NO. 00-1329

United States of America
First Circuit Court of Appeals

LAUREN K. DAVIS

Plaintiff/Appellant,

v.

LUCENT TECHNOLOGIES

Defendant/Appellee

BRIEF OF APPELLANT

APPEAL FROM ORDER OF DISMISSAL BY THE MASSACHUSETTS DISTRICT COURT

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STATEMENT OF JURISDICTION

This case was first filed in the Superior Court of the Commonwealth of Massachusetts for Essex County. It was removed to the United States District Court for the District of Massachusetts pursuant to 28 U.S.C. § 1441, based on diversity jurisdiction. 28 U.S.C. § 1332.

The Federal District Court for the District of Massachusetts (*Richard Stearns,* J.) issued a final decision in the matter on December 27, 1999. A notice of appeal was filed on January 26, 2000. The United States Court of Appeals for the First Circuit has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

2. The anti-discrimination statutes first require that an employee file her claims in MCAD within six months of the discriminatory incident, and allows that related claims may go forward along with it. Ms. Davis filed her discrimination claim within the period. Did the District Court err in dismissing her claims?

3. The statutes also require that an employee file her claims in court within three years of the discriminatory incident. Lauren Davis filed her suit, alleging both unjust termination and sexual discrimination, within three years of the date she was unjustly terminated. Did the District Court err in dismissing her claims?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Lauren Davis was employed at Lucent Technologies (formally AT&T) beginning in 1980. She was a "tester," a position requiring training and skill in industrial electronics, and was responsible for product quality control. Ms. Davis's job was in a factory setting, required the use of testing equipment shared among a number of fellow employees, and involved frequent contact with engineers regarding calibration and standards. The testing department employed very few females in these skilled positions.

From 1992 until her employment ended in 1996, Ms. Davis was subject to hostile work-place sexual discrimination. She pursued internal complaints for some of the incidents. On April 19, 1996, after a particularly difficult sexual discrimination incident, Ms. Davis left work too upset to perform her duties.

On July 17, 1996, Ms. Davis filed a complaint with the Massachusetts Commission Against Discrimination (MCAD) and the Equal Employment Opportunity Commission (EEOC) alleging sexual discrimination during the April 19 incident and on several prior occasions. She also filed a grievance pursuant to her employment contract.

On August 7, 1996, after Ms. Davis exhausted her time-off benefits but realized that no significant changes were going to be made to her work

environment, Lucent terminated Ms. Davis's employment for not showing up.

On September 18, 1996, her grievance was heard, but no disposition was reached.

In September 1997, Ms. Davis first retained an attorney. In November 1997, with the advice of counsel, she sought to amend her EEOC complaint to include unjust termination based on sexual discrimination, but the amendment was denied by the agency. In March 1998, the EEOC issued a finding of no probable cause, and the MCAD issued a similar finding in February 1999. Ms. Davis promptly filed an appeal of the MCAD ruling.

On March 29, 1999, Lucent issued a decision regarding the grievance Ms. Davis had filed.

In April 1999, MCAD held a hearing in the appeal of its no-probable-cause ruling. During the hearing and in the pleadings leading up to it, Ms. Davis raised and plead issues relating to both sexual harassment and unjust termination based on sexual discrimination. While Lucent attended the hearing, it raised no issues or defenses. MCAD denied her appeal on May 10, 1999.

On July 16, 1999, Ms. Davis filed this action in the Essex Superior Court, alleging violation of the Massachusetts Unlawful Discrimination statute. M.G.L. c. 151B § 4. It was later removed to the Massachusetts Federal District Court. For

the first time, Lucent raised the issue of whether Ms. Davis's complaints in MCAD were timely filed.

The Court (*Richard Stearns,* J.) dismissed the first count of Ms. Davis's complaint, alleging sexual harassment, because it was filed more than three years after the April 19, 1996 incident. The Court dismissed the second count, alleging sexually discriminatory termination, because the agency complaint on which the Court believed it was based was filed more than six months after Ms. Davis was terminated.

This appeal followed.

SUMMARY OF ARGUMENT

Lauren Davis first argues that her claims of sexual harassment and unjust termination are related because they were motivated by the same sexually discriminatory animus and because they grow out of the same series of events. She also notes that they are also related because a reasonable investigation into the sexual harassment claim would have revealed the unjust termination. The plaintiff points out that her claims were filed within the period of limitations, counting from the termination – the last act of discrimination. Based on this, the plaintiff argues that the District Court should have denied the defendant's motion to dismiss.

Ms. Davis also points out that the MCAD and EEOC were unreasonable in not allowing her to amend her complaints before the agencies and that therefore the Court should take cognizance of them.

Ms. Davis then argues that even if her claims were otherwise untimely filed, the deadlines should have been equitable tolled because she was mislead by EEOC as to the correct procedure by which to file her claims.

