

STATE OF WISCONSIN

PERSONNEL COMMISSION

**ARTHUR W. RADTKE, JR.,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF HEALTH  
AND FAMILY SERVICES,**  
*Respondent.*

**RULING ON  
RESPONDENT'S  
MOTION TO DISMISS**

Case No. 97-0068-PC-ER

On May 27, 1997, the Commission received the above-noted complaint which alleged that respondent violated the Family and Medical Leave Act (FMLA) (§103.10, Stats.). The narrative portion of the complaint (item #6) noted as follows:

On April 4, 5 and 6, I called-in sick at my job. I have the option of using sick-leave time or vacation time. I requested to use 20 hours of vacation time and 10 hours of sick time (3-10 hour days = 30 hours total time sick). Because I've had chronic asthma for most of my life and other personal health problems I've needed to use most of my sick leave during the course of the years I've been employed with the state. So I am required to see my personal doctor each time I am sick. I saw my doctor on the 4<sup>th</sup> and also went to an Urgent Care and saw a doctor on the 6<sup>th</sup> of April. My doctors put down on my excuse that I was seen and treated. When I handed in these excuses my employer refused to honor them because the doctors didn't put down what I was seen for. My employer deducted 30 hours of pay from my paycheck and also gave me a 1-day suspension which resulted in another loss of 10 hours of pay. They also used what would've been 12 hours of overtime pay (1-1/2 x's value) and used this as regular hours worked. They have always honored my doctors' excuses before without ever going into punishment. I have a doctor-patient confidentiality issue here and unless I have a workmen's compensation claim I believe my employer is overstepping here.

Respondent filed a motion to dismiss on June 6, 1997, based on respondent's opinion that the complaint was untimely filed. The motion included an affidavit of Susan Moritz stating that she informed complainant prior to April 22, 1997, that he would receive no pay for absences of April 4, 5 and 6, 1997, because he failed to provide proper medical verification. Ms. Moritz further stated in her affidavit that on April 22, 1997, complainant received written notice of the 1-day suspension. Complainant did not dispute the accuracy of these statements in his written arguments dated June 12, 1997.

### OPINION

The statutes require an FMLA complaint to be filed “within 30 days after the violation occurs or the employe should reasonably have known that the violation occurred, whichever is later.” §103.10(1)(b), Stats. It is undisputed that complainant had actual notice of all of respondent’s decisions by April 22, 1997. The resulting thirty-day period to file a complaint expired on May 22, 1997.

“Filing” means the physical receipt of a document at the Commission’s office. §PC 1.02(10), Wis. Adm. Code. The Commission did not receive Mr. Radtke’s complaint until May 27, 1997, several days after the 30-day period had expired.

Complainant’s written arguments dated June 12, 1997, contained the following statement (with emphasis as shown in the original):

Although the 30 day deadline may have (been) exceeded by less than 24 hours, I believe it would be in both parties’ interest to come to an early settlement. . . .

It appears from the above-noted comment that complainant does not realize his complaint was filed several days late. The Commission suspects that the apparent confusion is due to the fact that complainant initially filed his complaint with the wrong entity. Specifically, the Equal Rights Division of the Department of Workforce Development (formerly known as the Department of Industry, Labor and Human Relations) received the complaint on May 22, 1997. As noted previously, the Commission’s administrative rule measures filing with the Commission’s receipt of the document. The Commission has consistently held that filing with another entity is insufficient. *See, e.g., Ziegler v. LIRC*, 93-0031-PC-ER, 5/2/97; and *Gensch v. DER*, 87-0072-PC, 7/8/87.

ORDER

That respondent's motion is granted and this case is dismissed as untimely filed.

Dated: June 19, 1997.

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

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Parties:

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NOTICE  
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW  
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

**Petition for Rehearing.** Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

**Petition for Judicial Review.** Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

2/3/95