FEHA to determine which event activates the statute of limitations.[75] Second, the court analyzed whether using the actual termination date would impose hardships on employers.[76] Third, the court reasoned that the actual termination date serves as a bright-line trigger for the statute of limitations, preventing the filing of premature claims.[77] Finally, the court attempted to distinguish the facts and controlling law of Romano's case from analogous federal authority.[78]

First, the court examined the language, purpose, and plain meaning of FEHA to conclude that actual termination is the proper triggering event.[79] Specifically, the court noted that the language of section 12960 of the Government Code states that employees may not file complaints one year after the alleged unlawful practice occurred.[80] Consequently, the court focused on the definition of discharge.[81] Noting that the court will assign statutory language its plain meaning when no ambiguity exists,[82] the court reasoned that, in the employment context, the common interpretation of the term "discharge" is to terminate employment.[83] Given the standard definition of discharge, the court concluded that the statute of limitations must begin to run from the date of actual termination.[84]

Second, the court examined whether its interpretation of "actual termination" would impose new burdens on employers.[85] The court noted that both the notice and discharge dates are exclusively within employers' control.[86] Employers can,

---

[74] *See id.* at 491-500, 926 P.2d at 1122-27 (discussing court's rationale for concluding that statute of limitations starts on actual termination date).

[75] *See id.* at 492-94, 926 P.2d at 1122-23 (concluding that termination date triggers running of statute of limitations).

[76] *See id.* at 494, 926 P.2d at 1123.

[77] *See id.*

[78] *See id.* at 496-99, 926 P.2d at 1124-26.

[79] *See id.* at 493, 926 P.2d at 1122.

[80] *See id.*

[81] *See id.*

[82] *See id.*

[83] *See id.* (citing BLACK'S LAW DICTIONARY 463 (6th ed. 1990)).

[84] *See id.*

[85] *See id.* at 494, 926 P.2d at 1123.

[86] *See id.* The court stated that forcing employers to defend stale claims is not unduly burdensome. *See id.* Thus, the new rule would not force employers to defend stale claims

therefore, weigh the daily cost of documenting and retaining evidence against creating a large interim between the two dates.[87] If employers do not want to bear the expense of retaining evidence for a longer period of time, they should discharge their employees soon after giving notice.[88]

Additionally, the court stated that the new rule would not discourage employers from giving employees advance notice and other severance benefits.[89] Rather, employers who wish to exchange benefits for exoneration could still obtain a liability release from their employees.[90] The court concluded that any new burden imposed on employers remained within the employers' control.[91] Thus, rather than imposing a new burden on employers, the court's new decision allowed employers to choose whether or not to bear the potential burdens.[92]

The court's third rational stated that the actual termination date provides the benefit of simplicity.[93] The court noted that the termination notice, especially when oral, is often ambiguous.[94] This ambiguity may give rise to disputes about the exact notice date, creating unnecessary conflicts for employees.[95] Conversely, the court stated that parties rarely dispute the date of actual termination.[96] Thus, by using the actual termination

---

because the period between notice and discharge is usually short. *See id.*

[87] *See id.* at 493, 926 P.2d at 1123.

[88] *See id.* (stating that employer may decide whether long period between notification and termination is economically worthwhile in light of burden of documenting and defending claim that might ensue at deferred termination date).

[89] *See id.* at 500, 926 P.2d at 1127. Some of the humanitarian benefits employers may discontinue to offer discharged employees include (1) discussions about what documents and details employers will keep in employees' personnel records, (2) allowing employees to continue to work for a specified period until they find new jobs, and (3) providing access to company resources, such as an office, phone, typewriters, copiers, and research materials to prepare resumes and search for new jobs. *See* Peggy Sneden, *Preserve Goodwill to Avoid Litigation*, GRAND RAPIDS BUS. J., Sept. 6, 1988, at B4.

[90] *See* Romano v. Rockwell Int'l, Inc., 14 Cal. 4th 479, 501, 926 P.2d 1114, 1127 (1996) (stating that express waiver by employee waiving any potential claims is sufficient).

[91] *See id.* at 500, 926 P.2d at 1127.

[92] *See id.* at 494, 926 P.2d at 1123 (discussing court's rationale as to why decision will not impose new burdens on employers).

[93] *See id.*

[94] *See id.*

[95] *See id.*

[96] *See id.*

date, the court sought to avoid unnecessary and time-consuming disputes.[97]

The court further decided against using the termination notification date to avoid premature and potentially destructive claims.[98] Under the notice rule, the limitations period starts running from the date employees receive notice of termination.[99] The court explained that a notice rule may require employees to file with the Department while they are still working for employers.[100] Forcing employees to seek redress before their claims ripen effectively chills conciliation efforts between employers and employees.[101] The court also observed that a notice rule results in the Department's unnecessary involvement in investigations that employers and employees may resolve through informal conciliation.[102] The court chose the date of actual termination to avoid the problems associated with using the notification date.[103]

Finally, the court departed from federal authority in concluding that the statute of limitations runs from employees' actual termination.[104] The court stated that federal decisions which interpret title VII,[105] but not FEHA,[106] do not bind the court.[107] The court distinguished the relevant federal authority, *Delaware State College,* from *Romano II* on two grounds.[108] First, the court compared the facts of the cases and noted that *Delaware State College* involved an academic setting while *Romano II* involved a more traditional employment context.[109] The court

---

[97] *See id.*

[98] *See id.*

[99] *See* Regents of Univ. of Cal. v. Superior Court, 33 Cal. App. 4th 1710, 1710, 39 Cal. Rptr. 2d 919, 919 (Ct. App. 1995).