Ms. Davis next argues that the unjust termination was merely a final incident of the sexual discrimination directed at her. As such, it is part of continuing violation of the anti-discrimination laws, and the period of limitations for filing her claims must therefore run from the date of her termination. As such,

both her claims were timely filed.

Ms. Davis also argues that because she filed a grievance pursuant to her employment contract, the period of limitations should not begun running until the resolution of that procedure.

Finally, Ms. Davis argues that the timeliness of EEOC and MCAD filings are waivable, and that defenses not raised in the agency cannot be pressed in court. She notes that the defendant did not raise the timeliness of the plaintiff's filings when it had a chance, and that therefore the defense was waived.

ARGUMENT

I. Ms. Davis's Sexual Harassment Claim is Related to Her Unjust Termination Claim, Thus Making Both Timely Filed

A court action alleging discrimination may be brought in the Massachusetts Superior Court, M.G.L. c. 151B § 9, providing it is preceded by the filing of a complaint of discrimination with the MCAD within six months of the discriminatory act. M.G.L. c. 151B § 5. If two discriminatory acts are alleged, and just one of them is within the six-month window, the court may consider the untimely act if it is "related" to the one timely raised. *See e.g., Carter v. Commissioner of Correction*, 681 N.E.2d 1255, 43 Mass. App. Ct. 212 (1997).

A. Ms. Davis's Sexual Harassment and Unjust Termination are Related

Lauren Davis initially made a charge in MCAD and EEOC for sexual discrimination. Later, after she was fired, she attempted to amend the charge to include unlawful termination based on sexual discrimination. APPEAL OF M.C.A.D. FINDING OF LACK OF PROBABLE CAUSE (April 13, 1999), *Addendum* at 8, 12-13.

A second charge of discrimination is regarded as stated in the initial charge when they both concern the same subject matter, arise from the same set of facts, and are reasonably related. *Harper v. Godfrey Co.*, 45 F.3d 143 (7th Cir. 1995). If

one is timely filed, the related charge is deemed timely as well. *Conroy v. Boston Edison Co.*, 758 F.Supp. 54 (D. Mass. 1991).

Two entirely different types of discrimination generally cannot be related. *See e.g.*, *Davis v. Sodexho*, 157 F.3d 460 (6th Cir. 1998) (race and age discrimination not related); *Fairchild v. Forma Scientific, Inc.*, 147 F.3d 567 (7th Cir. 1998) (disability discrimination not shown to grow out of earlier age discrimination claim); *Antol v. Perry*, 82 F.3d 1291 (3rd Cir. 1996) (sex and disability discrimination not related); *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954 (4th Cir. 1996) (age and sex discrimination not related).

Similarly unrelated are charges of discrimination that arise from two separate courses of conduct. *Cheek v. Western & Southern Life Ins. Co.*, 31 F.3d 487 (4th Cir. 1994) (agency charge "must, at a minimum, describe the same conduct and implicate the same individuals"). *See e.g.*, *Shannon v. Ford Motor Co.*, 72 F.3d 678 (8th Cir. 1996) (failure to promote claim not reasonably related to charge of sex discrimination); *Harper v. Godfrey Co.*, 45 F.3d 143 (7th Cir. 1995) (ordering or seniority list and layoffs involved different conduct and different supervisors); *Chambers v. American Trans. Air, Inc.*, 17 F.3d 998 (7th Cir. 1994) (promotion denial outside scope of charge of wage discrimination); *Oxman v. WLS-TV*, 12 F.3d 562 (7th Cir. 1993) (failure to re-hire claim not reasonably related

to termination claim); *Stache v. International Union of Bricklayers*, 852 F.2d 1231 (9th Cir. 1988), *cert. den.* 493 U.S. 815 (1989) (claim against international union not like or reasonably related to charge against local union).

But when the discriminatory animus is the same, or the course of conduct giving rise to the charges are the same, the charges are related.

> "An amendment is said to grow out of the same subject matter as the initial charge where the protected categories are related, as is the case, for example, with race and national origin. Even where the amendment alleges a new protected category, age instead of race in [this] case, it will still relate back where the predicate facts underlying each claim are the same."

Conroy v. Boston Edison Co., 758 F. Supp. 54, 58 (D. Mass. 1991) (citations omitted). Thus, even different types of discrimination can relate when the same set of facts gave rise to both. *Hornsby v. Conoco, Inc.*, 777 F.2d 243 (5th Cir. 1985); *Sanchez v. Standard Brands*, Inc., 431 F.2d 455 (5th Cir. 1970) (national origin discrimination charge related back to date of sex discrimination charge because "a charging party's failure to attach the correct legal conclusion to factual allegations contained in charge of discrimination is mere technical defect")

In *Carter v. Commissioner of Correction*, 681 N.E.2d 1255, 43 Mass. App. Ct. 212 (1997), the court found that retaliation was related to race and sex discrimination. The court said that the reason a court claim must be preceded by

an MCAD charge is "to provide the agency with an opportunity to investigate and conciliate the claim of discrimination" . . . and to give "notice to the defendant of a potential suit." *Id.* at 217 (quotations and citations omitted). The court found that because they arose from the same set of facts, "[t]here can be no serious claim that the alleged retaliation was not related to or arising out of the subject matter of the original complaint." *Id.* at 219. *See also Black v. School Comm. Of Malden*, 310 N.E.2d 330, 365 Mass. 197 (1974). The Seventh Circuit has allowed a claim which relies on facts not specified in the plaintiff's underlying agency charge, and which occurred at a different branch office. *Taylor v. Western & Southern Life Ins. Co.,* 966 F.2d 1188 (7th Cir. 1992).

