



May 12, 2010

In Re: Igbinevbo Ohenhen v. Bank of America, Case No. FM 2008 -61

Dear Commissioner Agnew:

Enclosed please find my proposed decision in the matter of Igbinevbo Ohenhen v. Bank of America, Case No. FM 2008 -61, along with the case file and tape recording of the contested case hearing.

By a copy of this letter, I am advising parties to the above-referenced matter that, pursuant to Regs., Conn. State Agencies § 31-1-7(a), each party adversely affected by the proposed decision has the right to file an exception and present a brief and oral argument to you before you render the final decision. I am directing the parties that the deadline for requesting the opportunity to file exceptions or briefs or request oral argument is, two weeks from the date on which this document is mailed, and that parties may contact the Office of Program Policy (860-263-6755) if they have any questions.

Very truly yours,

Kathleen Pashos
Designated Hearing Officer

Enclosure

cc: Program Policy
Igbinevbo Ohenhen
Bank of America
Musa P. Sebadduka, Esq.
John G. Stretton, Esq.
Siobhan M. Sweeney, Esq.

RECEIVED

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**Office of Program Policy
Connecticut Labor Department**

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MAY 13 2010

**DEPARTMENT OF LABOR
OFFICE OF COMMISSIONER**

DOCKET NO.: FM 2008-61

COMPLAINANT:

IGBINEVBO OHENHEN
41 Kenyon Place
East Hartford CT 06108

EMPLOYER/RESPONDENT:

BANK OF AMERICA
One Constitution Plaza.
Hartford CT 06103

RESPONDENT'S ATTORNEY:

JOHN G. STRETTON, ESQ.
Edwards Angell, Palmer & Dodge LLP
Three Stamford Plaza
301 Tressor Boulevard
Stamford CT 06901

PROPOSED DECISION OF HEARING OFFICER

IGBINEVBO OHENHEN V. BANK OF AMERICA

Date Decision is Mailed: May 12, 2010

Hearing Date: March 8, 2010

Hearing Location: Connecticut Department of Labor
Appeals Division
3580 Main Street 2nd Floor, Room 212
Hartford, CT 0610

Appearances:

For the Complainant: Igbinevbo Ohenhen

For the Respondent: John G. Stretton and Siobhan Sweeney, Attorneys for the Respondent

CASE HISTORY

On August 28, 2008, the Complainant, Igbinevbo Ohenhen (hereinafter referred to as complainant), filed an untimely complaint with the State of Connecticut Department of Labor, Wage and Workplace Standards Division (hereinafter referred to as WWSD), in which he alleges that his former employer, Bank of America (hereinafter referred to as respondent), violated the provisions of the General Statutes §§ 31-55kk, et seq., An Act Concerning Family and Medical Leave from Employment (hereinafter referred to as CFMLA).

On November 3, 2009, the WWSD notified the parties it had no reason to believe that the respondent (1) interfered with, restrained or denied the exercise of, or the attempt to exercise, any rights provided under the CFMLA or (2) discharged or caused to be discharged, or in any manner discriminated against any individual for opposing any practice made unlawful by the Act or because such employee has exercised rights afforded to such employee under the Act; (3) violated any provision of the Act with respect to an eligible employee; or (4) discharged, or caused to be discharged or in any manner discriminated against an eligible employee because such individual (A) has filed any charge or has instituted or caused to be instituted any proceeding under or related to the Act; (B) has given or is about to give any information in connection with any inquiry or portending relating to any right provided under the Act; or (C) has testified or is about to testify in any inquiry or proceeding relating to any right under the Act. Additionally, the WWSD advised the complainant that, pursuant to Regs., Conn. State Agencies § 31-51qq-44(e), he had the right to request a hearing before the Labor Commissioner.

On November 11, 2009, the complainant filed a timely request for a hearing before the Commissioner of the Department of Labor. On February 5, 2010, the Hearing Officer mailed "A Notice of Hearing and Contested Case Hearing Order" to the parties. The contested case hearing was held on March 8, 2010, at the Connecticut Department of Labor, 3580 Main Street 2nd Floor, Room 212, Hartford CT 06120, before Hearing Officer Kathleen Pashos, who was designated the hearing officer in this matter by Deputy Labor Commissioner Linda Agnew on November 16, 2009. The hearing was limited to the issue of whether the complainant filed a timely complaint under the CFMLA and/or whether the complainant had good cause for filing a late complaint under the Act. In the Notice of Hearing, the hearing officer advised the parties that she would either issue a proposed decision dismissing the complaint for lack of jurisdiction or issue a notice for a continued hearing on the merits of the complaint.

