Memo

Date: April 7, 2008

To: Patricia E. Ryan, Executive Director

From: John P. Gause, Commission Counsel

Re: [redacted]

E07-0681, 0682

Complainant has sought to amend [redacted] and [redacted] add three new parties, [redacted] Contractor and [redacted] Contractor. The amended charge alleges that [redacted] are an "integrated enterprise. It also alleges that Complainant first learned on March 12, 2008 that the men who denied him the job he sought were [redacted]

The charges were filed on March 21, 2008. The six-month MHRA filing deadline expired in February 2008. Accordingly, all three amended charges are untimely unless a basis exists to relate the amended charges back to the original November 28, 2007 filing date of the [redacted] charges.

In cases involving discrete acts of discrimination, the filing deadline runs from the time that a reasonable person would have become aware of facts supporting a claim of discrimination. *LePage v. Bath Iron Works Corp.*, 2006 ME 130, ¶ 11. The test is whether Complainant has received unambiguous and authoritative notice of the discriminatory act, not whether Respondent's alleged discriminatory act has reached a state of actual or absolute finality or permanence. *Id.* at ¶ 15.

Our Procedural Rule § 2.02 (F) does not explicitly address the issue of adding parties. It states as follows:

> Complaints may be amended to cure technical defects or omissions, including failure to swear to the complaint under oath before a Notary Public, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful practices related to or growing out of the subject matter of the original complaint will relate back to the date the complaint was first received.

The EEOC uses the identical language in its procedural rule. *See* 29 C.F.R. § 1601.12(b). Courts interpreting the EEOC provision have held that amendments to add additional parties do not relate back to the original filing date. *See Rivera v. Department of Justice*, 821 F. Supp. 65, 70

(D.P.R. 1993); *Dobbs v. American Nat'l Bank, N.A.*, 1990 U.S. Dist. LEXIS 11595 (D. Mo. 1990). Accordingly, I do not think that Complainants can rely on § 2.02 (F) to add new parties and have the filing date of the original complaint apply.

Nevertheless, there are two factors that may warrant using the original filing date. First, Complainant alleges that one of the new parties [redacted] and an original party ([redacted]) constitute an "integrated enterprise." The United States District Court for the District of Maine has held that the failure to name a defendant in an administrative charge of discrimination before the MHRC will be excused if there is a "substantial identity" between the party who was not named and the named party. *See Lemerich v. Int'l Union of Operating Eng'rs*, 2002 U.S. Dist. LEXIS 43, 17-18 (D. Me. 2002). The test for whether multiple entities constitute an "integrated enterprise" examines four factors, "(1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership," *Romano v. U-Haul Int'l*, 233 F.3d 655, 662 (1st Cir. 2000), the most important of which being centralized control of labor relations. *See id.* at 666. If [redacted] and [redacted] are an "integrated enterprise" based on these factors, the filing date for the [redacted] charge should relate back to the filing date for the [redacted] charge, making the [redacted] charge timely. Accordingly, the charges should not be dismissed on this basis at this time, and [redacted] should receive the attached request for information and documents addressing whether it is indeed an integrated enterprise with [redacted] (or the other named party in the original charge, [redacted]). If so, we should send [redacted] a normal Document Request; if not, the complaint should be dismissed by the Commission as to [redacted] and forwarded to the EEOC for processing.

With respect to [redacted] and [redacted], Complainant alleges that the first time he learned that they were the ones who denied him a job was on March 12, 2008. If true, you may decide to equitably toll the statute of limitations, making the late complaint timely. Equitable tolling is limited 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 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 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. *See* EEOC Compliance Manual § 2-IV(D)(1)(a-d). *Accord* Larson, Labor and Employment Law § 72.06(1-8).

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).

Here, we should forward the amended charges to Respondents [redacted] and James Runyon seeking their position with respect to the issue of whether Complainant knew prior to March 12, 2008 that they were the ones who denied Complainant the position he sought. Respondents' position should be sent to Complainant for a reply, at which time we should make a determination on the issue of timeliness.

With respect to how to treat the charges, I would recommend opening a new charge number for each new Respondent at this time. They should later be investigated and decided together, if we determine that they are timely.