[100] *See Romano,* 14 Cal. 4th at 494, 926 P.2d at 1123.

[101] *See id.* at 494-95, 926 P.2d at 1123.

[102] *See id.* Additionally, if the Department does not pursue the claims, the trial courts bear the burden of deciding the premature discriminatory civil actions. *See id.*

[103] *See id.* at 495, 926 P.2d at 1124.

[104] *See id.* at 495-99, 926 P.2d at 1124-26.

[105] *See id.*

[106] *See id.* The court discussed how other state courts did not follow federal authority, noting how the Montana Supreme Court concluded that a statute similar to FEHA runs from actual termination. *See id.* at 495, 926 P.2d at 1123.

[107] *See id.* at 497, 926 P.2d at 1125 (stating that federal case law was not binding in present case).

[108] *See id.* at 495-99, 926 P.2d at 1124-26.

[109] *See id.* at 497, 926 P.2d at 1125. *Delaware State College* involved the denial of tenure to

reasoned that the notification of termination is not comparable to a denial of tenure because notice of termination, unlike denial of tenure, does not inevitably result in actual termination.[110] Second, the court stated that FEHA defines discharge as a discriminatory practice, distinguishing it from the federal law's focus on the decision to discriminate.[111] Thus, the court chose not to follow federal authority by distinguishing Romano's claim.[112]

To support the court's choice to disregard federal law, the court highlighted how other states have also disregarded federal precedent.[113] Specifically, the court noted that the Montana Supreme Court, in a case factually similar to *Romano II*, defined actual termination as a "complete severance of the relationship between employer and employee."[114] Although the court provided a number of compelling reasons for deciding that the limitations period begins on the date of actual termination,[115] a thorough analysis of the decision reveals flaws in its rationale.[116]

III. AN ANALYSIS OF THE SUPREME COURT'S DECISION

Romano II resolves an important split among the California courts of appeal.[117] The conflicting lower court rules created different results under the two methods of triggering the statute of limitations.[118] Thus, plaintiffs faced considerable uncertainty

---

a professor that eventually led to termination. *See* Delaware State College v. Ricks, 449 U.S. 250, 252-54 (1980). By contrast, *Romano* involved an employer firing an employee. *See Romano*, 14 Cal. 4th at 484-85, 926 P.2d at 1116-17.

[110] *See Romano*, 14 Cal. 4th at 497, 926 P.2d at 1125.

[111] *See id.*

[112] *See id.*

[113] *See id.* at 495-99, 926 P.2d at 1123-26.

[114] *See id.* at 495, 926 P.2d at 1123 (citing Allison v. Jumping Horse Ranch, Inc., 843 P.2d 1153 (Mont. 1992)).

[115] *See Romano*, 14 Cal. 4th at 493-500, 926 P.2d at 1122-27 (discussing California Supreme Court's rationale).

[116] *See* discussion *infra* Part III.B-D (attacking soundness of court's rationale).

[117] *See Romano*, 14 Cal. 4th at 494-95, 926 P.2d at 1123.

[118] *Compare* Romano v. Rockwell Int'l, Inc., 46 Cal. Rptr. 2d 77, 82 (Ct. App. 1995) (holding that statute of limitations runs from employee's actual discharge), *with* Regents of Univ. of Cal. v. Superior Court, 33 Cal. App. 4th 1710, 1710, 39 Cal. Rptr. 2d 919, 919 (Ct. App. 1995) (holding that statute of limitations begins to run when employee receives termination notice).

as to the timeliness of their potential claims under FEHA.[119] The California Supreme Court's decision in *Romano II* unifies the interpretation of the statute of limitations for FEHA termination claims filed with the Department.[120]

The California Supreme Court's decision to commence the statute of limitations upon employees' actual termination honors FEHA's purpose of protecting employees from discrimination. However, the court's arguments detract from the seemingly well-reasoned outcome in three ways. First, the opinion undermines the Department's role as an informal mechanism for resolving discrimination conflicts among employers and employees. Second, the court failed to clarify the ambiguity surrounding the language of FEHA's statute of limitations. Finally, the court improperly deviated from the tradition of construing FEHA in accordance with analogous federal interpretations under title VII.

