

Gause, John P

From: Gause, John P
Sent: Friday, November 19, 2010 1:00 PM
To:
Subject: RE: Deadline for filing a charge.

Your question presents an issue that is unresolved in Maine. In light of the uncertainty, the safest thing to do in order to preserve your ability to bring an unrestricted claim in the future would be to file a complaint with the Maine Human Rights Commission ("MHRC") as soon as possible. I will explain.

According to the statutory language alone, claims under the Maine Human Rights Act ("MHRA") must be filed with the MHRC "not more than 300 days after the alleged act of unlawful discrimination." 5 M.R.S.A. § 4611. In your case, the "alleged act of unlawful discrimination" would be the dates that the decisions were made to pay comparable coworkers more than you. This would have happened when you were hired (if others were paid more then) and when subsequent decisions were made to pay others more (either when they were hired or when they received pay increases). Under a strict application of the statute, you would need to file with the MHRC within 300 days of each of these dates in order to preserve your claims with respect to the pay decisions that were made on those dates. Interpreting federal law, this was the holding of the United States Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S.Ct. 2162, 2172 (2007). Under *Ledbetter*, it did not matter when you received your paychecks; rather, the filing period started when the discriminatory decisions underlying the pay differential were made.

There are a couple things to bear in mind on *Ledbetter*, though. First, the Lilly Ledbetter Fair Pay Act of 2009 made statutory changes to federal law, including the Age Discrimination in Employment Act (ADEA), that supersede the Supreme Court's decision. Accordingly, under the amended ADEA, you have 300 days from the date of the most recent discriminatory paycheck to file your claim with the Equal Employment Opportunity Commission (a complaint filed with the MHRC would be deemed filed with the EEOC). Because you are employed by the State, however, the types of relief you can recover under the ADEA are limited by sovereign immunity. Nevertheless, at a minimum, you could get an order that unlawful pay discrimination be corrected going forward.

Second, although there have not been any statutory changes to the MHRA in the wake of *Ledbetter*, it still may not be applied to the MHRA. The Supreme Court's decision interpreted federal law and is therefore not controlling. There were four dissenting Justices in *Ledbetter* who would have started the clock at the time of the most recent discriminatory paycheck. The Maine Supreme Court ("Law Court") could adopt the dissent's reasoning over that of the majority. The safest course from your perspective, however, is to assume that it would follow the majority.

There are some legal doctrines that might be helpful to you. Even if *Ledbetter* were followed, it is possible that the "discovery rule" could start the 300-day limitations period under the MHRA when you first learned of the pay differential a few weeks ago. Rather than start the clock at the time of the discrimination, under the "discovery rule," the accrual date of the filing period is when complainant discovers the allegedly discriminatory act. *See, e.g., Cada v. Baxter*

Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990) (Posner, Circuit Judge). For example, in a termination case, the clock starts when you are told of your termination, not the actual date of the termination. This approach appears to have been implicitly adopted by the Law Court. See *LePage v. Bath Iron Works Corp.*, 2006 ME 130, ¶ 15, 909 A.2d 629, 635 (“the appropriate standard is not whether an employer's alleged discriminatory act has reached a state of actual or absolute finality or permanence, but rather, whether the employee has received unambiguous and authoritative notice of the discriminatory act”) (citations and quotations omitted). Nevertheless, the Law Court has refused to adopt the “discovery rule” in many other contexts, see, e.g., *Bangor Water Dist. v. Malcolm Pirnie Engineers*, 534 A.2d 1326, 1328-1329 (Me. 1988), and it remains unclear whether it would explicitly adopt it here if asked to do so. It is also unclear whether the applicable “discovery” in your case would be the date that you learned of the pay differential or the date you learned of the amount of your pay.

Another way that the filing deadline can be enlarged is by “equitable tolling.” Some courts and the EEOC Compliance Manual (which the MHRC follows in this context) allow a filing deadline that has otherwise expired to be extended for a reasonable amount of time after the complaining party learns of sufficient information to suspect discrimination. See, e.g., *Cada v. Baxter Healthcare Corp.*, 920 F.2d at 451; EEOC Compliance Manual § 2-IV(D)(1), available online at <http://www.eeoc.gov/policy/docs/threshold.html#2-IV-D-2>. Under this doctrine, the filing deadline would be extended for a reasonable time (not a set amount) after you learned sufficient information to suspect age discrimination. See EEOC Compliance Manual § IV(D)(1). “Equitable tolling” is not applied uniformly by the courts, however. See, e.g., *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 53 (1st Cir. 1999) (noting First Circuit Court of Appeal’s narrower approach). There is also an argument that you should have discovered the pay differential sooner, e.g., by comparing your pay through publicly available information. If so, the start date would be when it should have been discovered, not when it was actually discovered.

Finally, it is also possible to enlarge an otherwise expired statute of limitations when your employer does something that prevents you from learning about the discriminatory act. This invokes the doctrine of “equitable estoppel.” See, e.g., EEOC Compliance Manual § 2-IV(D)(2). If your employer had a policy that prevented employees from finding out what others were paid, for example, equitable estoppel might apply. If it did, the 300-day filing period would start when you learned of the pay differential. *Id.*

In light of all of this, again, the safest thing to do would be to file as soon as possible. Another option, if you wanted to preserve your rights without filing, is to get an agreement from your employer to toll the statute of limitations.

On your second question, it is not necessary to have a charge first reviewed by the Commission and then returned to you before filing it. As long as it sets forth (briefly, preferably) the facts and circumstances surrounding the alleged discrimination, it will be deemed filed. Amendments to cure any technical defects, including a failure to notarize the charge, relate back to the original filing date. See MHRC Procedural Rule § 2.02(F).

John

John P. Gause
Commission Counsel
Maine Human Rights Commission
51 State House Station
Augusta, ME 04333-0051
(207) 624-8730 (direct)

11/22/2010

(207) 624-8729 (fax)
(888) 577-6690 (TTY)

From:
Sent: Mon 11/15/2010 9:13 AM
To: Gause, John P
Subject: Deadline for filing a charge.

Good Morning John:

About a year and a half ago I accepted employment with the _____ as an
About two weeks ago I learned many of my colleagues who were hired after me are being paid
significantly more than I am. I believe the _____ neglected to consider my 25 years of experience in
administrative law. This sounds in a manner like age discrimination.

I have filed a grievance with personnel and expect a reasonable resolution will be pursued in good faith.....but I
would like to be certain the option of a Human Rights complaint is still available if necessary.

When is my filing deadline?

Is it 300 days from learning of the discrimination or 300 days from the occurrence?

And, I understand that a charge is not considered filed until it has been reviewed by the Commission sent back to
the complainant and signed by the complainant before a Notary, and then received by the Commission correct?

Thank you for your consideration of these questions.