

LEGAL SERVICES

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MEMORANDUM

February 2, 2018

SUBJECT: Sexual and Other Workplace Harassment Policy Update: Complaint Deadline (Work Order No. 30-LS1366)

TO: Representative Matt Claman

FROM: Megan A. Wallace
Legislative Counsel *MAW*

You have asked for an opinion on the Sexual and Other Workplace Harassment Subcommittee's recommendation to provide a two-year limitation on bringing forward a complaint under the policy. In my opinion, a two-year deadline is inconsistent with the deadline for submitting a complaint to the Alaska Human Rights Commission (HRC), and any complaint deadline should be consistent with the HRC deadline.

Complaint Deadlines

HRC regulations provide that a complaint alleging a discriminatory act or practice be filed no later than 180 days after the alleged act or practice occurred.¹ The U.S. Equal Employment Opportunity Commission (EEOC) deadline is also no later than 180 days after the alleged act or practice occurred, but "is extended to 300 calendar days if a state or local agency enforces a state or local law that prohibits employment discrimination on the same basis."²

With respect to the statute of limitations for claims involving sexual harassment, the Alaska Supreme Court has explained that

¹ See 6 AAC 30.230(b). A complaint alleging a discriminatory act or practice of a continuing nature must be filed no later than 180 days after the alleged act or practice stopped. 6 AAC 30.230(c).

² <https://www.eeoc.gov/employees/timeliness.cfm>. "The rules are slightly different for age discrimination charges. For age discrimination, the filing deadline is only extended to 300 days if there is a state law prohibiting age discrimination in employment and a state agency or authority enforcing that law. The deadline is not extended if only a local law prohibits age discrimination." *Id.*

Alaska law prohibits an employer from discriminating against a person because of the person's sex.³ We have held that this law prohibits sexual harassment against employees. Alaska Statute 09.10.070 requires that claims for sexual harassment be brought within two years of the wrongful conduct's occurrence. The two-year limit starts when a party knows or should have known of a claim—usually the date that the alleged incident occurs.^[4]

EEOC Guidelines warn:

If an employer actively misleads an employee into missing the deadline for filing a charge by dragging out its investigation and assuring the employee that the harassment will be rectified, then the employer would be "equitably stopped" from challenging the delay. *See Currier v. Radio Free Europe/Radio Liberty, Inc.*, 159 F.3d 1363, 1368 (D.C. Cir. 1998) ("an employer's affirmatively misleading statements that a grievance will be resolved in the employee's favor can establish an equitable estoppel"); *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1531 (11th Cir. 1992) (tolling is appropriate where plaintiff was led by defendant to believe that the discriminatory treatment would be rectified); *Miller v. Beneficial Management Corp.*, 977 F.2d 834, 845 (3d Cir. 1992) (equitable tolling applies where employer's own acts or omission has lulled the plaintiff into foregoing prompt attempt to vindicate his rights).⁵

In other words, even though there is a general two-year statute of limitations for tort actions,⁶ there is a risk that any deadline that is longer than 180 days could result in the legislature being equitably estopped from challenging a delayed HRC petition on grounds that the employee was misled by the deadline for filing a charge.

³ See AS 18.80.220.

⁴ *Mahan v. Arctic Catering, Inc.*, 133 P.3d 655, 658 (Alaska 2006).

⁵ Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, <https://www.eeoc.gov/policy/docs/harassment.html>, at n. 64.

⁶ A claim for damages not based on tort liability might be subject to a different statute of limitation.

Recommendation

The subcommittee could amend the policy to encourage prompt and timely reporting without setting a specific complaint deadline.⁷ The HRC and EEOC filing deadlines and the statute of limitations would continue to operate to prohibit the filing of stale complaints in those forums. The subcommittee should consider whether it wants to retain the flexibility to investigate claims after the 180 day, 300 day, or two-year deadlines, or whether it wants to set a hard and fast deadline for filing a complaint under the policy.⁸ If it is the will of the subcommittee to set a complaint deadline, I recommend that the deadline be no longer than 180 days after the alleged discriminatory act to be consistent with the HRC deadline.

If you have any additional questions, please advise.

MAW:mlp
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⁷ The existing Sexual and Other Workplace Harassment Policy (adopted by Legislative Council on January 20, 2000) does not contain a complaint deadline.

⁸ For example, what if a complaint is made more than two years after an alleged discriminatory act, but the alleged actor is a current employee or member. Should the legislature retain the discretion to investigate such allegations?