A. The Decision Comports with FEHA's Purpose of Protecting Employees

In deciding that actual termination triggers the statute of limitations, the court correctly adhered to FEHA's policy of protecting employees from discrimination.[121] The court followed this policy by giving the term "discharge" the construction of an "unlawful employment practice"[122] that requires the use

---

[119] *See* Craig Summerfield, *Color as a Trademark and the Mere Color Rule: The Circuit Split for Color Alone* 68 CHI.-KENT L. REV. 973, 980 (1993) (noting problems created by circuit splits, including forum shopping and uncertainty of rights).

[120] *Cf.* Treber v. Superior Court, 68 Cal. 2d 128, 130, 436 P.2d 330, 332 (1968) (stating that court realized importance of speedy and authoritative construction of § 657 of Code of Civil Procedure to avoid splits).

[121] *See* CAL. GOV'T CODE §§ 12920, 12921 (West 1992). FEHA mandates liberal interpretation of its terms to accomplish its stated purpose of protecting employees from discrimination. *See id.* § 12993(a) (West Supp. 1998); *see also* Robinson v. Fair Employment & Hous. Comm'n, 2 Cal. 4th 226, 240, 825 P.2d 767, 776 (1992) (en banc) (stating that courts must construe FEHA broadly since it expresses legislative policy to protect and safeguard right of employee to enjoy employment free from discrimination). A policy of liberal construction is particularly important when, like FEHA, the statute expects lay persons to initiate the complaint. *See* Love v. Pullman Co., 404 U.S. 522, 527 (1972) (stating that statutory schemes initiated by laymen should remain free of unnecessary procedural technicalities); Flaherty v. Itek Corp., 500 F. Supp. 309, 311 (D. Mass. 1980) (stating that liberal construction applies when law expects untrained persons to initiate statutory processes).

[122] *See* Romano v. Rockwell Int'l, 14 Cal. 4th 479, 493-94, 926 P.2d 1114, 1122 (1996)

of the actual termination date.[123] Most employees become aware of and begin to seek remedies for discriminatory termination only after their discharge.[124] Therefore, to ensure redress is available, the limitations period should run from the time most employees actually become aware of their rights.[125] Further, adherence to FEHA's purpose prompts courts to avoid creating conditions that penalize employees and reward employers' ambiguous conduct.[126] By adopting a definition that affords employees the most time to seek relief, the court further effects FEHA's purpose.[127] Thus, the supreme court's decision in *Romano II*, which starts the limitations statute from the actual termination date, furthers FEHA's statutory mandate of liberal statutory construction favoring employees.[128]

B. Actual Termination Does Not Eliminate Uncertainty

Although the *Romano II* decision achieves the policy objectives of protecting employees from discrimination, designating the date of actual termination is not as exact a bright line as it appears. The court stated that the date of actual termination is subject to little dispute.[129] According to the court, although

---

(indicating California Supreme Court's intent to construe statutory language liberally to safeguard employees from employment discrimination).

[123] *See id.*

[124] *See* Ross v. Stouffer Hotel Co., 879 P.2d 1037, 1045 (Haw. 1994) (holding that statute of limitations runs from date of actual termination); *see also Romano*, 14 Cal. 4th at 493-94, 926 P.2d at 1122-23 (advocating starting statute of limitations when employees become aware of their rights).

[125] *See Ross*, 879 P.2d at 1045 (stating that if time for filing administrative complaint commences before employees become aware of their rights, employees would have little time to invoke statutory protections).

[126] *See Flaherty*, 500 F. Supp. at 311 (refusing to interpret statute of limitations under Age Discrimination in Employment Act as running from date of notice and expressing concern about rewarding employer's ambiguous conduct).

[127] *See Ross*, 879 P.2d at 1045 (stating that if statute of limitations begins to run before most employees become aware of their legal remedies, it is unlikely that employees would have time left to invoke statutory protections).

[128] *See supra* text accompanying notes 121-27 (discussing California Supreme Court's decision to obey FEHA's mandate favoring employees).

[129] *See* Romano v. Rockwell Int'l, Inc., 14 Cal. 4th 479, 494-95, 926 P.2d 1114, 1123 (1996) (distinguishing date of actual termination from notice of termination).

notice of termination may be ambiguous and subject to dispute, the actual termination date provides a more definitive bright line.[130]

In support of its decision to use actual termination, the court recognized that other states have reached the same decision.[131] In particular, the court highlighted Montana's interpretation of actual termination as a "complete severance of the relationship of the employer and the employee."[132] However, the court never provided its own definition of actual termination.[133]

The "complete severance of the employment relationship" language, as a valid definition for actual termination, creates ambiguity. Assessing exactly when employers and employees completely sever their relationship is often difficult.[134] By failing to address either when actual termination occurs or when the parties completely sever their relationship, the *Romano II* court injected new ambiguities into FEHA.[135] Thus, the lower courts bear the burden of deciding when employment relationships actually terminate.[136] By not specifically defining

---

[130] *See id.* (stating that, unlike date of termination notice, parties rarely dispute date of actual termination); *Ross*, 879 P.2d at 1045 (noting that actual termination rule removes doubt about when filing period begins and avoids litigation regarding precise date and adequacy of termination notice); *see also* Moses v. Falstaff Brewing Corp., 525 F.2d 92, 94 (8th Cir. 1975) (stating that date of official termination is easier to ascertain than oral discharge notice).

