



Maine Human Rights Commission  
# 51 State House Station | Augusta ME 04333-0051

Physical location: 19 Union Street, Augusta ME 04330  
Phone (207) 624-6290 ■ Fax (207) 624-8729 ■ TTY: 1-888-557-6690  
[www.maine.gov/mlrc](http://www.maine.gov/mlrc)

Amy M. Sneirson  
Executive Director

John P. Gause  
Commission Counsel

# Memo

Date: July 31, 2012  
To: Amy M. Sneirson, Executive Director  
From: John P. Gause, Commission Counsel  
Re: E12-0095, Jennifer Barker v. First Progressive Mortgage Co., LLC

---

By memo dated May 17, 2012, the Chief Investigator has requested that this complaint be administratively dismissed for failure to file the complaint within 300 days of the allegedly discriminatory act. *See* 94-348 C.M.R. ch. 2, §2.02(H)(3). For the following reasons, the complaint should be administratively dismissed as untimely.

The complaint alleges that Complainant worked for Respondent until February 2011, at which time she began working for a different employer in the same location and under the same supervisor. The supervisor apparently switched employment from Respondent to the subsequent employer in February 2010. Complainant alleges that the supervisor subjected her to a hostile environment on the basis of sex, which started while she worked for Respondent and continued until her termination by the subsequent employer on June 6, 2011. The complaint was filed with the Commission on February 27, 2012, against both Respondent and the subsequent employer.

The Maine Human Rights Act (“MHRA”) provides that “a complaint must be filed with the commission not more than 300 days after the alleged act of unlawful discrimination.” 5 M.R.S.A. §4611. As the complaint was filed with the Commission on February 27, 2012, the 300-day statute of limitations period extends back to April 29, 2011. This is after Complainant ceased working for Respondent, and Complainant does not allege that Respondent did anything unlawful within the 300-day filing window. Complainant argues that the complaint is nevertheless timely under *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 116-117 (2002), because she filed the complaint within 300 days of part of the conduct that contributed to the hostile environment.

Complainant is correct that the filing deadline generally runs from the most recent occurrence that contributes to a “hostile work environment.” *See id.* at 105; *LePage v. Bath Iron Works Corp.*, 2006 ME 130, ¶ 12 (citing *Morgan* favorably). The trickier issue here, though, is whether *Morgan* applies when complainant is subjected to a hostile environment involving successive employers.

There appears to be very little case law on this issue. In *Wilson v. Wal-Mart Stores*, 729 A.2d 1006 (N.J. 1999), the New Jersey Supreme Court faced a similar factual situation to that presented here. Plaintiff alleged a “hostile work environment” that started while she worked for K-Mart and continued after her store was purchased by Wal-Mart. K-Mart argued that plaintiff’s claim against it was barred because she filed her claim more than the prescriptive period after her employment ended with K-Mart but within the time limit if calculated from the end of the harassment altogether. The Court rejected this argument, holding that “[i]f plaintiff can demonstrate that [the alleged

harasser's] discriminatory conduct represents a continuum of harassment that began . . . while both were employed by K-mart, and continued through [the date of her termination by Wal-Mart], her claim against K-Mart may not be extinguished." *Id.* at 1011. There were three dissenting justices who would have found the claim against K-Mart untimely. *See id.* at 1012-1014.

In *Hancock v. Koin TV, Inc.*, 2003 WL 23538009 (D.Or. 2003), plaintiff similarly brought age and sex discrimination claims against a predecessor corporation that had sold the television station where she worked to a subsequent corporation. None of the alleged discrimination against the predecessor occurred within the statute of limitations period. *Id.* at \*2. In dismissing the complaint against the predecessor as untimely, the United States District Court for the District of Oregon declined to follow the New Jersey Supreme Court's decision in *Wilson*. *Id.* at \*3. The *Hancock* court agreed with the dissent in *Wilson* that the majority had relied on cases extending the statute of limitations that involved only *one* employer, whereas *Hancock* and *Wilson* involved two employers. *See Id.* The court also found it untenable that an otherwise untimely claim against a predecessor corporation could be resurrected by the actions of a successor. *Id.* at \*3.

I agree with the concerns raised by the *Hancock* court. In addition, I think that the replacement of one employer with another creates a sufficient change in circumstances to divide what would otherwise be a single "hostile work environment" in two. Liability for sexual harassment depends on the unique response of each employer, *see* MHRC Employment Regulations §3.06(1)(2), which weighs in favor of treating ongoing harassment during successive employers separately.

Complainant also argues that the complaint should not be dismissed until the relationship between Respondent and the subsequent employer is clarified. She states that it is unclear when she began working for Respondent because her supervisor started working for the subsequent employer in February 2010, and was thus jointly employed by Respondent and the subsequent employer. It would not save her claim against Respondent, however, if, like her supervisor, she started working for the subsequent employer earlier than February 2011. Complainant does not suggest that she worked for Respondent *after* February 2011, which is closer to the 300-day timeframe.

In sum, in order for her claim against Respondent to be timely, Complainant was required to file her Maine Human Rights Commission complaint within 300 days of the end of the alleged harassment that occurred during her employment with Respondent, even if the harassment continued under the subsequent employer. Because she did not do so, the complaint against Respondent should be dismissed as untimely. The investigation of the complaint against the subsequent employer should continue.