

Memo

Date: April 5, 2012
To: Amy M. Sneirson, Executive Director
From: John P. Gause, Commission Counsel
Re: E11-0713,

By Memo dated December 12, 2011, Chief Investigator Barbara Lelli has requested that this complaint be 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 administratively dismissed.

The complaint was filed on December 12, 2011. In it, Complainant alleges that he was demoted from an on-air news broadcaster position in 2007 because he was regarded as having a disability and because of his age. At the time, he had a loss in salary of approximately \$25,000 to \$35,000. He subsequently assumed lead responsibility for the role of IT specialist for Respondent. On February 24, 2011, Complainant was told that his salary would be cut from \$93,000 to \$45,000. He was told that the reason for the pay cut was that the station manager could not justify the higher salary based on the duties he was performing.

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. In cases involving discrete acts of discrimination (like this one), 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.

It is undisputed that Complainant received unambiguous and authoritative notice of his demotion outside of the 300-day deadline. Complainant nevertheless asserts that the complaint was timely because the additional loss of pay resulting from the demotion occurred within the limitations period. Complainant reasons that “[i]f the 2007 demotion was discriminatory, and the sole reason for the 2011 pay cut was the demotion, then the pay cut must also be discriminatory.” Complainant's January 10, 2012, submission at 2. Other than the fact that his job duties were reduced as a result of the earlier demotion, Complainant does not argue that Respondent instituted the 2011 pay cut because of his age or disability.

Essentially, Complainant argues that he has suffered the continuing effects within the limitations period of a discriminatory act that occurred outside of the limitations period. The United States Supreme Court has rejected “the suggestion that an employment practice committed with no improper purpose and no discriminatory intent is rendered unlawful nonetheless because it gives some effect to an intentional discriminatory act that occurred outside the charging period.” *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 632, 127 S.Ct. 2162, 2172 (2007). Although *Ledbetter* has been superseded by statute, and its holding has not been adopted by the Law Court, the Law Court is likely to follow the decision in its interpretation of the Maine Human Rights Act. In *Kezer v. Central Maine Medical Center*, 2012 ME 54, ¶ 20, the Law Court relied on the reasoning of the United States Court of Appeals for the First Circuit, *Tobin v. Liberty Mutual Insurance Co.*, 553 F.3d 121 (1st Cir. 2009), that “an employee could not rely on the continuing effects of an employer's denial of a request for a reasonable accommodation to extend the limitations period. . . .” *Kezer v.*

Central Maine Medical Center, 2012 ME 54, ¶ 20. The *Tobin* decision, in turn, relied on *Ledbetter*. See *Tobin v. Liberty Mutual Insurance Co.*, 553 F.3d 121, 130-132 (1st Cir. 2009).

The cases cited by Complainant are not to the contrary. While it is true that otherwise untimely acts may be used as “background evidence” to support a timely claim, see Complainant’s January 10, 2012, submission at 2-3, Complainant is not using the allegedly discriminatory demotion as “background evidence.” Rather, Complainant argues that the 2011 pay cut was unlawful solely because it resulted from the earlier demotion. This is giving “effect to an intentional discriminatory act that occurred outside the charging period.” *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. at 632, 127 S.Ct. at 2172. By contrast, in *Fischer v. Avandade, Inc.*, 519 F.3d 393 (7th Cir. 2008), cited by Complainant, plaintiff alleged that defendant’s rejection of her for a permanent position that occurred within the limitations period was itself based on a discriminatory motive, and the Seventh Circuit relied on the circumstances surrounding an earlier, time-barred appointment as evidence of a discriminatory motive for the timely claim. See *Fischer v. Avandade, Inc.*, 519 F.3d at 404.