[131] *See Romano*, 14 Cal. 4th at 495, 926 P.2d at 1123-24 (citing Allison v. Jumping Horse Ranch, Inc., 843 P.2d 753, 754-55 (Mont. 1992)).

[132] *See id.*

[133] *See id.* at 494-95, 926 P.2d at 1121-25 (referring to actual termination several times throughout opinion, but never providing definition for term).

[134] *See, e.g.*, Payne v. Crane Co., 560 F.2d 198, 199 (5th Cir. 1977) (per curiam) (describing how plaintiff relied on date of his last salary check, not date of notice, for severance date); *Moses*, 525 F.2d at 93 (illustrating how employee extended termination date two weeks through use of vacation days); Flaherty v. Itek Corp., 500 F. Supp. 309, 310-11 (D. Mass. 1980) (describing dispute over severance date when employer used effective termination date and employee stopped work before effective date). Montana had already decided that vacation days and pay checks do not extend the employment relationship. *See* Redfern v. Montana Muffler, 896 P.2d 455, 457 (Mont. 1995).

[135] *See* Aetna Casualty & Sur. Co. v. Brethren Mut. Ins. Co., 379 A.2d 1234, 1239 (Md. Ct. Spec. App. 1977) (concluding that failure of insurance policy to define "farming" creates ambiguity); *see also* Alexandra Sowell, *Covenants Not to Compete: A Review of the Governing Standards of Enforceability After* DeSantis v. Wackenhut Corp. *and the Legislative Amendments to the Texas Business and Commerce Code*, 45 SW. L.J. 1009, 1045 n.271 (1991) (stating that court's failure to define "common calling" in *DeSantes v. Wackenhut Corp.*, 793 S.W.2d 670, 682 (Tex. 1990), will likely plague practitioners and breed litigation).

[136] *See* Marc I. Steinberg, *Notes as Securities:* Reves *and Its Implications*, 51 OHIO ST. L.J.

"actual termination," the court failed to eliminate the ambiguity surrounding the starting point of the statute of limitations.[137]

C. The Court's Reasons for Avoiding Federal Authority Are Erroneous

The *Romano II* court's decision deviates from the traditional approach of following federal authority.[138] The court rightfully and clearly indicated that federal authority was not binding.[139] However, the court admitted that California courts traditionally rely on federal interpretations of title VII to construe analogous provisions of FEHA.[140] The statute of limitations language under FEHA is almost identical to that found in title VII.[141] Thus,

---

675, 675 (1990) (acknowledging that Supreme Court's decision in *Reves v. Ernst & Young*, 494 U.S. 56 (1990), helped resolve ambiguity in area where lower federal courts were strongly divided); *cf.* Janice Kemp, *The Continuing Appeal of Punitive Damages: An Analysis of Constitutional and Other Challenges to Punitive Damages, Post-*Haslip *and* Moriel, 26 TEX. TECH L. REV. 1, 63 (1995) (quoting Lunsford v. Morris, 746 S.W.2d 471, 475 (Tex. 1988) (Gonzales, J., dissenting)) (discussing court's failure to provide definition of "net worth" and resulting lower court confusion over its components).

[137] *See supra* text accompanying notes 135-36 (describing how court's failure to define actual termination creates ambiguity).

[138] *See* Mixon v. Fair Employment & Hous. Comm'n., 192 Cal. App. 3d 1306, 1316, 237 Cal. Rptr. 884, 890 (Ct. App. 1987) (noting identical objectives of FEHA and title VII and how California courts rely on federal law to interpret analogous provisions); City of San Francisco v. Fair Employment & Hous. Comm'n, 191 Cal. App. 3d 976, 985, 236 Cal. Rptr. 716, 721-22 (Ct. App. 1987) (noting that disparate impact standards established by Commission are identical to federal standards under title VII); *see also* Flait v. North Am. Watch Corp., 3 Cal. App. 4th 467, 475, 4 Cal. Rptr. 2d 522, 528 (Ct. App. 1992) (noting how California courts evaluate retaliatory employment termination claims in violation of FEHA under federal law interpreting title VII cases). *But see* Johnson Controls, Inc. v. Fair Employment & Hous. Comm'n, 218 Cal. App. 3d 517, 539, 267 Cal. Rptr. 158, 170 (Ct. App. 1990) (stating that no statute or case law requires Commission to construe FEHA in accordance with federal title VII precedent); Fisher v. San Pedro Peninsula Hosp., 214 Cal. App. 3d 590, 605, 262 Cal. Rptr. 842, 850 (Ct. App. 1989) (noting that where title VII precedent conflicts with essential purpose of FEHA, Commission does not rely on it).

