STATE OF CONNECTICUT
Department of Labor
249 Thomaston Avenue
Waterbury, Ct 06702

PROPOSED DECISION OF HEARING OFFICER

HOWARD WILLIAMS V. COLT MANUFACTURING

Docket No.: FM 2003-111

Date Proposed Decision is Mailed: October 18, 2004

Hearing Dates: July 15, 2004, and August 18, 2004 (both hearings limited to jurisdiction)

Hearing Location: Connecticut Department of Labor
Appeals Division
249 Thomaston Avenue
Waterbury, Ct 06702

Appearances:

July 15, 2004

For the Complainant: Howard Williams, Complainant.

For the Respondent Employer: Michael Magourik, human resources director; Robert Johnson, labor relations manager; James Tipton, training manager; Joseph Dieso, Attorney.

August 18, 2004

For the Complainant: Howard Williams, Complainant.

For the Respondent Employer: Michael Magourik, human resources director; Robert Johnson, labor relations manager; James Tipton, training manager; Lester Swain, shop-chairperson; Lee Adams, chief steward; Joseph Dieso, Attorney.

CASE HISTORY

On August 28, 2003, the complainant, Howard Williams, filed an initial complaint with the State of Connecticut Department of Labor. Wage and Workplace Standards Division alleging that his former employer, Colt Manufacturing, violated the provisions of General Statutes § 31-51kk, et seq., An Act Concerning Family and Medical Leave from Employment, (hereinafter referred to as CFMLA). On September 12, 2003, the Wage and Workplace Standards Division notified the respondent, Colt Manufacturing, that the complainant had filed a complaint, alleging that it had violated General Statutes § 31-51pp, and requested that the respondent respond to the complaint in writing, within twenty-one (21) calendar days.

On September 17, 2003, the respondent furnished the Wage and Workplace Standards Division with its response to the complainant's complaint, stating that the complaint was filed outside the one hundred and eighty-day limitations period contained in Regs., Conn. State Agencies § 31-51qq-43(c), and requesting that the complaint be dismissed as untimely. On September 22, 2003, the Wage and Workplace Standards Division notified the complainant that the respondent had filed its response to his complaint. On October 10, 2003, the complainant responded to the respondent's response. On January 27, 2004, the Wage and Workplace Standards Division notified the complainant and the respondent that the Wage and Workplace Standards Division had no jurisdiction over the complaint because it was not filed timely pursuant to Regs., Conn. State Agencies § 31-51qq-43. On February 16, 2004, the respondent filed a request for a contested case hearing before the Labor Commissioner pursuant to Regs., Conn. State Agencies § 31-51qq-44(e).

On February 24, 2004, the Wage and Workplace Standards Division mailed a Notice of Opportunity to Participate in Pre-Hearing Settlement Conference to the complainant and the respondent. Scheduling of a pre-hearing conference was contingent upon both parties requesting participation. Labor Commissioner Shaun B. Cashman designated Mr. John P. Vagnini as the hearing officer if the parties failed to reach a settlement.

On June 17, 2004, the hearing officer mailed a Notice of Contested Case Hearing and Pre-Hearing Order to the complainant and the respondent, advising that the hearing was confined to the issue whether the complainant had good cause for filing the complaint more than one hundred and eighty days after the respondent's action that prompted the complaint. On July 15, 2004, and August 18, 2004, hearings were held at the Connecticut Department of Labor, 249 Thomaston Ave., Waterbury, Connecticut before John P. Vagnini.

FINDINGS OF FACT

1. Colt Manufacturing employed Howard Williams from October 15, 1990, until July 26, 2002. At the time of the separation from employment, he held a position in the cutter grind department.

2. The respondent posted a notice entitled "Your rights under the Family and Medical Leave

Act of 1993." This notice contains an advisement that the U.S. Department of Labor, Wage and Hour Division is authorized to investigate and resolve complaints. The respondent posted the notice at prominent places within its facilities for its employees to read, including in break and personnel department areas.

3. The claimant was absent on July 18 and July 19, 2002. The respondent did not consider the complainant to be on a Family and Medical Leave Act leave of absence during this absence.

4. The complainant's absences on July 18 and July 19, 2002, were not properly excused by his physician, and the medical document that he presented to the respondent appeared to have been altered. On July 26, 2002, the respondent discharged the complainant because his July 18 and July 19 absence caused him to accumulate an excessive amount of points in violation of its attendance policy.