In Ms. Davis's case, her allegation of unjust termination is based on the exact same conduct which gave rise to her allegation of a sexually hostile work environment. In her MCAD appeal, she alleged:

> "Due to the constant sexual harassment resulting in a hostile, offensive work environment, Ms. Davis was forced to go on medical leave on April 19, 1996. On this date, Ms. Davis was forced to seek medical attention while at work due to uncontrollable shaking and crying. Clearly, this hostile work environment, coupled with Lucent's lack of response to the situation, resulted in Ms. Davis becoming effectively disabled in the Lucent workplace.
>
> . . .
>
> "Ms. Davis' real concerns over the safety of a sexually harassing, hostile work environment were never reasonably addressed by Lucent. Instead they chose to unjustly terminate Ms. Davis after sixteen years

of employment on August 7, 1996."

APPEAL OF M.C.A.D. FINDING OF LACK OF PROBABLE CAUSE (April 13, 1999), *Addendum* at 8, 12-13. In Ms. Davis's Superior Court complaint, she alleged:

> "The Defendant, through its employees and agents caused an intimidating, hostile and offensive work environment through its sexual harassment of the Plaintiff. This harassment resulted in the effect of unreasonably interfering with the Plaintiff's work performance. This sexual harassment resulted in the final act of harassment perpetrated on the Plaintiff by the Defendant; the Plaintiff's unjust termination on August 7, 1996. The harassing incidents resulting in the Plaintiff's dismissal were similar in time and nature and sufficiently linked to indicate a continuing pattern of abuse. The Defendant was well aware of these incidents by its employees and/or agents. The Defendant took no action to deal with these incidents resulting in unjust termination."

COMPLAINT (Newburyport Superior Court, No. 99-1406D), *Addendum* at 4, 6-7 (paragraphing omitted).

Ms. Davis thus made clear that her allegation of sexual harassment and of unjust termination are more than merely related. It is apparent that they are based on the same sexually discriminatory animus *and also* caused by the same acts of harassment. *Cf. Lattimore v. Polaroid Corp.*, 99 F.3d 456 (1st Cir. 1996) (allegations not included in agency charges based on separate acts of harassment). They are thus "related." Her initial charge of sexual harassment was made during the six-month window, and her otherwise untimely filing of unjust termination

should be deemed timely based on the initial charge.

B. An Investigation of Ms. Davis's Sexual Harassment Would Have Revealed Unlawful Termination, And The Claims Are Therefore Related

A second charge of discrimination is also related to an initial charge if a reasonably focused agency investigation of the initial charge would uncover the second. Thus, even if two charges are not facially related, a second may within the scope of the initial charge. *Walters v. President & Fellows of Harvard College*, 616 F. Supp. 471, 475 (D. Mass. 1985) ("the scope of a civil action is not determined by the [agency] complaint, but is co-extensive with 'the scope of the [agency] investigation which can reasonably be expected to grow out of the charge of discrimination'"); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970) ("it is obvious that the civil action is much more intimately related to the [agency] investigation than to the words of the charge which originally triggered the investigation.").

It is not necessary that the agency actually investigated the complaint; it is only necessary that had an investigation into the initial charge been done, it would have revealed the grounds of the second charge. *Powers v. Grinnell Corp.*, 915 F.2d 34, 38 (1st Cir. 1990) ("The charge merely provides the [agency] with a jurisdictional springboard to investigate whether the employer is engaged in any discriminatory practices."). *See Yamaguchi v. United States Dep't of Air Force*,

109 F.3d 1475 (9th Cir. 1997); *Rush v. McDonald's Corp.*, 966 F.2d 1104 (7th Cir. 1992). In *Conroy v. Boston Edison Co.*, 758 F.Supp. 54 (D. Mass. 1991), the Massachusetts District Court wrote:

> "the scope of a civil action is not determined by the specific language of the charge filed with the agency, but rather, may encompass acts of discrimination which the MCAD investigation could reasonably be expected to uncover. According to the so-called 'scope of the investigation rule,' the exact wording of the charge of discrimination need not presage with literary exactitude the judicial pleadings which may follow. In deciding what a reasonable investigation would uncover, the fact that a particular type of discrimination was actually investigated has evidentiary value. Nonetheless, where the factual statement in a plaintiff's written charge should have alerted the agency to an alternative basis of discrimination, and should have been investigated, the plaintiff will be allowed to allege this claim in his or her complaint regardless of whether it was actually investigated."