[139] *See* Romano v. Rockwell Int'l, 14 Cal. 4th 479, 496, 926 P.2d 1114, 1125 (1996) (stating that federal title VII cases do not bind California Supreme Court because title VII is federal statutory scheme whereas FEHA is state statute); *Johnson Controls*, 218 Cal. App. 3d at 539, 267 Cal. Rptr. at 170 (stating that there is no statutory or case law requiring courts to follow federal title VII precedent).

[140] *See Romano*, 14 Cal. 4th at 496, 926 P.2d at 1125.

[141] *Compare* 42 U.S.C. § 2000e-5(e) (1994) (requiring aggrieved persons to file complaint with EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred"), *with* CAL. GOV'T CODE § 12960 (West 1992) (stating that no complaint may be filed after expiration of "one year from the date upon which the

California's tradition should have prompted the *Romano II* court to follow federal authority.[142] Instead, the California Supreme Court chose to abandon the tradition of deferring to federal authority, citing superficial distinctions between *Romano II* and federal precedent.[143]

The court's primary distinction of *Delaware State College* from *Romano II* is unconvincing.[144] The court attempted to distinguish title VII from FEHA by stating that title VII focuses on the decision to discriminate while FEHA defines discharge as a discriminatory practice.[145] This distinction is erroneous for two reasons. First, like FEHA, title VII's statute of limitations focuses on unlawful employment practices.[146] Second, section 703 of

---

alleged unlawful practice or refusal to cooperate occurred"). For an excellent comparison of title VII and FEHA regarding the substantive coverage, procedures, and available remedies under each statute, see generally Gelb & Frankfurt, *supra* note 2.

[142] *See Mixon*, 192 Cal. App. 3d at 1316-17, 237 Cal. Rptr. at 890 (noting identical objectives of FEHA and title VII and how California courts rely on federal law to interpret analogous provisions); *City of San Francisco*, 191 Cal. App. 3d at 985-86, 236 Cal. Rptr. at 721-22 (noting that disparate impact standards established by Commission are identical to federal standards under title VII); KIRBY WILCOX ET AL., CALIFORNIA EMPLOYMENT LAW § 40.10[1] (1997) (stating that California courts often rely on federal title VII authority to interpret analogous FEHA provisions).

[143] *See* discussion *infra* notes 158-65, 161-62 and accompanying text (discussing and critiquing California Supreme Court's reasons for avoiding analogous federal authority).

[144] The California Supreme Court also distinguished *Delaware State College* from *Romano* on the facts. *See Romano*, 14 Cal. 4th at 496, 926 P.2d at 1125. The court stated that *Delaware State College* involved the denial of tenure and not a termination. *See id.* In *Delaware State College*, the United States Supreme Court reasoned that since termination is the inevitable result of a denial of tenure, the statute of limitations commenced when the employee received the adverse tenure decision. *See* Delaware State College v. Ricks, 449 U.S. 250, 257-58 (1980). Distinguishing *Delaware State College*, the California Supreme Court in *Romano* stated that, unlike the denial of tenure, a termination notice does not inevitably result in termination. *See Romano*, 14 Cal. 4th at 496, 926 P.2d at 1125. However, when Romano received notice of termination, he knew that his employment would terminate once he qualified for early retirement. *See id.* at 484, 926 P.2d at 1116. The court further noted that Romano understood that the only other option his employer offered was immediate termination. *See id.* Thus, Romano effectively acknowledged that his termination notice would in fact inevitably result in termination. *See id.* Therefore, the court's attempt to distinguish *Delaware State College* on the basis that Romano's termination notice might not have resulted in termination is factually inaccurate. *See id.*

[145] *See Romano*, 14 Cal. 4th at 496, 926 P.2d at 1125.

[146] *See* 42 U.S.C. § 2000e-5(e) (1994) (requiring aggrieved persons to file complaint with EEOC "within one hundred and eighty days after the *alleged unlawful employment practice* occurred") (emphasis added); CAL. GOV'T CODE § 12960 (stating that no complaint may be filed after expiration of "one year from the date upon which the *alleged unlawful practice or refusal to cooperate occurred*") (emphasis added); *see also Delaware State College*, 449

title VII similarly defines "discharge" as an unlawful employment practice.[147] Contrary to the court's interpretation, title VII and FEHA are in fact aligned in the pursuit of ending discriminatory employment practices. The court, thus, distinguished *Romano II* from federal authority on arguably erroneous grounds and failed to adequately justify the abandonment of federal authority.[148] Without providing a legitimate reason to avoid federal authority, the *Romano II* decision unnecessarily departs from the deference traditionally paid to analogous federal authority under title VII.[149]

D. The Decision Conflicts with the Department's Function to Provide an Alternative to Litigation

The final flaw with the *Romano II* court's decision is that it conflicts with the apparent purpose behind creating the Department. The language of section 12930 of the Government Code clearly states that the duty of the Department is to receive, investigate, and conciliate employment discrimination complaints.[150] "Conciliate" means to settle a dispute in a friendly, unantagonistic manner with a view towards avoiding trial.[151] FEHA created the Fair Employment and Housing Commission

---

U.S. at 257 (stating that timeliness of complaint requires determination of when "unlawful employment practice" occurs).

