

HEIDI M. FERGUSON,
Complainant,

v.

**Secretary, DEPARTMENT OF
COMMERCE,**
Respondent.

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

Case No. 00-0143-PC-ER

The Department of Commerce (DOComm) filed a motion to dismiss the complaint as untimely filed by letter dated November 8, 2000. An initial briefing schedule was established under which the respondent filed the last brief on December 13, 2000. By Commission letter dated January 19, 2001, the Commission gave the appellant an opportunity to respond to new matters raised in respondent's last brief. The Commission received her final brief on February 12, 2001.

The facts recited below are made solely to resolve the present motion.

FINDINGS OF FACT

1. This discrimination complaint was filed with the Commission on November 2, 2000. Complainant alleged therein that respondent's decision to terminate her employment for medical reasons constituted discrimination on the bases of disability, marital status and sex. She also alleged that the termination constituted retaliation for engaging in activities protected by the Fair Employment Act (FEA) and for exercising her rights under the Family or Medical Leave Act (FMLA). On November 17, 2000, Ms. Ferguson withdrew the FMLA claim "except to the extent that it is a part of her fair employment retaliation claim." (See Commission letter dated November 17, 2000.)

2. Complainant asserted in her discrimination complaint that she first received notice of her termination after January 18, 2000.

3. The complainant's mailbox is about a mile from her home. At all times relevant here, she made arrangements with the post office not to deliver her mail. Specifically, she requested that the post office hold her mail and she would retrieve her mail from the post office.

4. Respondent notified complainant by letter dated Friday, November 17, 1999, that her employment was terminated "effective at the close of business on Friday, November 19, 1999." (See Attachment 1 to respondent's 12/13/00 brief). Respondent sent separate copies of the letter by first class mail and by certified mail. The first class letter was not returned to respondent. The post office provided notice to complainant on November 20 (Saturday), November 26 (Friday) and December 5, 1999 (Saturday) that the certified letter was at the post office. She did not retrieve the certified letter and, accordingly, it was returned to respondent as unclaimed. (See Attachment 2 to respondent's 12/13/00 brief.)

5. Complainant would have received the termination letter shortly after it was mailed if she would have gone to the post office for her regular and certified mail.

6. Complainant sent a letter to Chris Lindeman, a Payroll & Benefits Specialist employed by respondent, on December 8, 1999, stating as shown below (emphasis added):

Enclosed please find Income Insurance Application. Please send me a completed copy once your information has been added.

I have forwarded my medical information to the insurance carrier in hopes to expedite matters. Her name is Pauline Gayle.

Please send me enough blank payroll forms to cover the time periods not previously reported since I first went on medical leave. I will be covering all pay periods so there is a uniform reporting record. There is time to report for doctor visits, obtaining information requested by the department, work hours, union discussions, etc. I am going to go over all information [for the] entire leave of absence in preparation for submitting my outstanding expanses as well.

I need to be information of all other items I need to complete. **My union has filed a grievance regarding my medical termination.** I am not sure how this affects your work and what I complete or submit. Please advise.

Should you have any questions, my number is listed above.

7. Complainant was aware sometime prior to December 8, 1999 (the date of her letter described in the prior paragraph), that respondent decided to terminate her employment for medical reasons.

8. Bennette D. Burks, Director of respondent's Bureau of Field Operations, sent a letter to complainant on December 20, 1999, stating as noted below (emphasis added). Respondent sent separate copies of this letter by first class mail and by certified mail. These letters were not returned to respondent.

Since your termination on November 19, 1999, your former supervisor has attempted to contact you to schedule the return of Department equipment, tools, and supplies in your possession. You have not responded to any of his inquiries. Please contact Harold Stanlick within five days of the date of this letter to schedule the return of this equipment, tools, and supplies.

According to Department records, you still possess an automobile, computer, cellular telephone, and tools supplied to you by the Department. Information regarding more expensive items is listed in Table 1 below. In addition, you have miscellaneous hand tools and supplies for completing daily tasks. All of this must be returned to the Department.

(Table Omitted)

Your former supervisor, Harold Stanlick, has been unsuccessful in his attempts to contact you. Please call him at (phone number omitted) within five days of the date of this letter to schedule the return of the equipment. If you do not contact him within five days of the date of this letter and schedule and cooperate with a prompt return of the above equipment, supplies and tools, I will ask the assistance of the Department of Justice or other appropriate authority to retrieve the equipment, supplies, and tools.

The Commission is providing you with an opportunity to address the apparent conflict noted in the prior paragraph .

9. Complainant would have received the Mr. Burks' letter shortly after it was mailed if she would have gone to the post office for her regular and certified mail.

