

his favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would be unable to recover under any set of facts.” *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

Ordinarily, in weighing a Rule 12(b)(6) motion, “a court may not consider any documents that are outside of the complaint, or not expressly incorporated therein, unless the motion is converted into one for summary judgment.” *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). “There is, however, a narrow exception for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs’ claim; or for documents sufficiently referred to in the complaint.” *Id.* (citation and internal quotation marks omitted). In this case, BIW appends four documents to its Motion that it asserts qualify as public records or materials integral to the Complaint, Motion at 4 & Exhs. A-D thereto, and Andretta appends one document (a cover letter) to her opposing memorandum, Plaintiff Gail Andretta’s Opposition to Defendant’s Motion To Dismiss, etc. (“Opposition”) (Docket No. 3), at 2-3 & Exh. A thereto. Inasmuch as neither party disputes the authenticity of the other’s extra-pleading materials, *see generally* Opposition; Reply, they are properly considered without converting the Motion to one for summary judgment.

The Reply also implicates Fed. R. Civ. P. 12(f), which provides, in relevant part, “Upon motion made by a party before responding to a pleading . . . the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Immaterial matter is defined as “that which has no essential or important relationship to the claim for relief or the defenses being pleaded[.]” 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1382, at 706-07 (2d ed. 1990). However, “such motions are narrow in scope,

disfavored in practice, and not calculated readily to invoke the court's discretion." *Boreri v. Fiat S.P.A.*, 763 F.2d 17, 23 (1st Cir. 1985); *see also, e.g., Nelson v. University of Maine Sys.*, 914 F. Supp. 643, 646 (D. Me. 1996) ("Motions to strike . . . are disfavored, and they are rarely granted absent a showing of prejudice to the moving party."); *Kounitz v. Slaatten*, 901 F. Supp. 650, 658 (S.D.N.Y. 1995) ("[M]otions to strike are generally disfavored and will not be granted unless the matter asserted clearly has no bearing on the issue in dispute.").

II. Factual Context

For purposes of this Motion I accept the following as true.

Andretta was employed by BIW as a preservation technician from April 22, 1982 until June 16, 2000. Complaint ¶ 6. In May 1996 she was sexually assaulted twice by a Paint Department co-worker who grabbed her breasts and later grabbed her breasts and genital area and tried to kiss her while the two were working in the same area. *Id.* ¶ 8. Andretta reported these incidents to supervisors and the BIW Human Resources Department. *Id.* ¶ 9. BIW investigated the incidents but did not take prompt and effective remedial action. *Id.* ¶ 10. The offending employee was not disciplined and remained in the same department, where he frequently came into contact with Andretta. *Id.* In 1996, Andretta and her husband met with BIW's vice-president for human resources. *Id.* ¶ 11. She requested that further remedial action be taken. *Id.*

BIW's failure to take prompt remedial action led to further such unlawful discrimination. *Id.* ¶ 12. Andretta and her assailant were sometimes assigned to the same work crew by Paint Department supervisors. *Id.* ¶ 13. Paint Department employees knew that she had been sexually assaulted by another worker and that no discipline had followed even though she had reported the assaults to the Human Resource Department and to top management. *Id.* ¶ 14. Andretta notified her direct supervisors that she was dissatisfied with BIW's lack of response to the 1996 assaults. *Id.* ¶ 15.

On or about February 11, 2000 Andretta was again physically assaulted in the same department. *Id.* ¶ 16. The assailant was her lead man/supervisor, who knew of the 1996 assault and supervised both Andretta and her 1996 assailant. *Id.* Specifically, Andretta was taken to a confined room aboard a ship and shown a painting assignment by the lead man/supervisor. *Id.* ¶ 17. While she looked at the work, he pulled open her jeans and reached toward her genital area. *Id.* This incident severely impacted Andretta’s working conditions as well as her sense of security. *Id.* ¶ 18. She reported the February 2000 incident to the Paint Department supervisor shortly after it happened, and said that she needed to be protected by not being in proximity to the lead man/supervisor at work again. *Id.* ¶ 19. The Paint Department supervisor did not report the assault to BIW’s Human Resources Department. *Id.* ¶ 20.

