

STATE OF WISCONSIN

PERSONNEL COMMISSION

**ROBERT W. MAGEL,**  
*Complainant,*

v.

**Chancellor, UNIVERSITY OF  
WISCONSIN-MADISON,**  
*Respondent.*

**RULING ON MOTION  
TO DISMISS AND  
ORDER DISMISSING  
CERTAIN CLAIMS**

Case No. 98-0167-PC-ER

#### NATURE OF THE CASE

This case involves a complaint of discrimination on the bases of FMLA (Family and Medical Leave Act), OSHA (Occupational Safety and Health Act), and WFEA (Wisconsin Fair Employment Act) (handicap). This matter is before the Commission on respondent's motion to dismiss the FMLA and OSHA claims as untimely, filed on September 29, 1998. The Commission has held an evidentiary hearing on this motion. The following findings are made solely for the purpose of deciding that motion.

#### FINDINGS OF FACT

1. At all relevant times prior to his termination effective July 3, 1998, complainant was employed in the Facilities Planning and Management/Physical Plant (FP&M/PP) as a Custodian 2.

2. From August 20, 1997, until his termination complainant was on a medical leave of absence and unable to work.

3. In an April 17, 1998, letter to complainant, from Carin Wallin, FP&M/PP personnel manager (Respondent's Exhibit 1), complainant was advised, among other things, that he would be placed on leave of absence through June 15, 1998, and that if no suitable position could be found by then, "regrettably we will have to terminate your employment at that time having exhausted all transfer options within the 60-day period."

4. Complainant admits he received this letter, and the Commission so finds.

5. In a May 26, 1998, letter to complainant from Ms. Wallin (Complainant's Exhibit 2), complainant was advised that his leave of absence would be extended through June 29, 1998, and that a leave extension form was enclosed which he should sign and return. The leave extension form was never returned.

6. Complainant denies he received this letter, and the Commission so finds.

7. In a June 30, 1998, letter to complainant from Ms. Wallin (Complainant's Exhibit 3), complainant was advised that an appropriate transfer opportunity had not been found, and that "we must formally notify you that you are being terminated from your position . . . on July 3, 1998."

8. Complainant admits he received this letter after it was sent, but asserts that he had placed the envelope in a bag with some junk mail and only opened it in November 1998. The Commission finds that complainant received this letter and had effective notice of his termination more than 30 days before he filed this appeal.

9. In a July 15 letter to complainant from Ms. Lannie Houghton, Payroll and Benefits Specialist 3 (Respondent's Exhibit 4), complainant was advised that he had overdrawn his vacation balance and owed the state \$137.51. The letter also stated: "Our records show that your employment was terminated from the Physical Plant Custodial Department on 7-3-98."

10. Complainant asserts he received this letter on August 3, 1998, and that this was the first time he learned of his termination. The Commission finds that complainant knew of his termination more than 30 days before he filed his complaint.

11. Complainant filed this complaint on September 3, 1998.

#### CONCLUSIONS OF LAW

1. Complainant has the burden of establishing that he filed this complaint in a timely manner as required by the FMLA and the OSHA.

2. Complainant has not established that he filed his complaint within 30 days of receiving notice of his termination.

3. The FMLA and OSHA claims must be dismissed from this complaint on the ground of untimely filing.

#### OPINION

Pursuant to §103.10(12)(b), Stats., an employe must file an FMLA complaint with the Commission “within 30 days after the violation occurs or the employe should reasonably have known that the violation occurred, whichever is later.” Pursuant to §101.055(8)(b), Stats., an employe must file an OSHA complaint “within 30 days after the employe received knowledge of the discrimination or discharge.”

In this case, the issue is whether complainant filed his complaint in a timely manner with respect to his FMLA and OSHA claims. The operative date to start the 30 days running in this case is the date when complainant received notice of his termination. In the Commission’s opinion, Respondent’s Exhibit 1 could not have provided complainant with notice of his discharge, because it did not tell complainant he was discharged, but rather advised him that if he had not transferred to an appropriate position by June 15, “regrettably we *will* have to terminate your employment *at that time* having exhausted all transfer options within the 60-day period.” (emphasis added) . In this letter, respondent advised complainant of what would happen if another job could not be found, and did not give any notice of a specific termination date.

Respondent’s Exhibit 2 simply provided complainant with notice of the extension of his leave of absence. Formal notice of complainant’s discharge was provided by Respondent’s Exhibit 3, which was dated June 30, 1998, and presumably mailed shortly thereafter and received by complainant, but he testified that he never opened it until after he had filed this complaint. However, complainant is charged with the receipt of this notice not when he opened the envelope but when he actually received it, *see* 58 Am Jur 2d Notice, §35, p.597 (effective date of mailed notice is the day of the recipient’s receipt); *Cozzens-Ellis v. UW*, 87-0085-PC, 9/26/88 (date of notice was the date written notice was placed in the employe’s mailbox at work, where she knew she had the letter but did not open it for several days).

Even if complainant had not been charged with receipt of Respondent's Exhibit 3, the OSHA and FMLA claims would still be untimely, because complainant admits he received Respondent's Exhibit 4, which includes additional notice of his termination, on August 3, 1998. In order to have filed timely OSHA and FMLA claims, he would have had to have filed this complaint within 30 days of August 3, 1998, or no later than September 2, 1998. This complaint was not filed until September 3, 1998, so even based on complainant's theory of the case, he was a day late.


It should be noted that while the OSHA and FMLA claims must be dismissed on the ground of untimely filing, this complaint also contains a claim of disability discrimination under the WFEA. The time limit for filing WFEA claims is "300 days after the alleged discrimination . . . occurred." §111.39(1), Stats. Since this complaint was filed within 300 days of the termination of complainant's termination, his WFEA claim remains viable and will continue to be processed.


ORDER

Complainant's OSHA and FMLA claims are dismissed as untimely filed. The Commission will continue to process his WFEA claim.

Dated:      27, 1999.

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

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Parties:

Robert W. Magel  
413 East Lincoln Drive  
De Forest, WI 53532

David Ward, Chancellor  
UW-Madison  
158 Bascom Hall  
500 Lincoln Drive  
Madison, WI 53706-1314