FINDINGS OF FACT

1. The complainant, Igbinevo Ohenhen, worked for the respondent, Bank of America, as a cash service representative II from July 2007. On December 7, 2007, the complainant requested a leave of absence by contacting Met Life, the respondent's short-term disability insurance carrier and FMLA administrator.

2. On December 10, 2007, MetLife mailed the complainant an acknowledgment of his request and provided a packet that included the respondent's notice of rights and obligations under the Family and Medical Leave Acts, a release, and a health care provider certification. In that letter, MetLife informed the complainant that he did not have to complete the health care provider certification if he was making a claim for disability benefits because MetLife would determine eligibility for leave under the state and federal Family and Medical Leave Acts when it made a determination on the complainant's disability claim.

3. The letter further advised the complainant that any paid time off would run concurrently with FMLA and be counted towards the leave. The letter also stated that if the complainant was not making a claim for disability benefits, the complainant would have to provide the health care provider certification within 20 days. Met Life also directed the complainant to the respondent's handbook for a further explanation of his rights under the state and federal Family and Medical Leave Acts.

5. On December 11, 2007, the complainant returned to work. On December 13, 2007, MetLife sent an email to the complainant's supervisor, Paul LeGeyt, notifying him that the complainant had applied for a leave of absence. The complainant last worked for the respondent on December 14, 2007.

6. LeGeyt mailed a letter to the complainant on December 27, 2007, stating that he had not provided the employer with sufficient medical documentation to justify his leave of absence. LeGeyt specifically advised the complainant: "If you do not submit sufficient medical documentation to justify your leave by January 7, 2008, the Bank will assume that you have voluntarily resigned. Your employment will be separated on January 8, 2008, and you will be ineligible for rehire."

9. On January 3, 2008, the complainant called and advised LeGeyt that he would drop off his employee badge and key. When the complainant arrived at the workplace, he did not indicate to the respondent that he wanted to continue his employment or that he intended to provide any documentation in support of his request for a leave of absence or disability payments.

10. On January 7, 2008, the respondent processed the complainant's termination effective December 17, 2007, the first scheduled work day following his last day of work.

11. The complainant did not report to work after December 14, 2007, because he was suffering from mental health problems. On January 28, 2008, the complainant was involuntarily committed to Hartford Hospital. At some point, the complainant left the hospital and entered an inpatient mental health program at the Institute of Living. The complainant does not recall the date that this inpatient treatment ended.

12. At the time of the complainant's involuntary committal, the Hartford Probate Court appointed Attorney Musa Sebadduka as the complainant's conservator. On February 6, 2008, while still in the hospital, the complainant initiated a claim for unemployment compensation benefits effective February 3, 2008. The complainant filed the claim himself but recalls that Attorney Sebadduka was acting as his conservator at that time.

13. On February 7, 2008, the complainant's attending physician at Hartford Hospital completed disability forms provided by MetLife. He indicated that the complainant was hospitalized due to schizophrenia from January 28, 2008. He also recommended psychological counseling.

14. On February 12, 2008, Attorney Sebadduka notified the employer's disability insurance carrier that he had been appointed as the complainant's conservator. He requested that the carrier provide, within ten days, a written explanation as to why the complainant's claim for benefits had been denied. He also requested that the carrier send him all documents and evidence relating to the complainant's disability claim. The employer does not know what, if any, communication occurred between Met Life and Attorney Sebadduka between February 12, 2008, and February 21, 2008.

15. On February 21, 2008, MetLife mailed the complainant a letter stating that no benefits were payable to him because the respondent had notified the carrier that it no longer employed the complainant effective December 17, 2007. The complainant did not appeal this decision.

16. Attorney Sebadduka assisted the complainant with a housing matter. The complainant does not recall when he was released from the hospital. However, he recalls that Attorney Sebadduka no longer served as his conservator as of March 2008.

17. On May 19, 2008, the complainant's health care provider released him to return to work full time without restrictions. From May 25, 2008, through August 3, 2008, the complainant filed for and received unemployment compensation benefits, using the administrator's interactive voice response system and the administrator's Internet continued claims filing system.

18. In June 2008, the complainant contacted the respondent's Human Resources Division seeking rehire. The Human Resources Division advised the complainant that it had determined at the time of his December 17, 2007 separation that he was not eligible for rehire. Thereafter, the complainant's spouse suggested that he contact the Connecticut Department of Labor for assistance in returning to work for the respondent.

19. The complainant did not contact any division within the Connecticut Department of Labor for assistance in this matter or consult its website before August 7, 2008. On August 7, 2008, the complainant filed his complaint with the Connecticut Department of Labor Wage and Workplace Standards Division.

20. In March 2009, Attorney Sebadduka advised the complainant that he could not represent him in the CFMLA matter and that he should seek other counsel. The complainant chose to appear pro se at the CFMLA hearing.