10. Complainant performed the following activities from November 17, 1999 through January 2000 (see letter of February 11, 2001):

- a. On 11/19/99, complainant kept a medical appointment.
- b. On 11/19/99, complainant obtained a medical excuse for being off from work through November 26, 1999.
- c. On 11/22/99, complainant sent a fax to her doctor asking for a medical appointment and asking the doctor to forward a medical excuse to respondent.
- d. On 11/26/99, complainant had a scheduled medical appointment at 11:15 a.m., which she presumably attended.¹
- e. On 11/29/99, complainant sent a letter to Mr. Lindeman via Federal Express.
- f. On 12/8/99, complainant sent a memo to the United Wisconsin Group. Complainant enclosed copies of medical records and documents relating to her income continuation benefits. She sent this letter by certified mail.
- g. On 12/30/99, complainant sent Mr. Lindeman a letter and enclosed a check for income continuation and medical insurance premiums for the month of January 2000. She mailed this letter via Federal Express.
- h. On 1/18/00, complainant had a scheduled medical appointment at 8:00 a.m., which she presumably kept.
- i. On 1/26/00, complainant completed paperwork for conversion of her health insurance benefits.

11. Complainant was not so incapacitated from November 19th through December 1999, that she could not have gone to the post office to claim her regular and certified mail.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to §230.45(1)(b), Stats.
2. The complainant has failed to meet her burden to show that the complaint was filed timely.

OPINION

This action was brought pursuant to the Fair Employment Act, which requires that a complaint be filed with the Commission no more than 300 days after the alleged discrimination or retaliation occurred (see ¶111.39(1), Stats.). The 300-day filing requirement is in the

¹ Complainant provided a copy of the appointment card. She did not indicate that she failed to keep the appointment.

nature of a statute of limitations and, as a result, subject to equitable tolling. *Milwaukee Co. v. LIRC*, 113 Wis.2d 199, 205, 335 N.W.2d 412 (Ct. App. 1983). Complainant has the burden to show that her complaint was timely filed. *See, Ziegler v. LIRC*, 93-0031-PC-ER, 5/2/96.

Complainant filed her complaint on November 2, 2000. In order for that complaint to be timely, complainant would have to have learned of her termination no earlier than January 7, 2000.

It is clear that complainant knew of the termination decision by December 8, 1999, when she wrote to Ms. Lindeman because complainant specifically referenced the termination decision therein. The Commission notes that complainant appears to contend that the 300-day period should not commence until she received *written* confirmation of the termination decision. The 300-day period, however, commences with her knowledge of the termination decision and not her later receipt of the termination letter.

Respondent sent complainant a termination letter on November 17, 1999, via regular and certified mail. She would have received the termination letter on November 20th or the following Monday (November 22nd), if she had gone to the post office to claim the certified letter or her regular mail. Her present complaint was filed more than 300 days after November 22, 1999.

Mr Burks sent complainant a letter referencing the termination decision on December 20, 1999, via regular and certified mail. She would have received this letter within a few days after it was mailed if she had gone to the post office to claim the certified letter or her regular mail. Her present complaint was filed more than 300 days after December 20, 1999.

Complainant contends she was disabled to such an extent that she could not retrieve her mail from the post office. The Commission rejects this argument. The Commission accepts as true that complainant suffered from two disabilities in November and December 1999. The disabilities, however, were not so severe as to keep complainant from many activities, including physician visits and completion of forms to secure benefits (income continuation and health insurance conversion). In other words, complainant could have gone to the post office during this time period to retrieve her mail. Her failure to collect her mail cannot be used here as a basis to extend the filing period.

Complainant contends the Commission has the power to waive the 300-day filing period. She formed this opinion based on an annotation to §111.39(1), Stats., which is shown below:

Sub. (1) is a statute of limitations. As such it is an affirmative defense that may be waived. *Milwaukee Co. v. LIRC*, 113 Wis. 2d 199, 335 N.W.2d 412 (Ct. App. 1983).

The cited case addressed the question of whether the 300-day period is jurisdictional in nature or whether it was more appropriate characterized as a statute of limitations. The court held that the 300-day period is akin to a statute of limitations and, consequently, if the employer fails to notice that the complaint was filed more than 300 days after the alleged discrimination occurred, then the employer could be deemed to have waived the timeliness objection. The case does not stand for the proposition that the Commission has the option to ignore the limitations period where, as here, the employer has raised a timeliness objection.

Complainant made the following requests in her letter of December 4, 2000 (p. 4):

The following are some statutory rules and annotations that seem to apply to both of my complaints. I am looking to the Commission to translate how these statutes apply to my case(s).

111.39(5)(c): I would like a response to a request to set aside the motion to dismiss due to the mistake and there is new information that would have come out had I had my hearing as originally determined from my appeal.

111.39(3) and 111.39(4)(d): Both seem to indicate that the statutory requirement is to send certified mail notifying a complainant of dismissal and/or findings.

None of the provisions cited by complainant are applicable here. Section 111.39(5)(c), Stats., pertains to the Commission's authority to set aside its own decision under some circumstances. There has been no Commission decision in this case prior to this ruling. Section 111.39(3), Stats., pertains to the Commission's authority to dismiss a case for lack of prosecution when a complainant fails to respond to correspondence from the Commission and

has nothing to do with an employer's motion to dismiss for untimely filing. Section 111.39(4)(d), Stats., addresses the enforcement of final Commission orders.

ORDER

Respondent's motion to dismiss is granted and this case is dismissed as untimely filed.

Dated: March 21, 2001.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner

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.)

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