Following her report of the February 2000 incident to her supervisor, Andretta was initially assigned to a different ship from where the lead man/supervisor assailant worked. *Id.* ¶ 21. About March 2000, she and this assailant were again assigned to the same ship. *Id.* The assailant kept coming to Andretta’s work area aboard the ship, further altering her work conditions. *Id.* ¶ 22. Andretta reported the assailant’s presence to BIW supervisors and requested that she be protected from any further contact with the lead man/supervisor assailant. *Id.* ¶ 23. On or about June 16, 2000 Andretta was assigned to clean up a room aboard ship with her Painting Department partner. *Id.* ¶ 24. The two men who had assaulted her were talking to each other near her work assignment. *Id.* Andretta became emotionally distraught and left the area. *Id.* On or about that day, she confronted the lead man who had made this assignment and told him that she could not work near the two men. *Id.* ¶ 25. She left work, emotionally distraught, and has been unable to work at BIW since. *Id.* ¶¶ 25, 27.

By cover letter dated October 18, 2000 Andretta submitted a charge of discrimination to the Maine Human Rights Commission (“MHRC”) for filing with the MHRC and the EEOC. Letter dated

October 18, 2000 from attorney Charles W. March to Patricia Ryan, attached as Exh. A to Opposition. The charge was received by the MHRC on October 19, 2000. Charge of Discrimination, attached as Exh. B to Motion. By document dated October 25, 2000 the EEOC notified BIW of the pendency of the charge. Notice of Charge of Discrimination (“EEOC Notice”), attached as Exh. D to Motion. The document, titled “Notice of Charge of Discrimination in Jurisdictions Where a FEP [*i.e.*, state] Agency Will Initially Process,” indicated that the charge had been received by the MHRC and sent to the EEOC “for dual filing purposes” and stated, *inter alia*, “While EEOC has jurisdiction (upon the expiration of any deferral requirement if this is a Title VII or ADA charge) to investigate this charge, EEOC may refrain from beginning an investigation and await the issuance of the [state] Agency’s final findings and orders.” *Id.*

MHRC Procedural Rule 2.02(C) provides that a complaint of discrimination must be filed with the MHRC “not more than six (6) months after the act of alleged discrimination occurred.” Maine Human Rights Commission, Procedural Rule[s], attached as Exh. A to Motion, § 2.02(C).

On or about September 28, 1998 the MHRC and EEOC executed a fiscal year 1999 work-sharing agreement that provided, in relevant part:

II. FILING OF CHARGES OF DISCRIMINATION

- A. In order to facilitate the assertion of employment rights, the EEOC and the FEPA [MHRC] each designate the other as its agent for the purpose of receiving and drafting charges, **including those that are not jurisdictional with the agency that initially receives the charges.** EEOC’s receipt of charges on the FEPA’s behalf will automatically initiate the proceedings of both EEOC and the FEPA for the purposes of Section 706©¹ and (e)(1) of Title VII, including ADEA, EPA and ADA. This delegation of authority to receive charges does not include the right of one Agency to determine the jurisdiction of the other Agency over a charge.

¹ So in original, but likely a typographical error. The parties apparently intended to refer to “Section 706(c).”

Once an agency begins an investigation, it resolves the charge. . . . Each agency will advise Charging Parties that charges will be resolved by the agency taking the charge except when the agency taking the charge lacks jurisdiction or when the charge is to be transferred in accordance with Section III.

Charges that are received by the Maine Human Rights Commission whether in person or by mail and jurisdictional with the EEOC and timely filed by the Charging Party or his/her representative will be automatically dual filed with the EEOC. The date of receipt will be the date of filing.

III. DIVISION OF INITIAL CHARGE-PROCESSING RESPONSIBILITIES

- A. EEOC and the FEPA will process all Title VII, ADA, and ADEA charges that they originally received.

FY 1999 Worksharing Agreement (“Work-Sharing Agreement”), attached as Exh. C to Motion, at 2-4, 8.²

III. Analysis

In its Motion, BIW attacks both Andretta’s 1996 allegations and the Complaint as a whole as time-barred. *See generally* Motion. I first address the 1996 incidents.