PROVISIONS OF LAW

General Statutes § 31-51pp. Family and medical leave: Prohibited acts, complaints, rights and remedies. (a)(1) It shall be a violation of sections 5-248a and 31-51kk to 31-51qq, inclusive, for any

employer to interfere with, restrain or deny the exercise of, or the attempt to exercise, any right provided under said sections.

(2) It shall be a violation of sections 5-248a and 31-51kk to 31-51qq, inclusive, for any employer to discharge or cause to be discharged, or in any other manner discriminate, against any individual for opposing any practice made unlawful by said sections or because such employee has exercised the rights afforded to such employee under said sections.

(b) It shall be a violation of sections 5-248a and 31-51kk to 31-51qq, inclusive, for any person to discharge or cause to be discharged, or in any other manner discriminate, against any individual because such individual:

(1) Has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to sections 5-248a and 31-51kk to 31-51qq, inclusive;

(2) Has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under said sections; or

(3) Has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under said sections....

(2) Any employee aggrieved by a violation of this subsection may file a complaint with the Labor Commissioner alleging violation of the provisions of this subsection. Upon receipt of any such complaint, the commissioner shall hold a hearing. After the hearing, the commissioner shall send each party a written copy of the commissioner's decision. The commissioner may award the employee all appropriate relief, including rehiring or reinstatement to the employee's previous job, payment of back wages and reestablishment of employee benefits to which the employee otherwise would have been eligible if a violation of this subsection had not occurred. Any party aggrieved by the decision of the commissioner may appeal the decision to the Superior Court in accordance with the provisions of chapter 54.....

Section 31-51qq-43(c) of the Connecticut State Agency Regulations provides that, in order to be considered timely filed, all complaints must be received by the Labor Department or postmarked within one hundred and eighty days of the employer action which prompted the complaint, described in subsection (a) of this section. Any complaint received or postmarked after such one hundred and eighty day period may be considered timely filed for good cause, as defined in subsection (d) of this section...

(d) "Good cause" means any circumstances which, in the opinion of the Commissioner, would prevent a reasonably prudent individual in the exercise of due diligence from timely filing his complaint.

DECISION

In order to be considered timely filed, all complaints must be received by the Labor Department or postmarked within 180 days of the employer action which prompted the complaint. See Regs., Conn. State Agencies § 31-51qq-43(c). At the contested case hearing, the complainant alleged that he filed his complaint beyond the statutorily prescribed period because he did not know his rights under the

CFMLA, and specifically did not know he could file a complaint regarding his termination from employment.

In ruling upon jurisdictional issues that arise under the CFMLA, the Commissioner has issued final decisions that draw upon state and federal discrimination law. For example, in *Cretella v. Blue Cross Blue Shield of Connecticut*, Case No. FM 93-9 (7/17/95), the Commissioner adopted the hearing officer's proposed decision which considered the Connecticut District Court's ruling under the Federal Age Discrimination in Employment Act (ADEA) in *Downie v. Electric Boat Division*, 504 Supp. 1082 (D.Conn. 1980). Under the ADEA, the employee must file a charge of unlawful discrimination within 180 days after the "alleged unfair practice occurred." In *Downie*, the District Court ruled that the 180-day period began to run when the employee knew, or as a reasonable person should have known, that the employer made a final decision to terminate him, and the employee ceased to render further services to the employer. The court went on to state that uncertainty over the reason for the termination or whether the termination will be remedied cannot alter the actual date of termination.

In the case before us, the respondent's last action which prompted the complaint in this matter is its discharging the complainant at the end of the day on January 7, 2008, with an effective date of December 17, 2007. The respondent mailed a letter to the complainant on December 27, 2007, indicating that he would be terminated if he did not provide medical documentation to justify a leave of absence by January 7, 2008. In response to that letter, the complainant turned in his badge and key. Therefore, although the complainant did not have a clear recollection of the events in this case, his actions confirm that he received the respondent's letter. Therefore, he knew or should have known that he had been terminated on January 7, 2008.

To be timely filed, the complainant in this case would have to file his action within 180 days of January 7, 2008. See Regs., Conn. State Agencies § 31-51qq-43. The complainant filed his action on August 28, 2008, which is 232 days after January 7, 2008. Therefore, the issue presented in this case is whether the complainant had good cause to file his complaint late pursuant to Sections 31-51qq-43(c) and (d) of the Connecticut State Agencies Regulations.