Conroy, 758 F. Supp. at 58 (quotations and citations omitted), citing *Powers v. Grinnell Corp.*, 915 F.2d 34, 37-40 (1st Cir. 1990). Courts have allowed charges to relate to each other although they otherwise seem unconnected, when investigations have revealed the grounds for the second charge. *See e.g., EEOC v. Delight Wholesale Co.*, 973 F.2d 664 (8th Cir. 1992) (allowing claims of constructive discharge and wage discrimination based on evidence uncovered during investigation of discriminatory demotion charge); *Farmer v. ARA Services, Inc.*, 660 F.2d 1096 (6th Cir. 1981) (women's charge of denial of fair representation by union reasonably led EEOC to investigate sex-segregated collective bargaining

provisions providing for unequal wage rates).

In Ms. Davis's case, the grounds upon which she alleged sexual discrimination are exactly the same as those on which she based her claim of unlawful termination. Moreover, the unjust termination necessarily came later in time than the harassment, thus making it likely that the investigation would have revealed it. *Cf. Lattimore v. Polaroid Corp.*, 99 F.3d 456 (1st Cir. 1996) (allegations not included in MCAD charge but pressed in court occurred *before* the charged conduct). It is unreasonable to suppose that an investigation into the harassment would not have revealed the termination. Thus, the two charges are related, and both should have been considered timely filed.

C. Court Can Consider Issues when MCAD Unreasonably Disallowed Amendment of a Complainant's Charge

In Ms. Davis's case, the EEOC did not allow her to amend her charge to include unjust termination. It is apparent, however, that the agency should have reasonably allowed such an amendment. It is also apparent that the court could have considered the unjust termination claim.

In *Carter v. Commissioner of Correction*, 681 N.E.2d 1255, 43 Mass. App. Ct. 212 (1997), the plaintiff suffered race and sex discrimination. She filed her complaint with MCAD in July 1989. During the following several months, the

plaintiff was retaliated against for the filing. She did not file an amendment to her complaint alleging retaliation, however, until October 1991. *Carter*, 681 N.E.2d at 217-18. Even though there was a two year tardiness, the MCAD allowed the amendment. *Carter*, 681 N.E.2d at 219.

The scope of a civil complaint is not determined by the scope of the administrative agency charge. In *Walters v. President & Fellows of Harvard College*, 616 F. Supp. 471 (D. MA 1985), the District Court wrote:

> "The civil action may also include 'relief for incidents not listed in his original charge to the EEOC . . . [which are] like or reasonably related to the allegations of the EEOC charge, *including new acts occurring during the pendency of the charge* before the EEOC.'"

Walters, 616 F.Supp. at 475 (emphasis added), *quoting Oubichon v. North American Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973). The court thus found that

> "Walters' failure to identify retaliation as a motive for her demotion and the other acts identified in her complaints before the [MCAD] is not a bar to such a claim in this court."

Walters, 616 F.Supp. at 475.

In *Albano v. Schering-Plough Corp.*, 912 F.2d 384 (9th Cir. 1997), the court held that a plaintiff is not barred from bringing a claim where failure to comply with the scope requirement was caused by EEOC's improper refusal to amend the

plaintiff's charge. More generally, failing to raise an issue in MCAD is not an automatic bar to subsequently making the claim in court, *see Larking v. Egger*, 117 F.R.D. 26 (D.Mass. 1987) (court allowed plaintiff to name second defendant, as no defense was raised in MCAD and there was no prejudice), and courts are not bound by the determination of the MCAD on timeliness of filings. *Christo v. Edward G. Boyle Ins. Agency, Inc.*, 525 N.E.2d 643, 645, 402 Mass. 815 (1988).

In Ms. Davis's case, she filed her complaint in MCAD and EEOC on July 17, 1996. She suffered unjust termination on August 7, 1996. The proceeding was not resolved by EEOC until March 1998, and by MCAD not until February 1999. The unjust termination was thus clearly a new act occurring during the pendency of the agency proceedings, and the agencies should have allowed Ms. Davis to amend her complaint to include it.

Had the agency allowed the amendment, all of Ms. Davis's claims would have been resolved on the merits, there would be no issue regarding whether they were time-barred, and this appeal would not exist.

Moreover, even though the agency initially denied Ms. Davis's request to amend her charge to include unjust termination, it effectively allowed the amendment during the MCAD appeal proceeding. Ms. Davis clearly raised the unjust termination issue during the appeal, and offered substantial arguments on

the matter. APPEAL OF M.C.A.D. FINDING OF LACK OF PROBABLE CAUSE (April 13, 1999), *Addendum* at 8, 12-13. The defendant did not object to it. Thus, the District Court was wrong in ruling that the unjust termination claim was untimely made.