[147] *See* 42 U.S.C. § 2000e-2(a)(1) (1994) (listing discharge of individual because of race, color, religion, sex, or national origin as unlawful practice).

[148] *Cf.* Fisher v. San Pedro Peninsula Hosp., 214 Cal. App. 3d 590, 605, 262 Cal. Rptr. 842, 850 (Ct. App. 1989) (noting that where title VII precedent conflicts with essential purpose of FEHA, Commission does not rely on it); City of San Francisco v. Fair Employment & Hous. Comm'n, 191 Cal. App. 3d 590, 605, 236 Cal. Rptr. 716, 721-22 (Ct. App. 1987) (noting identical "overriding public policy purposes" and "anti-discriminatory objectives" of title VII and FEHA); Mixon v. Fair Employment & Hous. Comm'n, 192 Cal. App. 3d 1306, 1316, 237 Cal. Rptr. 884, 890 (Ct. App. 1987) (exemplifying situation where both parties in action did not dispute applicability of federal precedent).

[149] *Compare Delaware State College*, 449 U.S. at 258-60 (holding that statute of limitations under title VII runs from date employee receives notice), *and Mixon*, 192 Cal. App. 3d at 1316, 237 Cal. Rptr. at 890 (noting identical objectives of FEHA and title VII and that California courts rely on federal law to interpret similar provisions), *with Romano*, 14 Cal. 4th at 494, 926 P.2d at 1123 (holding that statute of limitations runs from date of actual termination).

[150] *See* CAL. GOV'T CODE § 12930 (West Supp. 1998). The Department strives to reach an informal resolution to employment problems. *See* Gelb & Frankfurt, *supra* note 2, at 1061-62.

[151] *See* BLACK'S LAW DICTIONARY 289 (6th ed. 1990).

("Commission") to further this mandate.[152] Section 12935 of the Government Code states that the Commission's duty is to hold administrative hearings for employment discrimination complaints.[153] Through its creation of these administrative procedures to facilitate conciliation of disputes, the California Legislature expressly provided for resolution of employment discrimination complaints without litigation.[154] The court's reasoning, however, conflicts with the legislature's intent to create the Department as an alternative to litigation.[155]

The court's rationale for rejecting notice undermines the intended informal resolution directive of the Department.[156] The court rejected the notice rule because it results in the premature filing of claims and draws the Department into investigations that employers and employees might have avoided through informal conciliation.[157] In so holding, the court implied that the Department should not be involved in informal conciliation efforts between employers and employees.[158] The statute, however, clearly defines the Department's role as eliminating employment discrimination through conciliation.[159] Thus, the court's rationale for rejecting notice in favor of actual termination as the trigger for the statute of limitations directly undermines the intended purpose of the Department.[160] The deci-

---

[152] *See* CAL. GOV'T CODE § 12935 (West Supp. 1998) (granting Commission authority to implement FEHA).

[153] *See id.*; *see also* Commodore Home Sys., Inc. v. Superior Court, 32 Cal. 3d 211, 213, 649 P.2d 912, 913 (1982) (stating that Department may issue action, which is heard by Commission, to determine whether employer violated FEHA).

[154] *See* Garry G. Mathiason, *Evaluating and Using Employer-Initiated Arbitration Policies and Agreements: Preparing the Workplace for the Twenty-First Century*, CA35 ALI-ABA 793, 807 (1996) (stating that through creation of Department, California Legislature declared preference for resolving discrimination claims without litigation).

[155] *See* CAL. GOV'T CODE § 12930 (explaining intended informal resolution purpose of Department).

[156] *See id.* (noting duty of Department to obtain, investigate, and conciliate claims).

[157] *See* Romano v. Rockwell Int'l, 14 Cal. 4th 479, 494, 926 P.2d 1114, 1123 (1996) (noting that notification of termination requires filing while employee is still employed and reduces chances of conciliation).

[158] *See id.* (holding that statute of limitations commences on actual date of termination after harm occurred).

[159] *See* CAL. GOV'T CODE § 12930(f); *see also supra* text accompanying notes 150-54 (discussing FEHA's intended purpose of Department as conciliation mechanism between employers and employees).

[160] *See Romano*, 14 Cal. 4th at 494, 926 P.2d at 1123. Moreover, the court contradicts

sion not only conflicts with the intended role of the Department, but also impacts how plaintiffs will use FEHA's administrative remedies in the future.