5. On August 6, 2002, the claimant initiated a claim for unemployment compensation benefits and was awarded benefits on the issue of his discharge from the respondent's employment.

6. On August 6, 2002, the complainant followed the instructions contained in the respondent's Family and Medical Leave Act postings and contacted the Department of Labor, Wage and Workplace Standards Division to protest his separation from the respondent's employment pursuant to the Family and Medical Leave Act. Based his conversation with a staff member in the Wage and Workplace Standards Division, the complainant believed that he should delay filing the formal Family and Medical Leave Act complaint until he exhausted all his grievance options with the respondent and his union.

7. On August 6, 2002, the Wage and Workplace Standards Division staff member mailed the complainant all of the relevant paperwork, including instructions, with regard to filing a Family and Medical Leave Act complaint.

8. On August 12, 2002, the complainant filed his grievance, requesting that the respondent reinstate him to his former position and pay him for all lost wages. On October 9, 2002, the respondent denied the complainant's third step grievance.

9. The collective bargaining agreement between Colt's Manufacturing Company, Inc., and Amalgamated Local No. 376 and United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Article XVII, Section I allows either party fifteen (15) calendar days after a decision is made under Article XVI Section 1, Step 3, to notify the other party that the dispute is being taken to arbitration.

10. On two occasions during the last two weeks of October 2002, the complainant telephoned the union office, attempting to contact Lester Swain, shop-chairperson, to determine whether the union was taking the case to arbitration. Since Swain was not available, the complainant left two voice-mail messages for Lee Adams, the chief steward. Adams relayed the

complainant's messages to Swain.

11. The complainant made a third telephone call to the union in late October 2002, and spoke directly to Swain. Swain advised the complainant that the union would not take the case to arbitration. The complainant requested a letter from Swain verifying this information. Swain complied with the request and immediately mailed out that information that same day. The letter was not dated.

12. After receiving Swain's letter, the complainant chose not to file a Family and Medical Leave Act complaint with the Wage and Workplace Standards Division of the Department of Labor.

13. In May 2003, the complainant met with his attorney concerning an unrelated matter. When the complainant mentioned that he could file a Family and Medical Leave Act complaint, his attorney advised him that an Family and Medical Leave Act complaint had to be filed within a specific time limit. The complainant decided not to file a Family and Medical Leave Act complaint despite his attorney's warning. Moreover, he did not read the Family and Medical Leave Act information that the Wage and Workplace Standards Division mailed him on August 6, 2002.

14. In May and June 2003, the complainant visited Georgia to attend to personal and family matters. He returned to Connecticut in early June 2003. He returned to Georgia in late June, and came back to Connecticut in mid July 2003.

15. On August 28, 2003, the complainant filed his complaint with the Wage and Workplace Standards Division of the Connecticut Department of Labor, alleging that the respondent had violated the Connecticut Family and Medical Leave Act.

16. Although the complainant was notified in late October, 2002, that the union was not taking his case to arbitration, he delayed filing his CFMLA complaint for three hundred and one (301) days, until August 28, 2003.

ISSUE

The initial issue in this matter is whether the complainant, Howard Williams, can establish good cause for his failure to file his complaint with the Connecticut Department of Labor within the one hundred and eighty (180) day filing period. In the absence of good cause, the hearing officer is precluded from ruling on the merits of his complaint.

PROVISIONS OF LAW

Sections 31-51qq-1 to 31-51qq-48 of the Regulations of Connecticut State Agencies, inclusive, provide, in relevant part:

Section 31-51qq-43. What can employees do who believe that their rights under Family and Medical Leave Act have been violated?

(a) Any employee, or his authorized representative, may file a complaint with the Labor Department if he believes that:

(1) his employer has interfered with, restrained or denied the exercise of, or the attempt to exercise, any rights provided under the Act;

(2) his employer discharged or caused to be discharged, or in any manner discriminated against such employee for opposing any practice made unlawful by the Act or because such employee has exercised the rights afforded to such employee under the Act;

(3) his employer has violated any provision of the Act with respect to such employee....

(c) 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.

THE CONTENTIONS OF THE RESPONDENT WITH REGARD TO THE LATE FILING OF THE COMPLAINT

The respondent contends that, pursuant to Regs., Conn. State Agencies § 31-51qq-43(c), the Commissioner should dismiss the complainant's complaint for lack of jurisdiction since the complainant does not have good cause for filing his complaint on August 28, 2003, beyond one hundred and eighty days after the employer action that prompted the complaint.