D. Ms. Davis's Claims Are Related and Should be Deemed Timely Filed

The District Court mechanically held that Ms. Davis's claims were time-barred and thus dismissed Ms. Davis's suit. But because Ms. Davis's charges of sexual discrimination and unlawful termination are related, and because she did in fact raise both claims in MCAD, both were timely filed. Accordingly, the District Court's holding that both counts were time-barred is in error, and should be reversed.

II. Ms. Davis's Filing Should Be Deemed Timely by Equitable Tolling Because EEOC Discouraged Her From Filing On Time

Compliance with MCAD's six-month limitation period is subject to equitable tolling. *Cherella v. Phoenix Technologies Ltd.*, 586 N.E.2d 29, 32 Mass. App. Ct. 919 (1992); *Jones v. City of Somerville*, 735 F.2d 5, 8 (1st Cir. 1984); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-98; *Conroy*, 758 F. Supp at 60-61.

Equitable tolling is appropriate when a plaintiff is mislead by the administrative agency as to proper filing procedures, the deadline to file, or as to the ability to raise issues before the agency. *Agin v. Federal White Cement, Inc.*, 632 N.E.2d 1197, 1199, 417 Mass. 669 (1994) (MCAD told plaintiff he could not file with agency; case remanded for additional facts); *Christo v. Edward G. Boyle*, 525 N.E.2d 643, 402 Mass. 815 (1988) (MCAD employees discouraged plaintiff from filing a timely complaint with the agency; case remanded). *See also Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374 (11th Cir. 1998) (en banc) (statute tolled for plaintiffs who were affirmatively misinformed by EEOC that they had two or three years in which to file suit); *Browning v. AT&T Paradyne*, 120 F.3d 222 (11th Cir. 1997 (tolling appropriate where EEOC did not inform plaintiff of right to sue or of potentially applicable statute of limitations, and EEOC

investigator misinformed plaintiff's attorney regarding applicable statute of limitations); *Anderson v. Unisys Corp.*, 47 F.3d 302 (8th Cir. 1995), *petition for reh. denied*, 52 F.3d 764, *cert. denied*, 516 U.S. 913 (1995) (agency's letter used "ambiguous and misleading language" regarding filing deadline); *Gray v. Phillips Petroleum Co.*, 858 F.2d 610 (10th Cir. 1988) (statements by EEOC employee "mislead or at least lulled plaintiffs into inaction"); *Chappell v. Emco Mach. Works Co.*, 601 F.2d 1295 (5th Cir. 1979) (tolling when EEOC inadvertently mislead plaintiff about proper procedure and employee followed the advice).

In Ms. Davis's case, she made efforts to amend her agency complaint during the limitations period. She had at least two contacts with employees of the EEOC, in which Ms. Davis was told that she should not amend her complaint at that time, but would be allowed to amend at a later date when the agency was ready to consider the case. APPEAL OF M.C.A.D. FINDING OF LACK OF PROBABLE CAUSE (April 13, 1999), *Addendum* at 8, 9; LETTER FROM LAUREN K. DAVIS TO MR. LEONARD MOORE, EEOC (Dec. 10, 1997), *Addendum* at 16. She followed this advise to her detriment. *Albano*, 912 F.2d at 384.

At the time of Ms. Davis's calls to EEOC about this matter, she was not represented by counsel. She retained an attorney in September 1997, at which time she attempted to amend her complaint to include unjust termination. *See Cano v.*

U.S. Postal Service, 755 F.2d 221 (1st Cir. 1985) (no tolling for illness when employee was represented by attorney); *Hamel v. Prudential Ins. Co.*, 640 F.Supp. 103 (D. Mass. 1986) (administrative error by EEOC which delayed filing of charge did not toll limitations period where employee was represented by attorney); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (*pro se* litigant held to a less stringent standard than attorney)

Since the defendant here has been aware of the unjust termination issue since it occurred, it cannot claim any prejudice. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984).

When a plaintiff has been thwarted in her efforts to file with the agency, remand for the application of equitable tolling is appropriate. *Agin v. Federal White Cement, Inc.*, 632 N.E.2d at 1197, 417 Mass. at 669; *Christo v. Edward G. Boyle*, 525 N.E.2d at 643, 402 Mass. at 815 (1988).

The District Court in this case dismissed Ms. Davis's claims because they were not timely filed. The timeliness of her filing hinges on the fact, according to the court, that Ms. Davis did not file her claim of unjust termination until more than six months after it occurred. Had she been helped to do so, rather than discouraged by the EEOC staff, her claim would have long ago been heard on the merits. Because of the agency's action, the deadline should be equitably tolled

such that her filing is deemed timely.