E. Future Impact of the Decision

The new decision will likely impact future enforcement of FEHA. Specifically, plaintiffs will be inclined to bypass the Department's informal conciliatory mechanism, pushing the responsibility of enforcing FEHA onto the courts.[161] Thus, the

---

itself when it rationalizes that the new rule will not impose additional burdens on employers. *See id.* In the construction argument, the court implied that employees deserve special protection because they are legally unsophisticated. *See id.* at 495, 926 P.2d at 1122-23. The court noted that employees are not generally aware of their legal remedies until after discharge. *See id.* at 495, 926 P.2d at 1123. The court also maintained that the statute should be liberally construed in favor of employees. *See id.* at 494, 926 P.2d at 1122. Both of these statements imply that because employees generally are legally unsophisticated they deserve protection. *See id.* at 495, 926 P.2d at 1122-23; *see also* Flaherty v. Itek Corp., 500 F. Supp. 309, 311 (D. Mass. 1980) (stating that liberal construction particularly applies when law expects untrained persons to initiate statutory processes). The court also explained that employers are not discouraged from extending additional benefits to employees because employers can always exchange benefits for a covenant not to sue. *See Romano*, 14 Cal. 4th at 500, 926 P.2d at 1127. Yet, the court stated it did not want to involve the Department in employment disputes that employers and employees may resolve through conciliation. *See id.* at 494, 926 P.2d at 1123. Here, the court implied that employees can negotiate a release for benefits without the aid of the Department. *See id.* at 500, 926 P.2d at 1127. An inherent contradiction exists in *Romano II* because the court implied that employees are unsophisticated and deserve protection, yet the court later suggested that employees are sophisticated enough to negotiate a release in exchange for benefits without the Department's aid. *Compare id.* at 494, 926 P.2d at 1123 (implying that Department should not be involved in early negotiations between employer and employee), *with id.* at 500, 926 P.2d at 1127 (implying that employees can negotiate release in exchange for benefits without Department's aid). Thus, the court's opinions regarding the sophistication of employees were at odds. Therefore, the court relied on conflicting notions regarding the sophistication of employees to rationalize its decision, which in turn discredit the court's reasoning. *See id.*

[161] The California Supreme Court's decision will also effectively revive claims previously barred under a notice standard. *Cf.* Gutowsky v. County of Placer, 108 F.3d 256, 261 (9th Cir. 1997) (reversing summary judgment in favor of employee by finding that limitation period for 42 U.S.C. § 1983 claim did not run until employee's last day). The *Romano II* court rejected notice and held that the statute of limitations does not begin to run until the date of actual termination. *See Romano*, 14 Cal. 4th at 503, 926 P.2d at 1123. Before the decision, employees who did not file a complaint with the Department within one year of receiving a termination notice thought they were barred under a notice standard. *See, e.g.*, Regents of Univ. of Cal. v. Superior Court, 33 Cal. App. 4th 1710, 1710-11, 39 Cal. Rptr. 2d 919, 926 (Ct. App. 1995) (granting summary judgment in favor of employer because employee failed to file complaint within one year of termination notice). Now, complaints

new decision will undercut the Department's role in resolving employment discrimination disputes and increase participation by the courts. The new decision also prompts employees to avoid filing a complaint with the Department until after their discharge.[162] Under the statute, plaintiffs potentially may wait a year before they file a complaint,[163] at which time the possibility of reinstatement is marginal at best.[164] The amount of time that passes between the discharge and the reinstatement offer is an important factor affecting employees' willingness to accept reinstatement.[165] Once the likelihood of reinstatement disappears, plaintiffs tend to seek the larger monetary damages available in civil suits.[166]

---

are timely if employees file them within one year from the date of discharge. *See* CAL. GOV'T CODE § 12960 (West 1992) (codifying one year limitation from date alleged unlawful action occurred and granting 90-day extension in special circumstances). Thus, the new ruling has the effect of reviving claims that were once thought invalid. The California Supreme Court decision will also force the lower courts to develop firm definitions of "actual termination." The court's use of the term, and reference to Montana's complete severance of the employment relationship language, creates ambiguities. *See* discussion *supra* Part III.B. (describing how court's use of "actual termination" creates ambiguity). One court may define actual termination as the employee's last day of work. *See* Payne v. Crane Co., 560 F.2d 198, 199 (5th Cir. 1977) (holding that discharge occurs at latest as of date employee's services are no longer accepted). Yet, another court may use the effective termination date listed in the employee's personnel file, rather than the employee's last day. *See Flaherty*, 500 F. Supp. at 311 (holding that employee was justified in assuming that relevant termination date was effective termination date). Because the new triggering date carries some ambiguity, the lower courts are charged with resolving the ambiguities. *Cf.* Kemp, *supra* note 136, at 63 (quoting Lunsford v. Morris, 746 S.W.2d 471, 475 (Tex. 1988) (Gonzales, J., dissenting)) (implying that courts' failure to provide bench and bar with definition of "net worth" results in confusion as lower court judges struggle to ascertain components of "net worth").

[162] *See Romano*, 14 Cal. 4th at 485-86, 926 P.2d at 1122-23; Ross v. Stouffer Hotel Co., 879 P.2d 1037, 1045 (Haw. 1994) (holding that plaintiff timely filed complaint with Department of Labor and Industrial Relations).