THE CONTENTIONS OF THE COMPLAINANT WITH REGARD TO THE LATE FILING OF THE COMPLAINT

The complainant requests that the Commissioner accept jurisdiction over his complaint even though he filed it more than one hundred and eighty days after the employer denied his step three grievance because he had good cause for filing his complaint late. He maintains that a staff member at the Department of Labor instructed him to delay filing the complaint until he had exhausted all remedies

afforded him by the union grievance process. The complainant alleges that the shop chairperson, Lester Swain, deliberately prevented him from filing a timely complaint by waiting until the one hundred and eighty day limitations period had expired to inform him that the union would not take his grievance to arbitration. He further alleges that Swain intentionally provided him with an undated non-arbitration notice to conceal the delay.

ANALYSIS

THE COMPLAINANT HAS NOT ESTABLISHED GOOD CAUSE FOR FILING HIS COMPLAINT MORE THAN ONE HUNDRED AND EIGHTY DAYS AFTER THE EMPLOYER ACTION THAT PROMPTED THE COMPLAINT.

1. **The employer action that prompted the complainant's complaint occurred when he was discharged, not when he was notified that the union would not bring his discharge grievance to arbitration.**

Section 31-51qq-43(c) of the Regulations of Connecticut State Agencies provides that to be timely a complaint must be received within one hundred and eighty days of the employer action prompting the complaint, except that a complaint filed after the one hundred and eighty day period may be considered timely filed if the complainant demonstrates good cause for the late filing. Good cause is defined as any circumstances that would prevent a reasonably prudent individual in the exercise of due diligence from timely filing his complaint.

Duly enacted regulations that prescribe rules and regulations for the operation and enforcement of a law that promote the spirit and purpose of policies and standards fixed by the legislature are a valid exercise of legislative authority and have the force of law. See *H. Duys & Company v. Tone*, 125 Conn. 300, 312 (1939); *State v. White*, 204 Conn. 410, 419 (1987).

In *McCarthy v. Bristol See Sandino v. Jim Rybczk Plumbing & Heating Co., 1171-BR-88 (3/30/89). Company*, FM 93-15 (6/29/94), the Commissioner recognized that one of the primary issues in establishing whether a complaint has been timely filed is a determination of when the alleged violation occurred. In *McCarthy*, the Commissioner cited a case involving a claim of discriminatory discharge wherein the court found that the time period generally runs from the date that the employee was notified that he is discharged. See *Kryzewski v. Metropolicty Government of Nashville*, 584 F.2d 802 (6th Cir. 1978). The Commissioner further cited a case in which the court found that an exception to this rule occurs where the statute of limitations on the alleged discriminatory discharge has run before the employee is advised that he has been discharged. See *Cervantes v. IMPC*, 724 F.2d 511 (5th Cir.), reh'g denied, 728 F.2d (5th Cir. 1984).

The record establishes that on July 26, 2002, the employer advised the claimant that he was discharged for his July 18 and July 19, 2002 absence. Therefore, the hearing officer finds that the one hundred and eighty day period for filing his Connecticut Family and Medical Leave Act complaint commenced on July 26, 2002, which is the date of the employer action that prompted the

complaint. The regulation specifically requires the complainant to have filed his complaint within one hundred and eighty days of the employer action that prompted the complaint. Accordingly, the complainant was limited to filing his complaint within one hundred and eighty days after July 26, or by January 22, 2003. Nonetheless, the complainant filed his complaint on August 28, 2003, after the filing period expired. Thus, his complaint should be dismissed for lack of jurisdiction.

2. **Even if the statute of limitations is toiled until the union advised the claimant that the discharge was final, the weight of the evidence establishes that the complainant should have filed a timely complaint by May 1, 2003, which is within one hundred and eighty days of November 1, 2002.**

Alternatively, even if it were found that the complainant delayed filing his complaint because he believed that the Wage and Workplace Standards Division staff member instructed him to postpone filing the action until he exhausted his grievance rights, his complaint should be dismissed for lack of jurisdiction. The hearing officer finds that, at the most, the one hundred and eighty day period for filing his Connecticut Family and Medical Leave Act complaint would commence when the complainant was advised that his union would not take his grievance to arbitration.

