Filed 6/25/07

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JOHN MCDONALD et al., Plaintiffs and Appellants, v. ANTELOPE VALLEY COMMUNITY COLLEGE DISTRICT, Defendant and Respondent.	B188077 (Los Angeles County Super. Ct. No. BC304873) ORDER MODIFYING OPINION [NO CHANGE IN JUDGMENT]

The published opinion filed June 1, 2007 is modified as follows.

1. On page 35 of the typed opinion, first sentence of the third paragraph, delete

Fifth, it can be asserted that the doctrine of principle of *expressio unius est exclusio alterius* precludes us from applying equitable tolling principles to this case.

2. In it's place, insert:

Fifth, it can be asserted that the doctrine of *expressio unius est exclusio alterius* precludes us from applying equitable tolling principles to this case.

3. On page 37, commencing on line 12, delete the following language:

Thus, there is evidence, principally in Dr. Fisher's declaration, that Ms. Brown's January 2001 failure to hire claim was subject to administrative review pursuant to California Code of Regulations, title 5, section 59300 et seq. from October 8, 2001, until May 2003;

after Ms. Brown filed her October 11, 2002 Department of Fair Employment and Housing complaint.

4. In it place, insert:

Thus, there is evidence, principally in Dr. Fisher's declaration, that Ms. Brown's January 2001 failure to hire claim was subject to administrative review pursuant to California Code of Regulations, title 5, section 59300 et seq. from October 8, 2001, until May 2003. On October 11, 2002, while Ms. Brown's failure to hire claim was subject to administrative review pursuant to California Code of Regulations, title 5, section 59300 et seq., she filed her Department of Fair Employment and Housing administrative complaint.

5. On page 37, line 19, delete:

Thus, under

6. In its place, insert:

Under

7. Delete the last sentence on page 37:

We need not address the parties remaining contentions as to Ms. Brown.

8. In it place, insert the following three new paragraphs:

Defendant argues the foregoing conclusions concerning the availability of equitable tolling are inconsistent with language appearing in *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1079-1092. Defendant argues, "The doctrine of 'equitable tolling' cannot salvage the belated filing of a [Department of Fair Housing and Employment administrative] complaint where the California Supreme Court has already held that a litigant who has pursued, but not completed, the internal remedial process is not legally obligated to 'exhaust' those internal remedies as a precondition to obtaining relief under [the Fair Employment and Housing Act]." In support of this contention, defendant relies on language appearing in *Schifando*. Defendant cites to the following analysis in *Schifando*: "The Legislature intended the FEHA's administrative system 'to occupy the field of regulation of discrimination in employment and housing encompassed

by the provisions of [the act], exclusive of all other laws banning discrimination in employment and housing by any city, city and county, county, or other political subdivision of the state . . . ." (§ 12993, subd. (c).) In other words, although the FEHA does not limit the application of other state statutes (e.g., Civ. Code, § 51.7), or constitutional provisions involving discrimination, it expressly preempts local governmental laws, regulations, and procedures that would affect the rights included in its provisions. It provides a one-year grace period for pending local enforcement proceedings. (Gov. Code, § 12960; see *Rojo v. Kliger*[, *supra*,] 52 Cal.3d [at pp.] 77-79.)" (*Schifando v. City of Los Angeles*, *supra*, 31 Cal.4th at p. 1082.) Defendant also relies on the following comment in *Schifando*, "This court, however, has never held that exhaustion of an internal employer procedure was required where an employee made a claim under FEHA or another statutory scheme containing its own exhaustion prerequisite." (*Id*. at p. 1092.)

Defendant's reliance on *Schifando* is without merit. The Supreme Court identified the issue and its resolution in *Schifando* thusly: "We granted review to determine whether a city employee must exhaust both the administrative remedy that the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) (FEHA) provides and the internal remedy that a city charter requires before filing an FEHA disability discrimination claim in superior court. We conclude the employee need not exhaust both administrative remedies, and that receiving a Department of Fair Employment and Housing (the Department) 'right to sue' letter is a sufficient prerequisite to filing an FEHA claim in superior court." *(Schifando v. City of Los Angeles*, *supra*, 31 Cal.4th at pp. 1079-1080; fn. omitted.) Our Supreme Court concluded its administrative remedy analysis in *Schifando* as follows: "We hold that municipal employees who claim they have suffered employment-related discrimination need not exhaust City Charter internal remedies prior to filing a complaint with the Department. We recognize the existence of potential procedural issues that might arise in the situation where an employee chooses to pursue both avenues of redress, but those issues are not before us." (*Id*. at p. 1092.)

Our Supreme Court has never held that the equitable tolling doctrine is inapplicable to section 12960, subdivision (d). In *Schifando*, our Supreme Court addressed and resolved an entirely different issue—whether an employee of the City of Los Angeles must exhaust his administrative remedies under the city charter. The present issue, the application of well established equitable tolling principles to the section 12960, subdivision (d) statute of limitations for filing an administrative complaint with the Department of Fair Employment and Housing, was not before the Supreme Court in *Schifando*. Because that issue was not before our Supreme Court, *Schifando* is not controlling authority for the proposition before us. (*Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 118; *Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 343.) We need not address the parties' remaining contentions concerning Ms. Brown.

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TURNER, P.J.	ARMSTRONG, J.	KRIEGLER, J.