III. The Firing of Ms. Davis is Part of a Continuing Violation and Should Therefore be Deemed Timely Filed

The MCAD rules allow that "the six month requirement shall not be a bar to filing in those instances where facts are alleged which indicate that the unlawful conduct complained of is of a continuing nature." 804 C.M.R. 1.03(2). In *Mack v. Great Atlantic and Pacific Tea Co., Inc.*, 871 F.2d 179 (1st Cir. 1989), this court defined a continuing violation as separate acts which

> "involve an interlinked succession of related events. . . . Although the limitations clock generally starts with the commission of a discriminatory act, a true 'continuing violation' rewinds the clock for each discriminatory episode along the way. Thus, if the later violations in the series are within the prescriptive period, an employee may pursue them despite the fact that earlier acts, forming part and parcel of the same pattern, have grown stale."

Mack v. A & P, 871 F.2d at 183 (citations omitted).

A. In Massachusetts, Unlike Federal Law, the 6-Month MCAD Limitations Period Begins When a Prior Discriminatory Practice Creates an Effect

Beyond this statement of the doctrine, however, Massachusetts and federal law differ on its application.

Under federal law, a delayed effect of an earlier discriminatory practice is not part of a continuing serial violation. *Jones v. City of Somerville*, 735 F.2d 5 (1st Cir. 1984). This is because the "purpose of the serial doctrine is to permit

inclusion of acts whose character as discriminatory was not apparent at the time they occurred. *Provencher v. CVS Pharmacy*, 145 F.3d 5, 15 (1st Cir. 1998). In *American Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111 (1st Cir. 1998), for example, this Court held that the employees claims accrued when they were discriminated against in their job, not when they later lost their job in facially neutral reduction in force. When an allegedly discriminatory act has some "permanence," the plaintiff is deemed to know about it, and must make her timely filing. *Sabree v. United Broth. of Carpenters and Joiners Local 33*, 921 F.2d 396 (1st Cir. 1990).

Thus, under federal law, a firing can almost never be part of a continuing violation. It is an act with sufficient definiteness which the plaintiff should know begins ticking the statutory clock. *Lawton v. State Mut. Life Assur. Co. of America*, 101 F.3d 218 (1st Cir. 1996) (attempt to bring other acts into scope of discriminatory firing); *Jensen v. Frank*, 912 F.2d 517 (1st Cir. 1990) (attempt to bring firing into scope of other discriminatory acts). *See also Mascheroni v. Board of Regents of University of California*, 28 F.3d 1554 (10th Cir. 1994) (firing as result of budget limitations not part of continuing violation).

Under federal law, the defendant here has a cogent defense to an allegation of a continuing violation. All it has to do is note that Ms. Davis was fired as a non-

discriminatory result, the company can claim, of her not having returned to work after her leave.

But Massachusetts law is different, and does not allow the defense. In Massachusetts, a content-neutral policy which has a discriminatory *effect* due to prior discrimination is itself actionable, and is timely filed when the *effect* manifests.

In *Lynn Teachers Union, Local 1037 v. MCAD*, 549 N.E.2d 97, 406 Mass. 515 (1990) two teachers were forced to leave their employment because they were pregnant in 1962 and 1970. Both teachers later re-joined their profession. In 1981, in anticipation of projected layoffs, seniority lists were posted. Seniority, however, was calculated by years of consecutive service. The teachers were thus not credited with years of service prior to their forced pregnancy resignations. In 1982 they were fired, and thereafter filed complaints with MCAD. The pregnancy resignations were clearly discriminatory, but the firing was a result of a content-neutral policy. The defendant thus argued that a timely filing would have been in 1962 and 1970 because "the seniority system is facially neutral and does not explicitly adopt the discriminatory rule contained within the original maternity leave policy." *Lynn Teachers*, 549 N.E.2d at 101. The Massachusetts Court rejected the argument and held that:

> "The [defendant's] refusal to credit the complainants' pre-resignation seniority springs directly from the discriminatory maternity leave policy. Had the [defendant] been willing to alter its seniority system to disregard breaks in service caused by illegal acts, the effects of the maternity leave policy would have gradually disappeared. Instead, the [defendant's] refusal to credit the complainants for their pre-resignation seniority breathes new life into a concededly illegal policy. Given the [defendant's] knowledge that the complainants were illegally forced to resign, the refusal to credit the complainants constituted a discriminatory act.

Lynn Teachers, 549 N.E.2d at 101.

Thus, the Massachusetts Court has explicitly rejected the federal rule that delayed discriminatory effects are not a continuing violation. Under Massachusetts law, they clearly are. The reason for the difference lies in the Massachusetts statute. In *Rock v. MCAD*, 424 N.E.2d 244, 249, 384 Mass. 198 (1981), the Massachusetts Court noted that the MCAD is "mandated to construe the provisions of [the anti-discrimination law] 'liberally for the accomplishment of the purposes thereof.'" Accordingly, the federal rule does not obtain in Massachusetts nor, as here, in cases removed from Massachusetts courts. *See Lattimore v. Polaroid Corp.*, 99 F.3d 456 (1st Cir. 1996) (use of Massachusetts law when more permissive than federal as to pretextual firings).