[163] *See* CAL. GOV'T CODE § 12960 (stating that no complaint may be filed after expiration of one year from date of alleged unlawful employment practice).

[164] *See* Martha West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. ILL. L. REV. 1, 29-31 (discussing weaknesses in reinstatement as remedy for employment discrimination).

[165] *See id.* at 30. A 1971-1972 study found that 93% of employees offered reinstatement within two weeks of discharge accepted, while only five percent accepted offers extended after six months had passed. *See id.* at 30 & n.144.

[166] *Cf.* Joseph M. Kelly & Bob Watt, *Damages in Sex Harassment Cases: A Comparative Study of American, Canadian, and British Law*, 16 N.Y.L. SCH. J. INT'L & COMP. L. 79, 89 (1996) (stating that plaintiffs often filed common-law tort claims along with title VII claims when only available remedies provided by title VII were back pay and reinstatement); West, *supra*

CONCLUSION

The purpose behind FEHA is to protect employees from employment discrimination.[167] However, FEHA limits the amount of time plaintiffs have to file their claims with the Department.[168] The California Supreme Court recently resolved a con-

---

note 164, at 46 (stating that wrongful discharge tort actions are attractive because they provide possibility of large damage recoveries). Professor West also notes that the possibility of large recoveries benefits employees because it helps finance expensive lawsuits through contingency fee arrangements. *See id.* FEHA does not limit the remedies available to employees who bring actions in Superior Court. *See* Peralta Community College Dist. v. Fair Employment & Hous. Comm'n., 52 Cal. 3d 40, 46-47, 801 P.2d 357, 361 (1990) (en banc) (noting that compensatory and punitive damages are available in civil actions under FEHA); Commodore Home Sys., Inc. v. Superior Court, 32 Cal. 3d 211, 221, 649 P.2d 912, 918 (1982) (en banc) (holding that all relief available in noncontractual actions, including punitive damages, is available in civil actions under FEHA). FEHA strictly limits the remedies available to employees who resolve claims through the Department. *See* CAL. GOV'T CODE § 12970(a)(3)-(4) (West Supp. 1998) (limiting damages to $150,000 and administrative fines to $50,000 per aggrieved person). The Department may award damages, impose civil penalties on employers, or force the employer to reinstate the employee. *See id.* However, FEHA places a cap on the Department's ability to award damages and civil penalties and does not allow punitive damages. *See id.* § 12970(a)(3)-(4); *see also* Dyna-Med, Inc. v. Fair Employment & Hous. Comm'n., 43 Cal. 3d 1379, 1404, 743 P.2d 1323, 1339 (1987) (finding that FEHA does not authorize Commission to award punitive damages); WILCOX ET. AL., *supra* note 142, § 43.01[8][f] n.163. (noting that Commission cannot award punitive damages, but can assess administrative fines). Unlike the Department, civil courts may render unlimited compensatory and punitive damages under FEHA. *See Commodore Home Sys.*, 32 Cal. 3d at 221, 649 P.2d at 918 (holding that all relief available in noncontractual actions, including punitive damages, is available in civil actions under FEHA). However punitive damages are only available when FEHA violations involve malice, oppression, or fraud. *See* WILCOX ET. AL., *supra* note 142, § 43.01[8][f]. Consequently, employees may elect to bypass enforcement by the Department and instead seek judicial enforcement to secure punitive and compensatory damages. *See EEOC: Backlog of Discrimination Cases Leads to Greater Use of Right to Sue Letters*, BNA EMPLOYMENT POLICY & LAW DAILY, Sept. 30, 1996, at 16 (stating that only reason plaintiffs file with EEOC is because it is required step to get to courthouse). Therefore, the California Supreme Court's decision in *Romano* further prompts employees to avoid the Department as an enforcement mechanism and seek redress through the courts instead. *See Romano*, 14 Cal. App. 4th at 479, 926 P.2d at 1117. For example, Romano elected to enforce his claim in court. *See id.* Romano filed his complaint with the Department on September 18, 1991 and received permission to file a civil action three days later. *See id.* Thus, Romano used the Department solely to receive the necessary right to sue. *See id.*

[167] *See* CAL. GOV'T CODE §§ 12920-12921 (West Supp. 1998); *see also* Robinson v. Fair Employment & Hous. Comm'n, 2 Cal. 4th 226, 243, 825 P.2d 767, 776 (1992) (en banc) (stating that FEHA expresses legislative policy to protect and safeguard employees' rights to seek, obtain, and hold employment free from discrimination).

[168] *See* CAL GOV'T CODE § 12960 (stating that employees must file administrative complaint within one year of alleged unlawful employment practice, unless 90-day extension applies).

flict between the lower courts regarding which action triggers the statute of limitations. The court, however, used flawed arguments in deciding to afford employees the necessary protection from employment discrimination. The result is a decision that rejects settled federal authority, perpetuates the ambiguity surrounding the definition of actual termination, and fosters unnecessary litigation by undermining the informal conciliatory efforts of FEHA.

Patrick O'Neil