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The California Supreme Court has held in *McDonald v. Antelope Valley Community College District*, that the statute of limitations for an employee's discrimination claim could be equitably tolled, or extended while the subject employee voluntarily pursued her employer's internal administrative remedy. The court reasoned that because the employer had notice of the claims alleged, it could gather and preserve evidence, and the public policy behind the statute of limitations was satisfied.

***McDonald v. Antelope Valley Community College District*: An Employee's Use of an Employer's Internal Administrative Complaint Procedure May "Equitably Toll" the Time Limit for Filing a DFEH Complaint**

By Meghann J. Barloewen

In *McDonald v. Antelope Valley Community College District*, No. S153964 (Oct. 27, 2008), the California Supreme Court recently held that an employee of the Antelope Valley Community College District (the District) had equitably tolled the one-year statute of limitations that applied to her discrimination complaints with the Department of Fair Employment and Housing (DFEH) by her good faith use of the District's internal administrative remedies. As this decision may be applied to private and public employers alike, any entity that utilizes internal investigational processes must now, more than ever, properly manage these processes and document the results.

The *McDonald* Facts

In *McDonald*, three employees of the Antelope Valley Community College District (the District), filed a lawsuit alleging racial harassment, racial discrimination, and retaliation. None, however, had filed a complaint with the DFEH within one year of the discriminatory incidents. In light of this undisputed fact, the trial court granted the District summary judgment on all of the plaintiffs' claims. The Court of Appeal reversed judgment as to two of the employees, but affirmed the judgment against the third. The Supreme Court granted the District's petition for review, but only as to one of the two employees, Sylvia Brown, and solely on whether her use of the District's internal administrative procedures equitably tolled the statute of limitations applicable to DFEH complaints.

Brown began working for the District in 1998 as a library technician's assistant. In October 1999, Brown applied for a database administrator position, but was not interviewed, allegedly because of her race. In June 2000, the database administrator position again became open. Brown applied, but initially was not interviewed. After Brown protested, the District interviewed her in January 2001. Brown alleged that the interview was a sham because the District had already made the decision to put a non-African American in the position.

In October 2001, Brown sent a letter to the Vice Chancellor of Human Resources for the California Community Colleges. She filed a formal complaint with the Chancellor's Office in November 2001 pursuant to the voluntary administrative grievance procedures applicable to District employees pursuant to the California Code of Regulations. Brown's complaint was then forwarded to the District to investigate. The District hired a private investigator, who concluded that Brown's allegations were unsubstantiated. Brown appealed the findings to the District's Board of Trustees, who affirmed the findings. After further investigation, the Chancellor's office also concluded that the allegations were unsubstantiated.

The District advised Brown in November 2001, when she filed her complaint, that the internal investigational process did not preclude her from filing a DFEH complaint. Brown, however, did not file a complaint with the DFEH until October 11, 2002, which was approximately one year and nine months after her interview. At the time Brown filed her DFEH complaint, the District's internal investigation was still active and ongoing.

Brown received a right-to-sue letter from the DFEH on October 24, 2002, and filed suit against the District exactly one year later.

The Supreme Court Applies Equitable Tolling

Although it is already established that equitable tolling applies automatically if exhaustion of a private administrative remedy is mandatory prior to filing a lawsuit, *McDonald* is the first time that the California Supreme Court considered whether the doctrine applies when the private administrative remedy is voluntary. Under *McDonald*, if an internal administrative complaint sufficiently affords a defendant employer notice of the claims against it so that it may gather and preserve evidence, the principle policy behind the statute of limitations is satisfied.

In order for equitable tolling to apply, the *McDonald* court held that three conditions must be met: (1) timely notice; (2) lack of prejudice; and (3) reasonable and good faith conduct on the part of the employee. According to the court, timely notice means that the private administrative claim must be filed within the statute of limitations period and that it be filed against the same party that is subsequently sued. For there to be a lack of prejudice, the court held that the two claims be identical or so similar that the defendant employer's first investigation will put it in a position to fairly defend the second. Although the court did not strictly define "good faith and reasonable conduct," it implied that it may require that the plaintiff file the second claim (*i.e.* the lawsuit) shortly after the tolling period ends.

In disputing the application of equitable tolling to Brown's claim, the District raised several arguments that the court found unconvincing. First, the court rejected the District's argument that the voluntary nature of its internal process should bar tolling. The District's internal remedy procedures supported application of equitable tolling because they provided the type of benefit equitable tolling is meant to preserve: The full opportunity to formally or informally resolve a dispute so as to minimize or entirely eliminate the employee's need to pursue further judicial proceedings.

The court also found nothing in the language of the FEHA that prohibited or discouraged the use of equitable tolling for a voluntary complaint process. The court was not persuaded by the District's argument that Brown should not be able to toll her claim because she filed her DFEH complaint prior to the District's process being concluded. Such a rule, the court reasoned, would encourage defendant employers to "drag their feet" to forestall a potential DFEH complaint.

Finally, the court rejected the District's argument that equitable tolling should only be applied where a plaintiff actually exhausts the alternate procedure she initiated. The court agreed that a party who initiates a judicial procedure (*i.e.*, a proceeding where testimony is under oath, witnesses are called and evidence is introduced, and a record is made of the proceeding), must exhaust that process, but disagreed that the District's procedure would qualify as such.

What *McDonald* Means for Employers

The decision in *McDonald* may give California employees another opportunity to extend the time in which to file a DFEH complaint and ultimately a lawsuit. Unfortunately, the court's guidelines on applying equitable tolling and what types of employees can use it

are not entirely clear. An employee will need to engage in the informal investigatory process with the employer within a year of the alleged discriminatory, harassing, or retaliatory incident to utilize tolling. However, *McDonald* does not define the prejudice element in detail. Subsequent courts analyzing the issue will likely focus on whether the complaints are identical or substantially similar so that the employer can “fairly” defend the second action. The California Supreme Court ultimately felt that the District’s internal process was detailed enough to avoid prejudice, but failed to provide much guidance on how much detail is enough. Perhaps the most elusive requirement is that the plaintiff act reasonably and in good faith. The only guideline provided regarding this element is that the plaintiff file his/her second claim “a short time” after tolling ended. This vague statement will most likely lead to additional litigation over just how short is “a short time.” Finally, the court did not make clear if this decision will implicate the complaint procedures of private employers, or if it will only be available to employees of public agencies such as the District. However, the rationale for equitable tolling as applied by the court seems equally applicable to private employer internal complaint procedures.

Despite these unanswered questions, in light of *McDonald*’s holding, employers are well advised to assure that they fully document any informal complaint procedures used by employees or initiated by the employer. Documentation should include the specific issues presented by the investigation, the exact dates of when the investigation started and ended, and the employee’s level of cooperation during the investigation. Providing this information in some form to the employee (so that there is, for example, no dispute as to the issues being investigated) will also be critical, along with promptly advising a complaining employee that the employer’s internal complaint procedure has concluded and no further relief will be forthcoming. Finally, nothing in this decision should discourage an employer from conducting in-depth investigations of complaints of discrimination, harassment, or retaliation, as appropriate. Conducting such investigations continues to be one of the most important means of avoiding litigation over employee complaints.

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