A second group of cases highlights the distinction between the Massachusetts and federal rules.

Most continuing violation cases arise when the plaintiff files a claim based on the latest discriminatory act and then wants to include (and increase damages thereby) discrimination based on older (now untimely) acts as well. *See e.g., DeNovellis v. Shalala*, 124 F.3d 298 (1st Cir. 1996); *Kassaye v. Bryant College*, 999 F.2d 603 (1st Cir. 1993); *Sabree*, 921 F.2d 396 (1st Cir. 1990); *Jensen v. Frank*, 912 F.2d at 517; *Mack v. A&P*, 871 F.2d at 179; *Cajigas v. Banco de Ponce*, 741 F.2d 464 (1st Cir. 1984). A case presenting the procedurally opposite set of facts – a plaintiff filing a claim based on early discriminatory acts who then wants to allege discrimination based on newer conduct which had become untimely because of the running of the limitations period – would almost always be barred under the federal rule. This is because a person who earlier filed a claim would be deemed to be aware of the law's period of limitations, and thus could be no excusable ignorance. *Jensen v. Frank*, 912 F.2d 517 (1st Cir. 1990); *Desrosiers v. Great Atlantic & Pacific Tea* Co., Inc., 885 F.Supp. 308 (D. Mass. 1995).

In Massachusetts, however, such a claim does not run afoul of the law. In *Carter v. Commissioner of Correction*, 681 N.E.2d 1255, 43 Mass. App. Ct. 212 (1997), the plaintiff made timely discrimination charges in MCAD. Thereafter, she felt retaliated against, and filed an untimely retaliation charge. The court had no trouble finding that the retaliation was part of a continuing violation.

Accordingly, under Massachusetts law, the six-month MCAD limitations period begins on the date a prior discriminatory practice creates an *effect*, not on the date of the practice itself. This includes termination as the delayed effect.

B. Ms. Davis's Termination Was Part of a Continuing Violation

In Ms. Davis's case, her unlawful termination was merely one more discriminatory act in a long series of them. Ms. Davis was subject to incident after incident of sexual harassment, about which her employer did nothing. She had been branded a trouble-maker for bringing these to Lucent's attention, and her inability to continue working in that environment made it impossible for her to come back to work without having the problems addressed. Rather than apply oil where it was needed, the company applied an obviously content neutral policy – it is reasonable to fire employees who don't come to work – in order to get rid of the squeaky wheel.

Because the unlawful termination was merely a final act of discrimination, or an effect of a prior act of discrimination, it is part of a continuing violation. Accordingly, Ms. Davis's otherwise untimely complaint of unjust termination must be deemed timely. *Egger v. Local 276, Plumbers Union*, 644 F. Supp. 795 (D. Mass. 1986); *Morrison v. Carleton Woolen Mills, Inc.*, 108 F.3d 429 (1st Cir. 1997). Moreover, her complaint of sexual harassment must also be deemed timely filed because it was filed in court within three years of her unjust termination – the final act of discrimination.

IV. Ms. Davis Filed a Grievance Pursuant to Her Employment Contract, Thus Tolling the Limitations Period

The rules of the MCAD allow that

> "the six month requirement shall not be a bar to filing in those instances . . . when pursuant to an employment contract, an aggrieved person enters into grievance proceedings concerning the alleged discriminatory act(s) within six months of the conduct complained of and subsequently files a complaint within six months of the outcome of such proceeding(s).

804 C.M.R. 1.03(2).

This is in explicit derogation of federal law. *See Delaware State College v. Ricks*, 449 U.S. 250, 261 (1980) ("The pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods."); *Cajigas v. Banco de Ponce*, 741 F.2d 464, 468 (1st Cir. 1984) (same); *Mercado-Garcia v. Ponce Federal Bank*, 979 F.2d 890 (1st Cir. 1992) (employer's offer to enter settlement talks not toll); *Johnson v. General Elec.*, 840 F.2d 132 (1st Cir. 1988) (pursuing a union grievance procedure not toll).

On the other hand, because the limitations are equitable, where an employee makes substantial efforts to obtain an informal resolution, the failure to meet procedural deadlines is excusable. *Loe v. Heckler*, 768 F.2d 409 (D.C. Dir. 1985). *LaChance v. Northeast Publishing, Inc.*, 965 F.supp. 177 (D.Mass 1997) (mandatory arbitration pursuant to collective bargaining agreement may toll

MCAD deadlines).

In Ms. Davis's case her employment contract provides for a grievance procedure. MANUFACTURING GENERAL AGREEMENT BETWEEN AT&T AND C.W.A. (1992), *Addendum* at 17, 18. Thus, pursuing a grievance tolls her deadline, as long as Ms. Davis filed with MCAD within six months of the outcome of the proceeding.