In determining what constitutes good cause for filing of an untimely complaint under the CFMLA, the Labor Commissioner has considered state and federal discrimination law, as well as the late appeal provisions of Connecticut's Unemployment Compensation Act, General Statutes §§ 31-222, et.seq. See *Cretella, supra*; see also General Statutes § 31-241; Regs., Conn. State Agencies § 31-237g-15. Some of the factors which might be considered in determining whether an individual has good cause for the late filing of a complaint are when the complainant became aware of or, through the exercise of due diligence, should have become aware of the respondent's conduct which led to the complaint; whether the complainant acted with due diligence in filing the complaint once he or she became aware of the respondent's conduct; and whether factors outside the complainant's control or physical or mental impairment prevented the complainant from filing a timely complaint. The complainant's familiarity with the CFMLA is certainly a relevant consideration, as is whether the complainant was represented during the period for timely filing or whether administrative error by the agency in any way contributed to the late filing. Good cause might exist if the complainant was prevented from filing a claim because of coercion or intimidation. The presence of good faith

error and the absence of prejudice to the respondent may be considered in determining whether a reasonably prudent complainant had good cause for the untimely filing of his or her complaint. Many of these factors parallel the considerations in the equitable tolling cases found in state and federal discrimination law.

The record in the instant case reveals that the respondent's agent, MetLife, provided the complainant with information concerning his FMLA rights under both federal and state law in response to his request for a leave of absence and his claim for short-term disability. Specifically, MetLife provided the complainant with a copy of the respondent's notice of rights and obligations under the Family and Medical Leave Act and directed the complainant to the respondent's handbook for a further explanation of his rights under the state and federal Family and Medical Leave Acts.

At the contested case hearing, the complainant did not provide any reliable evidence to establish that he was medically unable to understand the respondent's notice of his rights under the state and federal Family and Medical Leave Acts. However, we need not reach that issue because, as of February 12, 2008, the complainant was represented by an individual who was both his conservator and an attorney.

Under federal discrimination law, ignorance of legal rights may be excused, and a filing limitation consequently may be tolled under certain circumstances. For example, in *Downie v Electric Boat Division*, 504 Supp. 1082 (D.Conn. 1980), the court ruled that a complainant's bare assertion that he had not seen notices of his ADEA rights would not require tolling, or delaying, an appeal period, but evidence that the respondent failed to post certain notices of his ADEA rights as required might. However, the court further ruled that, regardless of whether the correct notice was provided, tolling is inappropriate when the plaintiff or complainant is represented by counsel during the statutory filing period. *Downie*, supra, citing *Smith v. American President Lines, Ltd.*, 571 F.2d 102 (2d Cir. 1978). The court stated that "counsel are presumptively aware of whatever legal recourse may be available to their client." The Commissioner adopted this reasoning in *Cretella*, supra.

The complainant was represented by counsel during the statutory filing period. Although the complainant did not know the date of the conservator's appointment, the respondent produced a letter from Attorney Sebadduka, which is dated February 12, 2008, and in which Attorney Sebadduka requested information within ten days. Thus, the complainant had representation at least from February 12 through February 22, 2008. Because the complainant had legal representation during the statutory filing period, we cannot conclude that the complainant's stated reason for the late filing, lack of knowledge of his rights, constituted good cause for the late filing of his complaint.

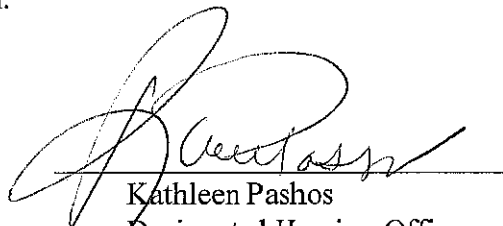
In so ruling, we recognize that the claimant was involuntarily hospitalized on January 28, 2008. However, during the period of incompetence, the Hartford Probate Court appointed Attorney Sebadduka as the complainant's conservator, to protect his legal rights. As of March 2008, Attorney Sebadduka no longer served as the complainant's conservator, and there is no other evidence in the record to establish that he was unable to file a timely complaint following his release from the inpatient treatment he received. From May 25, 2008, through July 4, 2008, the claimant filed for and received unemployment insurance benefits. In order to be eligible for unemployment benefits, the complainant had to establish his availability for work as well maintain and document an active

search for work. Moreover, the complainant was represented during his February period of incapacity. Therefore, we conclude that the complainant was not incapacitated during the entire statutory filing period. The complainant has not established any circumstances that would have prevented a reasonably prudent person who was acting diligently from the filing of timely complaint.

CONCLUSION

As the designated representative of the Labor Department Commissioner and the authorized hearing officer in this matter, the undersigned has reached the following proposed decision:

The complainant has failed to establish good cause for the late filing of his CFMLA complaint. The complaint is dismissed for lack of jurisdiction.



Kathleen Pashos
Designated Hearing Officer
3580 Main Street, Room 212
Hartford, CT 06120

COPIES MAILED TO:

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