A. 1996 Allegations

Andretta concedes that she cannot recover damages for the two alleged sexual assaults by a co-worker in the Paint Department in 1996 – *i.e.*, that these particular claims are time-barred. Opposition

² Inasmuch as appears, the fiscal year 1999 work-sharing agreement was not in effect when Andretta filed her charge of discrimination with the MHRC and the EEOC in October 2000. By its terms, the agreement was to operate until September 30, 1999, although it could be “renewed or modified by mutual consent of the parties.” Work-Sharing Agreement at 8. BIW appends a “FY 2002 Extension of Worksharing Agreement”; however, this latter document (which is not executed by the EEOC) refers to and purports to extend “the current worksharing agreement that was executed on 08-25-00,” a copy of which is not provided by either Andretta or BIW. *See* FY 2002 Extension of Worksharing Agreement, attached as Exh. C to Defendant’s Motion. Nonetheless, inasmuch as no issue is raised by Andretta concerning the authenticity or materiality of the Work-Sharing Agreement provided, I shall assume its terms (*continued on next page*)

at 3-4. However, she contends that this evidence is nonetheless relevant and admissible with respect to her claims predicated on the 2000 conduct. *Id.*; see also, e.g., *O'Rourke v. City of Providence*, 235 F.3d 713, 726 (1st Cir. 2001) (“[S]ometimes time-barred prior incidents [of discrimination] become admissible as relevant background evidence.”) (citations and internal quotation marks omitted) (dictum).

Specifically, Andretta notes, “The facts recited in paragraphs 8 through 15 of the Complaint [describing the 1996 incidents] demonstrate that BIW was put on notice by [her] that sexual harassment, especially in the form of unlawful touching, was occurring in the workplace. By taking no action, BIW contributed to the perception among workers and foremen that such unlawful behavior would or could be condoned by Bath Iron Works.” Opposition at 3-4.

In response, BIW moves pursuant to Fed. R. Civ. P. 12(f) to strike portions of the Complaint addressing the 1996 incidents, which it asserts are neither relevant nor material to the 2000 claim. Reply at 2-3. It argues, *inter alia*, that the 1996 and 2000 incidents “involve two separate individuals – one a co-worker, the other the Plaintiff’s supervisor – under different circumstances, that occurred over four years apart. . . . There is no material connection between the two incidents. Indeed, Plaintiff admits there is no connection or continuing violation theory.” *Id.* at 1-2.

In so arguing, BIW fails to clear the high hurdle of Rule 12(f). I am unpersuaded that the 1996 incidents “clearly have no bearing” on the 2000 conduct; it is plausible (as Andretta suggests) that she was attacked in 2000 at least in part because her supervisor/lead man, who had supervised both Andretta and her first assailant, knew that the first assailant had assaulted her with impunity. The request to strike portions of the Complaint accordingly is denied.

are the same in all key respects as the document that was in effect when Andretta filed her charge of discrimination.

B. Complaint as Whole

BIW next argues that the Complaint as a whole was untimely filed with the EEOC, Motion at 7-15, implicating a statute of limitations that the Court of Appeals for the Second Circuit has described as “qualified in ways that bedevil lawyers as well as laypersons[.]” *Ford v. Bernard Fineson Dev. Ctr.*, 81 F.3d 304, 305 (2d Cir. 1996).

Analysis begins with the premise that a Title VII charge must be filed with the EEOC within one hundred and eighty days of the alleged unlawful employment practice “except [when] . . . the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice,” in which case the charge must be filed within three hundred days of the alleged unlawful practice. 42 U.S.C. § 2000e-5(e)(1).

However, in cases in which a charge first is filed with a state agency such as the MHRC, section 706(c) of Title VII provides that “no charge may be filed [with the EEOC] . . . before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated” 42 U.S.C. § 2000e-5(c); *see also, e.g., EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 110-11 (1988).

The combination of the latter (so-called “deferral”) provision and the three-hundred-day deadline “mean[s], first, that a charge filed with a state agency by the 240th day after an alleged violation always will be timely under federal law because the 60-day deferral period will run within the 300-day limitation period, and second, that a charge submitted after the 240th day will be timely only if the state ‘terminates’ its proceedings by the 300th day.” *Isaac v. Harvard Univ.*, 769 F.2d 817, 819 (1st Cir. 1985).

As BIW recognizes, Motion at 10, there is yet a further wrinkle: The Supreme Court has held that a state agency “terminates” its proceedings for purposes of section 706(c) if, via a work-sharing

agreement with the EEOC, it waives the sixty-day deferral period, *see Commercial Office Prods.*, 486 U.S. at 112, 125.

