

Memo

Date: May 17, 2006
To: Patricia Ryan, Executive Director
From: John Gause, Commission Counsel
Re: MHRC Charges Filed After the Six-Month Deadline

This memo addresses the circumstances under which a complaint of discrimination filed after the six-month deadline can still be processed by the Commission.

The MHRA provides, in relevant part, that victims of unlawful discrimination “may file a complaint under oath with the commission stating the facts concerning the alleged discrimination, provided that such complaints must be filed with the commission not more than 6 months after the alleged act of unlawful discrimination.” 5 M.R.S.A. § 4611. Our Procedural Rule provides, similarly, that “[a] complaint of discrimination must be filed with the Commission not more than six (6) months after the act of alleged discrimination occurred.” Procedural Rule § 2.02(C). The Procedural Rule also provides that “[t]he Executive Director, or the Commission, may extend any time limit provided in this part for good cause shown, and shall notify the parties of any such extension.” Procedural Rule § 2.11(C).

Because the Law Court has not yet addressed this issue of timeliness, we should look to federal law for guidance. Title VII provides that an EEOC charge of discrimination “shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred. . . .” 42 U.S.C. § 2000e-5(e)(1). The Supreme Court has interpreted this provision as being a statute of limitations that “is subject to waiver, estoppel, and equitable tolling.” *Zipes v. TWA*, 455 U.S. 385, 393 (1982). The EEOC applies this standard in its EEOC Compliance Manual. *See* EEOC Compliance Manual § 2-IV(D). I think we should interpret § 4611 in the same fashion, namely, as a statute of limitations that can be avoided through waiver, estoppel, or equitable tolling. Other statutes of limitations have been so interpreted in Maine. *See Pino v. Maplewood Packing Co.*, 375 A.2d 534, 538-539 (Me. 1977) (applying waiver and estoppel to workers’ compensation statute of limitations); *Dasha by Dasha v. Maine Med. Ctr.*, 665 A.2d 993, 996 n. 2 (Me. 1995) (noting the existence of the equitable tolling doctrine).

Thus, a late charge of discrimination should still be processed by the Commission if one of the following exists:

- 1) Waiver.

Waiver requires the intentional relinquishment of a known right. *Kraul v. Maine Bonding & Casualty Co.*, 559 A.2d 338 (Me. 1989). Therefore, in this context, waiver would only apply if there

has been an agreement by Respondent to enlarge the six-month filing deadline. The new filing deadline will be controlled by the agreement of the parties.

2) Equitable Estoppel.

Equitable estoppel applies where Respondent conducts itself "in a manner which actually induces the plaintiff not to take timely legal action on a claim." See *Townsend v. Appel*, 446 A.2d 1132, 1134 (Me. 1982). Complainant's reliance on Respondent's conduct must be reasonable. See *Hanusek v. Southern Maine Medical Center*, 584 A.2d 634, 636-637 (Me. 1990). In order to establish estoppel, it is not necessary that Respondent knowingly or intentionally mislead Complainant; rather, the focus is on whether Complainant justifiably relied on Respondent's conduct. See *Pino v. Maplewood Packing Co.*, 375 A.2d at 538-539.

The EEOC Compliance Manual lists examples of circumstances where equitable estoppel would apply (assuming Complainant is reasonably induced not to file a timely charge), including 1) Complainant relied on a promise by Respondent not to raise a statute of limitations defense, 2) Respondent threatened Complainant with retaliation if she pursued a charge, 3) Respondent concealed or misrepresented facts that would support a charge, 4) Respondent gave Complainant assurances that relief would be provided through internal procedures, or 5) Respondent failed to post required notices informing Complainant of her anti-discrimination rights. See EEOC Compliance Manual § 2-IV(D)(2).

If equitable estoppel applies, the filing period begins to run when Complainant knows or should have known of the misconduct. EEOC Compliance Manual § 2-IV(D)(2).

3) Equitable Tolling.

Equitable tolling is a broader concept, but courts have limited its application to "exceptional extenuating circumstances." Larson, Labor and Employment Law § 72.06. It cannot be invoked where Complainant simply does not know, without more, of her rights, or where Complainant has retained an attorney. See *Kale v. Combined Ins. Co.*, 861 F.2d 746, 752 (1st Cir. 1988). Courts generally consider five factors when deciding whether to apply equitable tolling: "1) lack of actual notice of filing requirement; (2) lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement." *Id.*

The First Circuit Court of Appeals, interpreting federal law, has (so far) only recognized equitable tolling in circumstances where Complainant 1) lacks knowledge of Respondent's unlawful motivation underlying the charge of discrimination, which is caused by Respondent's misconduct, or 2) lacks general knowledge of her anti-discrimination rights, which is caused by Respondent's failure to post required notices. See *Mercado v. Ritz-Carlton San Juan Hotel, Spa & Casino*, 410 F.3d 41, 46-48 (1st Cir. 2005). The latter basis is not available if Complainant is unaware of the time limits but is aware of her general right to be free from discrimination. See *Kale v. Combined Ins. Co.*, 861 F.2d at 754.

The EEOC Compliance Manual states that equitable tolling applies where "the charging party

was understandably unaware of the EEO process or of important facts that should have led him or her to suspect discrimination.” EEOC Compliance Manual § 2-IV(D)(1). The Manual recognizes circumstances beyond Respondent’s control that give rise to equitable estoppel, including 1) Complainant’s excusable ignorance of sufficient information to support a reasonable inference of discrimination, and the filing period starts to run when Complainant has such information; 2) Complainant’s mental state prevented Complainant from pursuing her legal remedies; 3) the EEOC or FEPA gave misleading statements to Complainant or mishandled the charge; 4) Complainant filed in the wrong forum, as long as Complainant was diligently attempting to assert her rights. *See* EEOC Compliance Manual § 2-IV(D)(1)(a-d). *Accord* Larson, Labor and Employment Law § 72.06(1-8).

I think the best approach is to not limit equitable tolling to any particular preset circumstances but to view each request individually. The case law and the Compliance Manual should be used as a guide, but each request should not necessarily be denied because it does not fit neatly within one of the recognized examples. As a general rule, I think we should consider the factors articulated by the First Circuit, namely “1) lack of actual notice of filing requirement; (2) lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one’s rights; (4) absence of prejudice to the defendant; and (5) a plaintiff’s reasonableness in remaining ignorant of the notice requirement.” *Kale v. Combined Ins. Co.*, 861 F.2d at 752.

If equitable tolling applies, the EEOC Compliance Manual recommends extending the filing deadline for a “reasonable period of time,” meaning enough time to consult with an attorney and evaluate whether to file a charge. EEOC Compliance Manual § IV(D)(1).