Ms. Davis's filed her grievance in August 1996 shortly after she was terminated. LETTER FROM JOHN S. PRIOIA, V.P., C.W.A., TO MR. DOMINIC P. MAZZOCCO, MANAGER, LUCENT, (Aug. 26, 1996), *Addendum* at 19. The grievance was heard on September 18, 1996, and was not disposed of until March 29, 1999. LETTER FROM J.W. OSTROWSKI, LUCENT, TO MR. WILLIAM MCKELLIGAN, C.W.A., (Mar. 29, 1999), *Addendum* at 20; APPEAL OF M.C.A.D. FINDING OF LACK OF PROBABLE CAUSE (April 13, 1999), *Addendum* at 8, 14 ("Ms. Davis attempted to go through proper corporate channels"). Ms. Davis filed her complaints with EEOC and MCAD in 1996, and her amendment to include unjust termination in 1997. Her grievance tolled the statute of limitations, and thus her agency filing, as to both counts, must be deemed timely filed. This is a substantial issue which affects the outcome of this case.

V. Because Lucent Did Not Raise Untimeliness Issue in MCAD, it is Barred From Raising it in Court

Massachusetts' anti-discrimination statute provides that:

> "No objection that has not been urged before the commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

M.G.L. c. 151B § 6.

In *Katz v. MCAD*, 312 N.E.2d 182, 186, 365 Mass. 357 (1974), the defendant raised the issue in court that the plaintiff's MCAD complaint was vague and overbroad.. The court held that because the matter had not been raised in MCAD, the defendant was barred from raising it in court. Similarly, in *Mass. Elec. Co.* v. *MCAD*, 375 N.E.2d 1192, 375 Mass. 160 (1978), the company claimed in court that low electric prices were a public interest that justified pregnancy discrimination. The court said that because the defense had not been raised in the agency, it couldn't be pressed in court.

There is no evidence in Ms. Davis's case that the issue of the timeliness of her charge was raised by Lucent in MCAD. The plaintiff argued and filed pleadings concerning both sexual harassment and unjust termination before the agency. Lucent had an opportunity to respond, but filed no pleadings. Although a Lucent representative was present, no untimeliness defense was raised. *MCAD v.*

Colangelo, 182 N.E.2d 595, 603, 344 Mass. 387 (1962) ("In subsequent cases . . . the parties will be on notice from this opinion, as well as from the statute, that they should raise before the commission any issues which they intend to present upon a judicial review of the commission's decision.").

The defense was pressed for the first time in the District Court, and there are no extraordinary circumstances excusing Lucent's neglect. The untimeliness defense, therefore, is barred by the statute. Though filing in MCAD is a prerequisite to judicial action, *Tardanico v. Aetna Life & Cas. Co.*, 671 N.E.2d 510, 41 Mass. App. Ct. 443 (1996), *appeal denied*, 674 N.E.2d 246, the timeliness of MCAD filings is waivable and not jurisdictional, *Jones v. City of Somerville*, 735 F.2d 5 (1st Cir. 1984), and therefore is not deserving of *sua sponte* attention by the District Court. Accordingly, Lucent waived the untimeliness defense, and Ms. Davis's complaint should have been heard on the merits.

VI. Standard of Review

Motions to dismiss are reviewed by this court *de novo*, accepting as true all well-pleaded facts. *Carreiro v. Rhodes Gill & Co., Ltd.*, 69 F.3d 1443, 1446 (1st Cir. 1995). All reasonable inferences are drawn in favor of the party dismissed. *Id.*

CONCLUSION

The District Court dismissed Ms. Davis's claim of sexual harassment because it was filed in the Superior Court more than three years after the April 19, 1996 harassment incident. The claim was filed, however, well within three years from the date she was unjustly terminated. For the reasons discussed in this brief, the date of Ms. Davis's unjust termination should be deemed the beginning of the three-year clock. Accordingly, her claim of sexual harassment is timely.

The District Court dismissed Ms. Davis's claim of unjust termination because the MCAD charge relating to it was filed more than six months after the incident. For the reasons discussed herein, the two claims should be deemed related. Accordingly, Ms. Davis's claim of unjust termination is timely as well.

Ms. Davis therefore requests that this court either reverse the District Court's order and allow Ms. Davis's claims to go forward on the merits, or remand this case for determination of the timeliness of her filings.

Ms. Davis also requests that her attorney be allowed to present oral

argument.

Respectfully submitted,
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Dated: May 30, 2001

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I hereby certify that on May 30, 2001, a copy of the foregoing, as well as a computer disk containing the foregoing, formatted by WordPerfect 8, will be forwarded to Thomas E. Shirley, Choate, Hall & Stewart, attorney for the defendant.

Dated: May 30, 2001

Joshua L. Gordon, Esq.

I hereby certify that this brief complies with the type-volume limitations contained in F.R.A.P. 32(a)(7)(B) and that it contains no more than 7,243 words.

Dated: May 30, 2001

Joshua L. Gordon, Esq.

ADDENDUM