

Memo

Date: April 23, 2012
To: Amy M. Sneirson, Executive Director
From: John P. Gause, Commission Counsel
Re: E11-0730

By Memo dated January 3, 2012, Chief Investigator Barbara Lelli has requested that this complaint be partially administratively dismissed for failure to file the complaint within 300 days of the allegedly discriminatory act. A complaint may be administratively dismissed by the Executive Director for that reason. 94-348 C.M.R. ch. 2, §2.02(H)(3). Here, the complaint should be partially administratively dismissed.

The complaint was filed on December 21, 2011. In it, Complainant alleges that (a) she was subjected to a hostile work environment on the basis of sex between late December 2010 and January 30, 2011; (b) she was terminated on February 15, 2011 in retaliation for complaining about the harassment; and (c) that she was subject to further retaliation when Respondent contested her claim for unemployment benefits on or about March 3, 2011.

A complaint of discrimination “must be filed with the commission not more than 300 days after the alleged act of unlawful discrimination.” 5 M.R.S. § 4611. With respect to the termination claim, 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. With respect to the “hostile environment” claim, the

limitations period runs from the most recent act that forms a part of the “hostile environment.” *See AMTRAK v. Morgan*, 536 U.S. 101, 122 (2002).

Here, the complaint was filed more than 300 days after the last act that contributed to the allegedly “hostile work environment” and the date that Complainant was notified of her termination. Complainant argues, however, that her termination and hostile environment claims were timely because her employment did not formally cease until February 25, 2011. *See* February 21, 2012 letter from James Clifford, Esq. (“Clifford Letter”) at 2. Complainant alleges that she continued to be employed by virtue of her receiving a paycheck on February 25th. It is doubtful that Complainant’s receipt of a paycheck on February 25th alone rendered her an “employee” until that time. Nevertheless, even if Complainant were correct, the 300-day deadline does not run from the last date of employment. *See* 5 M.R.S. § 4611; *LePage*, 2006 ME 130, ¶ 11. Because the last act contributing to the “hostile environment” claim and the date that Complainant received “unambiguous and authoritative” notice of her termination occurred outside of the 300-day window, those claims are untimely.

Complainant also requests that the 300-day deadline be enlarged by the Executive Director for “good cause” pursuant to Procedural Rule 2.11(C). As grounds, Complainant cites that she did not retain an attorney until shortly before filing her complaint, that she did not receive her personnel file until November 28, 2011, and that she was unavailable and unreachable for the first three weeks of December 2011 due to illness, being out of state, and an interruption in cell phone service. Letter at 3.

The Commission will extend the filing deadline when there has been a waiver or when the principles of “equitable estoppel” or “equitable tolling” justify such an extension. *See* May 17, 2006

Commission Counsel Memo, *MHRC Charges Filed After the Six-Month Deadline*, available online at http://www.maine.gov/mhrc/guidance/memo/20060517_g.pdf. The bases offered by Complainant do not even arguably justify an extension based on waiver or equitable estoppel (Complainant has not alleged that the delay in her obtaining her personnel file was caused by Respondent). With respect to equitable tolling, applying the general factors here, Complainant's offered justifications do not show that she lacked actual notice of filing requirement, lacked constructive knowledge of the filing requirement, was diligent in pursuing her rights, or was reasonable in remaining ignorant of the notice requirement. *See Kale v. Combined Ins. Co.*, 861 F.2d 746, 752 (1st Cir. 1988). Accordingly, the deadline should not be extended.

The hostile environment and termination claims should be administratively dismissed as untimely. The investigation should proceed only with respect to the retaliation claim arising out of the unemployment proceeding.