

June 30, 2009

Court of Appeal of the State of California  
First Appellate District, Division Two  
350 McAllister Street  
San Francisco, CA 94102

Re: Iftikhar Nazir v. United Air Lines, Inc. and Bernard Petersen  
Case No. A121651

To the Honorable Justices of the Court of Appeal:

This letter brief is submitted on behalf of plaintiff and appellant Iftikhar Nazir as requested by the Court's letter of June 15, 2009. The Court asked the parties to brief 'the effect, if any, of appellant's attempt to utilize the internal procedure offered by respondent United Airlines to appeal his termination, on the FEHA statute of limitations issue. (See *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88."

For the reasons discussed below, Nazir's attempt to utilize United's internal appeal procedures equitably tolled the statute of limitations for filing discrimination and harassment complaints with the DFEH from at least May 9, 2005 until the filing of Nazir's present lawsuit. This equitable tolling makes timely all claims of discriminatory harassment and termination raised by Nazir's May 2006 (and October 2005) DFEH complaints.

**1. Nazir Diligently Attempted to Utilize United's Internal Procedure**

Nazir diligently attempted to utilize United's internal procedure to appeal his termination and seek redress for the discriminatory harassment to which he had been subjected in his employment at United.

United notified Nazir of its internal appeal procedure by a letter dated May 10, 2005. The letter told Nazir he had 10 days from the receipt of the letter to initiate use of United's internal appeal procedure. The letter told

Nazir that his request to use United's internal procedure should be made in writing to Senior Vice President Greg Hall. AA:V2:0350:12-21, AA:V2:0407.

Nazir timely sent a letter to Mr. Hall to attempt to use United's internal procedure. AA:V13:3299:1-15; AA:V14:3485:10-23, AA:V14:3584-3587. A copy was sent to Petersen. AA:V13:3299:10-15. Nazir's letter initiating use of United's internal procedure contested United's decision to terminate Nazir and further contested the discriminatory harassment to which Nazir had been subjected:

"I have faced [sic] this exact problem for years at United Airlines. It is a doubled [sic] standard. I am of Pakistani decent [sic]. My religious beliefs and customs are normally slandered, pork products offered and or mixed intentionally to offend me, for which I dare not complain. I would like to have equal rights..." AA:V14:3436.

Nazir's faith that the harassment against him and his termination were not set in stone, but could be remedied by United's internal procedure, was illustrated by how Nazir signed his letter: "Iftikhar Nazir, Facilities Supervisor, United Airlines SFOMP." AA3436. Nazir even asked United if his benefits would remain in place while his internal appeal was pending. United told Nazir this was not done for "management employees," although it was done for other "salaried employees." AA:V13:3299:16-23, AA:V14:3440-3441.

United's internal procedure provided for a hearing, presentation of the employee's case to a hearing officer, witness testimony, and a written decision by the hearing officer. The breadth of the issues that could be decided by United's internal procedure is shown by the title of the procedure: "Resolution of Management Issues." AA:V14:3441, AA:V13:3299:16-23.

Nazir sent a series of e-mails requesting the hearing date be scheduled. AA:V13:3299:16-3300:3, AA:V14:3439-3444. United never scheduled a hearing on Nazir's internal appeal or notified him of any hearing date. AA:V13:3300:4-7. Instead, United led Nazir on for more than ten months into believing it would schedule a hearing pursuant to its internal procedure.

United acknowledged receipt of Nazir's internal appeal letter. AA:V14:3440, AA:V13:3299:16-23. About a month after Nazir sent the letter, United wrote it would "be contacting you soon with the scheduled hearing date" and quoted its internal procedure to Nazir. AA:V14:3441, AA:V13:3299:16-25.

On February 27, 2006, over 9 months after Nazir's written letter initiating United's appeal, United wrote Nazir "I will schedule the hearing as soon as possible, and get you the details of the time date and hearing officer by Wednesday end of day." AA:V14:3442, AA:V13:3299:16-28.

