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## Trials & TRIBULATIONS

### State law claims not automatically tolled while a claim is pending before the EEOC

As litigators, it is always important to be aware of the applicable statutes of limitations. It is also important to know when the clock starts to run on a claim and equally as important to know when that clock may be tolled. In a recent decision in the Western District of New York, Judge Charles J. Siragusa found that the statute of limitations for claims brought under the New York Human Rights Law (“HRL”) is not automatically tolled while a charge is pending before the Equal Opportunity Employment Commission (“EEOC”). *Kimball v. Vil. of Painted Post*, 12-CV-6275-CJS-MWP, 2016 WL 4417121 (W.D.N.Y. Aug. 19, 2016). As a result, state law discrimination claims against an individual defendant were dismissed as untimely.

The tolling of the statute of limitations for a HRL claim is determined by state law. Pursuant to CPLR 204(a), where the commencement of an action is stayed by court or statutory prohibition, the statute of limitations on that claim is tolled during the stay. Until recently, some courts in New York applied CPLR 204(a) to toll the of statute limitations on HRL claims while a similar complaint was pending before the EEOC. In *Kimball*, the court examined the statutory language of the HRL and found that claims against an individual defendant were not tolled while a complaint against the employer was pending before the EEOC.

Title VII spawns work-sharing agreements between the EEOC and state anti-discrimination agencies.

In order to understand the court’s holding, a review of the history of Title VII and the evolution of work-sharing agreements between the EEOC and state agen-



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cies is necessary. Title VII requires that where a complaint arises in a state that has its own anti-discrimination agency, a complainant cannot file a claim with the EEOC “for 60 days from the date that proceedings are begun with the state agency, ‘unless such proceedings have been earlier terminated.’” *Ford v. Bernard Fineson*, 81 F.3d 304, 308 (2d Cir. 1996) (quoting 42 U.S.C. § 2000e-5(c)). As the *Ford* court explained, “although Title VII expressly provides only two triggers for the commencement of EEOC proceedings (expiration of the 60-day period, and ‘termination’ of state agency proceedings), the EEOC regulations add a third: waiver by the state agency of its ‘right to exclusively process the charge.’” *Id.*; see also 29 CFR § 1601.13(a)(3)(iii). As a result, the EEOC and states with anti-discrimination agencies enter into work-sharing agreements, which generally operate to both instantaneously file a charge with the state agency and terminate that charge, thus allowing the charge to be immediately accepted by the EEOC. *Id.*

Tolling the statute of limitations on state claims pending before the DHR.

Claims under the HRL must be brought within three years. A complainant could choose to bypass the administrative agency, the New York Division of Human Rights (“DHR”), and bring an action directly in a court of competent jurisdiction.

Or, a complainant could file an administrative charge before the DHR within one year. Executive Law §297(5). When an administrative charge is filed with the DHR, a complainant is prohibited by statute from filing a claim for discrimination in court. *Id.* at §297(9). Thus, CPLR 204(a) operates to toll the statute of limitations for such claims while the administrative complaint is pending before the DHR.

Historically, with respect to charges that were subject to dual filing under work-sharing agreements, some courts have found that section 279(9) prohibited a party from filing a claim in court, even when the charge was initially filed with the EEOC, since under the work-sharing agreement, the administrative claim could be viewed as pending before both the EEOC and the DHR.

Charges filed with the DHR as a result of a work-sharing agreement are not subject to automatic tolling.

In *Kimball*, an individual defendant (represented by our firm) successfully argued that section 297(9) specifically does not permit the tolling of a state law claim pending the outcome of a charge filed with the EEOC. *Kimball* filed a charge with the EEOC in August 2008 and amended her charge in September 2008. The EEOC did not issue a right to sue letter until February 23, 2012.

*Kimball* then filed suit in the Western District of New York on May 21, 2012, raising claims under Title VII and the HRL, nearly four years after her initial discrimination charge and approximately six years after some of the complained-of conduct initially occurred.

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The individual defendant argued that Kimball's state law claims were time-barred because the three-year statute of limitations for employment discrimination claims had lapsed, and were not tolled by CPLR 204(a). Specifically, in 1991, section 297(9) was amended to expressly state that "[a] complaint filed by the equal employment opportunity commission to comply with the requirements of 42 USC 2000e-5(c) . . . shall not constitute the filing of a complaint within the meaning of this subdivision." 1991 Sess. Law News of N.Y. Ch. 342 (A. 2964-A)(McKinney's). "The clear intent" of the amendments to section 297(9) "was to preserve the complainant's right to commence an action in court" even though the EEOC forwarded the complainant's charge to the DHR. *Barr v. BJ's Wholesale Club, Inc.*, 62 A.D.3d 820, 821 (2d Dep't 2009).

Many courts, however, adopted or relied on holdings that pre-dated the 1991 amendments to the DHL. Indeed, relying on *Matter of Pan Am. World Airways, Inc. v. New York State Human Rights Appeal Board*, 61 N.Y.2d 542 (1984), courts held that where a claim was originally filed with the EEOC and then also filed with the DHL as a result of a work-sharing agreement, the statute of limitations on state law claims were tolled while a complaint was pending before the EEOC. Section 297(9), however, was amended six years after the holding in *Matter of Pan Am.*

The court ultimately agreed, and held that section 297(9) did not bar plaintiff from simultaneously adjudicating her state law claims while her complaint was pending before the EEOC. Further, the court acknowledged that case law reliant on *Matter of Pan Am.* has been rendered moot by the 1991 amendments to section 297(9). There is no federal statutory au-

thority tolling state law statute of limitations periods when claims are pending before the EEOC. Moreover, because there was no state law statutory prohibition against bringing a DHR claim in a court of competent jurisdiction while a claim was pending before the EEOC, Kimball could not rely on CPLR 204(a) to save her claims. As such, the court dismissed plaintiff's claims as time-barred. *Kimball*, 2016 WL 4417121 at \*\*7-8.

Moving forward, attorneys should be acutely aware of the time constraints in which to bring state law employment discrimination claims. Practitioners would be unwise to assume that claims filed initially with the EEOC are subject to the tolling provisions of section 297(9) and CPLR 204(a).

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