

Legal Opinion: GMP-0021

Index: 6.400  
Subject: Age Discrimination in Employment Act

November 14, 1991

MEMORANDUM FOR : Sandra Hobson, Director, Equal Employment  
Opportunity Division

FROM : Sam Hutchinson, Assistant General Counsel for Personnel  
and Ethics Law

SUBJECT: Statute of Limitations for Federal Employees under the  
Age Discrimination in Employment Act

In order to assist your division in assuring that age discrimination complaints are processed timely, you have asked for information on judicial decisions which have ruled on the applicable statute of limitations for filing an age discrimination action in federal district court. As you are aware, 29 U.S.C. Section 633a does not contain a stated statute of limitations.

There are only two federal circuit courts of appeal which have definitively ruled on this issue. The First Circuit, in *Lavery v Marsh*, 918 F.2d 1022 (1st Cir. 1990), held that an aggrieved federal employee must file an age discrimination claim in federal district court within thirty days of receipt of the final administrative order in connection with his or her administrative EEO complaint. The First Circuit encompasses the states of Maine, Massachusetts, New Hampshire, and Rhode Island. Puerto Rico is also in the First Circuit.

The Ninth Circuit is the other federal circuit court which has adopted a statute of limitations for filing federal employment age discrimination suits. The Ninth Circuit has held in *Lubniewski v Lehman*, 891 F.2d 216 (9th Cir. 1989) that suit must be brought within six years of the alleged discriminatory event. The Ninth Circuit includes Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, Guam, and Hawaii.

Several federal district courts have ruled on the issue. However, their decisions are inconsistent, even within the same federal district, and should not be relied upon as controlling precedent. For example, one panel for the district court for the Southern District of New York has ruled that suit must be filed within thirty days of the final administrative order (see also the district courts in Maryland) but another panel in that same district has applied the two year (or three year if willful) statute of limitations applicable to private employment actions (see also the Eastern District of Tennessee) and yet another

Southern district New York panel has held the six year statute of limitations to apply!

It is also noted that other federal circuit courts of appeals have considered the issue but have declined to rule on it. For example, the Second Circuit, in *Bornholdt v Brady*, 869 F.2d 57 (2d Cir. 1989) rejected the reasoning behind adoption of either the two year statute of limitations applicable in private employment ADEA suits or the thirty day statute of limitations adopted by the First Circuit. The *Bornholdt* opinion appeared to lean toward the six year statute of limitations adopted in *Lubniewski*, but declined to rule on the issue. In *Paetz v U.S.*, 795 F.2d 1533 (11th Cir. 1986), the court noted that in general limitations on claims against the government do not commence until completion of the administrative process, but did not decide what the applicable statute of limitations was.

We have been advised by the EEOC that regulations are being drafted which propose to adopt the position that suit must be filed in federal district court within thirty days of receipt of notice of the final administrative order. Adoption of this position may be very helpful to the agency, particularly in view of the fact that much of the time in the administrative processing of complaints, e.g., hearings before and appeals before EEOC, is out of the hands of our agency.

We hope that this information is helpful to you. If you have further questions regarding this matter please contact Judy Keeler on 708-2205.