EEOC regulations seemingly summarize all of the above, providing, in pertinent part:

When a charge is initially presented to a FEP [state] agency and the charging party requests that the charge be presented to the Commission, the charge will be deemed to be filed with the Commission upon expiration of 60 (or where appropriate, 120) days after a written and signed statement of facts upon which the charge is based was sent to the FEP agency by registered mail or was otherwise received by the FEP agency, or upon the termination of FEP agency proceedings, or upon waiver of the FEP agency's right to exclusively process the charge, whichever is earliest. Such filing is timely if effected within 300 days from the date of the alleged violation.

29 C.F.R. § 1601.13(b)(1).

BIW posits that:

1. The last alleged act of discrimination against Andretta occurred on February 11, 2000, triggering the running of the three-hundred-day statute-of-limitations clock. Motion at 7-8.

2. The MHRC in this case never "terminated" its proceedings inasmuch as it retained jurisdiction and proceeded with its own investigation of Andretta's charge. *Id.* at 10.³ The 240th day after February 11, 2000 was October 9, 2000; the MHRC received Andretta's charge on October 19, 2000. *Id.* at 11 n.7. Thus, the charge was filed with the EEOC, at the earliest, at the conclusion of the sixty-day deferral period, at which point it was filed too late. *Id.*

3. Although this court recognized in *Crowley v. L.L. Bean, Inc.*, 143 F. Supp.2d 38, 52 (D. Me. 2001), that, pursuant to an EEOC-MHRC work-sharing agreement, charges filed with the MHRC were "automatically dual filed with EEOC," in this case the MHRC did not automatically waive the sixty-day deferral period because it never "terminated" its proceedings in the first instance, but rather continued to process and investigate Andretta's charge. *Id.* at 11-12. The EEOC Notice on

³ BIW adduces no evidence, apart from the tangentially related EEOC Notice, that the MHRC did actually process the Andretta charge. Nonetheless, Andretta does not contest this proposition, *see* Opposition at 8 n.1, and I assume it for purposes of this decision.

its face states that “[w]hile EEOC has jurisdiction (upon the expiration of any deferral requirement if this is a Title VII or ADA charge) to investigate this charge, EEOC may refrain from beginning an investigation and await the issuance of the Agency’s final findings and Orders.” *Id.* at 12 (quoting EEOC Notice). Thus, although the Work-Sharing Agreement may have recognized Maine’s right to waive the sixty-day deferral period, and although, pursuant to that agreement, the Andretta charge apparently should have been processed by the EEOC,⁴ there was no clear waiver in this case. *Id.* at 12-13.

4. The Work-Sharing Agreement is ambiguous at best as to whether the MHRC automatically waives its sixty-day deferral period in every instance. *Id.* at 13. Setting forth that charges are “dual-filed” is not tantamount to a specific waiver of exclusive processing rights. *Id.* at 13-14. In addition, other language in that agreement seems to contradict the notion of automatic waiver, including provisions that, as a general matter, the agency receiving the charge investigates it, and once an agency begins an investigation, it resolves the charge. *Id.* at 14.

Andretta counters, *inter alia*, that (i) BIW’s position runs counter to *Crowley* and (ii) the MHRC’s continued processing of her case is not a material distinction inasmuch as “a state investigation does not negate dual-filing.” Opposition at 6-8 & n.1. I agree.

In *Crowley*, this court held that the MHRC-EEOC work-sharing agreement in issue effectuated an automatic waiver of the sixty-day deferral period, thus “terminating” the MHRC’s proceedings within the meaning of 42 U.S.C. § 2000e-5(c). *Crowley*, 143 F. Supp.2d at 52. The court noted: “The work sharing agreement between the MHRC and the EEOC provides that charges filed with the

⁴ BIW suggests that the Work-Sharing Agreement was not followed in the Andretta case inasmuch as (i) section II(C) indicates that the recipient agency will not process a charge over which it lacks jurisdiction, and (ii) in this case, the MHRC lacked jurisdiction inasmuch as the Andretta charge was filed well past its one-hundred-and-eighty-day filing deadline. Motion at 11, 13; *see also* Reply at 4. This seems a reasonable interpretation of what happened in this case, although I note that an untimely filing with a state agency does not preclude application of the extended three-hundred-day federal filing period. *See, e.g., Commercial Office Prods.*, 486 (continued on next page)

MHRC are ‘automatically dual filed with the EEOC.’ . . . The Court interprets that provision of the work sharing agreement to waive Maine’s exclusive sixty-day deferral period.” *Id.*