About two weeks later, and over ten months after sending his appeal letter, Nazir wrote United "I am still waiting for a response regarding my appeal hearing appointment, could you help followup on it also. I will really appreciate your expeditious response." In response, United told Nazir it would get the appeal hearing "scheduled as soon as possible." AA:V14:3443, AA:V13:3299:16-3300:3.

United still did not schedule a hearing on Nazir's internal appeal or notify him of any hearing date. Ultimately, it never did. AA:V13:3300:4-7.

In May 2006, two months after United's latest promise to schedule an appeal hearing, Nazir filed his second and third DFEH complaints for discriminatory harassment and termination. AA:V2:0445-0446.

## **2. FEHA Statutes of Limitation Are Equitably Tolloed While Employees Voluntarily Pursue Employers' Internal Procedures**

McDonald v. Antelope Valley Community College District (2008) 45 Cal.4th 88 unanimously held that employees' voluntary pursuit of employers' internal procedures equitably tolls the statute of limitations for FEHA claims.

This rule serves an important public policy. FEHA statutes of limitation should be liberally construed in a way that "would maximize the likelihood of informal employer-employee reconciliation and minimize the need for premature litigation." McDonald at 108, citing Romano v. Rockwell International, Inc. (1996) 14 Cal.4th 479, 494-495, Richards v. CH2M Hill, Inc. (2001) 26 Cal.4th 798, 820-821 and Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1057-1059.

"Tolling promotes resort to such [internal] procedures; if at least some percentage of grievances is thereby resolved, the number of complaints under the FEHA is reduced; and for those that are pursued under the FEHA, tolling increases the likelihood that those 'potentially meritorious claims' will in fact be resolved 'on the merits'.... [cites omitted]" McDonald at 108.

Although McDonald involved a governmental employer, its holding applies equally to private non-governmental employers such as United Air Lines, Inc.

The California Supreme Court has held that statutes of limitation are equitably tolled during use of internal procedures established by non-governmental entities. Prudential-LMI Commercial Insurance v. Superior Court (1990) 51 Cal.3d 674, 690-693 (equitable tolling applied while insured uses insurance company's internal procedure).

McDonald cited this holding of Prudential-LMI with approval. McDonald at 103. See also Rodriguez v. Southern California District Council of Laborers (1984) 160 Cal.App.3d 956, 961 (statutes of limitation tolled against union while employee uses union's internal procedures, even if internal procedures are not mandatory); cf. Schiffando v. City of Los Angeles (2003) 31 Cal.4th 1074, 1091-1092 (rule requiring physician employed by private or public hospital to exhaust hospital's internal procedures does not apply to FEHA claims).

### **3. There is Sufficient Evidence of All Three Elements Needed to Establish Equitable Tolling**

Three elements must be shown to establish equitable tolling: "timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff." McDonald at 102, quoting Elkins v. Derby (1974) 12 Cal.3d 410, 419. There is sufficient evidence on the record of the present case to establish triable issues of fact as to all three elements.

Courts "should 'liberally appl[y] tolling rules or their functional equivalents to situations in which the plaintiff has satisfied the notification purpose of a limitations statute.'" McDonald at 102, quoting Elkins v. Derby (1974) 12 Cal.3d 410, 418. Application of the equitable tolling doctrine is well justified on the facts of the present case.

**A. Nazir's Use of United's Internal Procedure Gave Defendants Timely and Sufficient Notice**

Nazir's May 19, 2005 letter to initiate use of United's internal procedures gave United timely and sufficient notice of his discriminatory harassment and termination claims. The letter complained about Nazir's termination and it complained about the harassment to which he had been subjected "for years." AA:V14:3584-3587 (quoted language is at AA:V14:3436).

To equitably toll FEHA statutes of limitation, an employee's internal claims must be similar enough "that the defendant's investigation of the first claim will put him in a position to fairly defend the second [cites omitted]." McDonald at 102, fn. 2.

"The critical question is whether notice of the first claims affords the defendant an opportunity to identify the sources of evidence which might be needed to defend against the second claim." Collier v. City of Pasadena (1983) 142 Cal.App.3d 917, 925.