The Work-Sharing Agreement in this case contains identical “dual-filing” language. Thus, the sixty-day deferral period was waived in this case unless it matters that the MHRC mistakenly retained jurisdiction and processed this case.⁵ My research indicates that it does not. Inasmuch as appears, courts considering the issue have readily concluded that mistaken, continued processing by a state agency does not override automatic waiver of the sixty-day deferral period pursuant to a work-sharing agreement with the EEOC. *See, e.g., Laquaglia v. Rio Hotel & Casino, Inc.*, 186 F.3d 1172, 1176 (9th Cir. 1999) (“For purposes of the constructive filing of a charge with the EEOC, it is irrelevant whether the state agency actually followed the referral provisions in the agreement or erroneously began investigating a complaint that should have been forwarded to the EEOC.”); *Ford*, 81 F.3d at 310 (“The unqualified language of the 1995 [work-sharing] Agreement makes this waiver self-executing: whether the [state agency] deferred to the EEOC or, notwithstanding the waiver, undertook its own immediate investigation (as it did here), the [state agency’s] waiver of its right to exclusive jurisdiction went into effect as soon as Ford filed his Title VII charge on the 281st day.”) (footnote omitted); *Marlowe v. Bottarelli*, 938 F.2d 807, 809, 814 (7th Cir. 1991) (holding, in case in which state agency erroneously simultaneously processed complaint at same time as EEOC, “The language of the [work-sharing] agreement indicates that the state’s decision to waive its review prerogative took place during the drafting and execution of the agreement, and that the actions of the [state agency’s] agent in administering the agreement were no more than icing on an already baked cake. Once Marlowe’s complaint was filed with the EEOC, the agreement worked instantaneous constructive

U.S. at 122-24.

⁵ As Andretta points out, Opposition at 8 n.1, it is not clear from *Crowley* whether the MHRC did or did not continue an investigation in that case. Thus, *Crowley* itself neither cuts in favor of or against Andretta’s position; it does not speak to the issue.

termination of the state’s jurisdiction over her charges.”) (citation and internal quotation marks omitted); *EEOC v. Techalloy Maryland, Inc.*, 894 F.2d 676, 679 (4th Cir. 1990) (“To hold that the waiver is not self-executing, and that it must be perfected by the agencies’ strict compliance with the referral provisions of the worksharing agreement, would be to exalt form over substance and preclude relief to a potentially meritorious claim simply because it was the victim of a bureaucratic mix-up.”); *Griffin v. Air Prods. & Chems., Inc.*, 883 F.2d 940, 944 (11th Cir. 1989) (“Air Products argues that the [state agency’s] actual conduct is inconsistent with this waiver analysis because the [state agency] processed Griffin’s claim. Air Products ignores, however, the fact that both the [EEOC] regulation and the worksharing agreement specify [state-agency] waiver of *exclusive* processing. Although the [state agency] processed Griffin’s claim, the EEOC also possessed the right to proceed.”) (emphasis in original); *see also, e.g., Brown v. Crowe*, 963 F.2d 895, 896-97, 899 (6th Cir. 1992) (equitably tolling EEOC statute of limitations in case in which state agency erroneously checked box indicating it would process charge despite work-sharing waiver agreement pursuant to which charge should have been processed by EEOC; noting, “to reject the plaintiff’s claim due to the bureaucratic confusion between the two agencies would be manifestly unjust.”).⁶

Assuming *arguendo* that the last act of discrimination against Andretta occurred, as BIW argues, on February 11, 2000, her charge with the EEOC nonetheless was timely filed within the three-hundred-day statute of limitations on October 19, 2000. Notwithstanding that the MHRC mistakenly continued to process the charge, the Work-Sharing Agreement effectuated an automatic waiver of the sixty-day deferral period.

⁶ The language of work-sharing agreements also has been held to trump contrary provisions in boilerplate EEOC forms, such as the EEOC Notice issued in this case. *See, e.g., Puryear v. County of Roanoke*, 214 F.3d 514, 518 n.4 (4th Cir. 2000) (whether complainant checked box on EEOC form seeking dual filing was irrelevant inasmuch as dual filing occurred automatically pursuant to work-sharing agreement); *Worthington v. Union Pac. R.R.*, 948 F.2d 477, 479-80 (8th Cir. 1991) (same).

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