Applying the same notice standard, courts have held that an administrative complaint with only a bare allegation of harassment, but no specific examples, sufficiently exhausts administrative remedies for harassment. B.K.B. v. Maui Police Dept. (9th Cir. 2002) 276 F.3d 1091, 1102-1103.

Likewise, an administrative complaint listing specific incidents of harassment, discrimination and retaliation was sufficient to exhaust administrative remedies for other incidents never mentioned in the charge. Sosa v. Hiraoka (9th Cir. 1990) 920 F.2d 1451, 1457-58; see also Soldinger v. Northwest Airlines (1997) 51 Cal.App.4th 345, 382-83 (retaliation).

Defendants are given sufficient notice for purposes of "tolling rules or their functional equivalents" if "recovery is still sought upon the same general set of facts that underlay the original complaint." Elkins v. Derby (1974) 12 Cal.3d 410, 418 (applying the standard for relating back an amended complaint to the date of the original complaint). Nazir's May 19, 2005 letter gave United sufficient timely notice.

**B. Equitable Tolling Would Not Prejudice Defendants**

Equitable tolling would not prejudice defendants. Both defendants received notice of Nazir's complaint and had adequate opportunity to investigate, interview witnesses, and preserve documents. They would also have had the opportunity to question Nazir to elicit any further details they desired if United had scheduled the appeal hearing in compliance with its own internal procedure.

**C. Nazir Acted Reasonably and in Good Faith**

Nazir acted reasonably and in good faith. Nazir initiated use of United's internal procedure within ten days of when he received United's letter notifying him of his right to use that procedure.

Nazir followed through diligently with his use of United's internal procedure. Like the plaintiff in Collier v. City of Pasadena (1983) 142 Cal.App.3d 917, 934, Nazir "had thrown the ball" into United's court and "was waiting for the ball to come back." As did the employer in Collier, United "effectively picked up the ball and left the court under cover of darkness." *Id.*

Nazir was not required to continue waiting longer for United's internal procedure to move forward than the ten months he did wait.

Equitable tolling is not "contingent on a plaintiff's waiting for resolution of an alternate proceeding, not otherwise subject to mandatory exhaustion, prior to institution of further proceedings." McDonald at 111; see also McDonald at 112-113. Otherwise, it could encourage "potential defendants with control over such [internal] procedures to drag their feet as a way of forestalling a potential DFEH complaint." McDonald at 113.

Nazir continued to act diligently in pursuing his claims. Nazir filed his second and third DFEH charges about two months after United's latest unfulfilled promise to schedule an appeal hearing. Nazir then filed the present lawsuit about two months later. AA:V1:0001-0036.

**4. The Court of Appeal Properly Raised the Issue of Equitable Tolling**

The Court of Appeal properly raised the issue of equitable tolling sua sponte, even if the issue was not previously raised by the parties, because the necessary facts are part of the record. Jones v. Tracy School District (1980) 27 Cal.3d 99, 108.

**5. Conclusion**

Nazir's attempt to utilize United's internal appeal procedures equitably tolled the statute of limitations for filing discrimination and harassment complaints with the DFEH from at least May 9, 2005 until the filing of Nazir's present lawsuit.

The equitable tolling doctrine extended the time for Nazir to file his DFEH administrative complaints. As discussed in Appellant's Opening and Reply Briefs, the continuing violation doctrine also extended the time for Nazir to file his DFEH administrative complaints.

Under the continuing violation doctrine, harassment claims that are part of a continuing course of conduct are timely until they have established permanence such that any further reasonable hope that internal processes can halt the harassment are necessarily exhausted. Richards v. CH2M Hill, Inc. (2001) 26 Cal.4th 798, 823 and Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1059.

Together, the equitable tolling and continuing violation doctrines make timely all claims of discriminatory harassment and termination raised by Nazir's May 2006 (and October 2005) DFEH complaints.

Respectfully submitted,

Phil Horowitz

cc: Kurt R. Bockes  
Nancy E. Pritikin