The Labor Commissioner has previously considered what constitutes good cause for the untimely filing of a complaint under the Connecticut Family and Medical Leave Act, and has issued several final decisions that draw on State and Federal law, as well as the late appeal provisions of the Connecticut Unemployment Compensation Act, General Statutes Sections 31-222, et. seq. See, e.g., *Cretella v. Blue Cross Blue Shield of Connecticut*, FM 93-9 (7/17/95). In *Cretella*, the Commissioner adopted the hearing officer's proposed decision, which relied on the court's reasoning in *Downie v. Electric Boat Division*, 504 F. Supp. 1082 (D.C.Conn., 1980). In *Downie*, the court reasoned that a plaintiff's ignorance of his or her legal rights may be excused and a filing limitation period tolled if the employer failed to post a notice as required by law, which would advise employees of the existence of the Age Discrimination in Employment Act.

The record in this case establishes that the respondent provided the complainant with the required information by posting the Family and Medical Leave Act notice within the production, break and personnel department areas. A finding that the claimant was aware of his Family and Medical Leave Act rights is buttressed by the claimant's credible testimony that, after he was discharged, he contacted the Wage and Workplace Standards Division on August 6, 2002, and requested the packet of information that explains how to file a complaint under the Family and Medical Leave Act. The complainant received the information packet that was mailed to him on August 6, 2002. Accordingly, the complainant's failure to file a timely complaint cannot be excused on the ground that the respondent failed to provide notice of his rights under the Family and Medical Leave Act. See *Downie v. Electric Boat Division*, supra.

Additionally in *Cretella*, the Commissioner specifically adopted the hearing officer's use of regulations and case law interpreting the good cause provisions of another program administered by the Labor Commissioner, the Unemployment Compensation Act, General Statutes § 31-222, et. seq.,

for determining whether a complainant has good cause for the untimely filing of a complaint under the Connecticut Family and Medical Leave Act. See General Statutes § 31-241 and Regs.. Conn. State Agencies § 31-237g-15. The Commissioner ruled that some of the factors that might be considered in determining whether an individual has good cause for failing to file a timely complaint are when the individual became aware of or, through the exercise of due diligence, should have become aware of the employer conduct that led to the complaint; whether the individual acted with due diligence in filing the complaint once he or she became aware of the employer's conduct; and whether factors outside the individual's control prevented the timely filing of the complaint. The final decision of the Commissioner further stated that the individual's familiarity with the Family and Medical Leave Act is a relevant consideration, as is whether the party was represented during the period for timely filing or whether administrative error by the agency in any way contributed to the untimely filing. Good cause might exist if a party is prevented from filing a claim because of prejudice 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 person had good cause for untimely filing. Many of these factors parallel the considerations in equitable tolling cases.

The claimant testified that the shop-chairperson, Lester Swain, waited until after the one hundred and eighty day limitation period had expired to advise him that the union would not bring his discharge grievance to arbitration. The mere fact that an individual has provided testimony that supports a fact does not by itself mean that the fact has been proven. *Howell v. Administrator*, 174 Conn. 529, 533. The complainant bears the burden of proving facts that will qualify this individual to receive the benefits that he or she seeks. *Northup v. Administrator*, 148 Conn. 475, 478, 172 A. 2d 390. That a fact is not contradicted does not make it admitted or otherwise undisputed. *Mercier v. American Refractories & Crucible Corp.*, 151 Conn. 559, 560, 200 A. 2d 716.

The complainant's hearing testimony was often vague and lacked specific details. His testimony, standing alone, is not sufficient to sustain his burden of proving that through no fault of his own he was prevented from filing his complaint more than one hundred and eighty days after the respondent's action was final. Moreover, the first-hand testimony of Swain and Adams at the continued hearing on August 18, 2004, and documentary evidence in the record outweigh the complainant's allegation that he received late notice that the union did not intend to bring his grievance to arbitration. On October 9, 2002, the respondent formally advised the parties in writing that it had denied the complainant's step three grievance. The union contract requires the union to notify the employer that it intends to bring a matter before arbitration within fifteen days after the conclusion of a step three grievance. Thus, by October 26, 2002, Adams and Swain were aware that the complainant's grievance was not going to arbitration.

Adams testified that the complainant left two telephone messages for Swain in October 2002. Moreover, Swain testified the complainant personally spoke to him at the end of October 2002. At that time Swain advised the complainant that the union concluded his case at the step three grievance and would not take the matter to arbitration. Swain further stated that, at the complainant's request, he created the letter that verified the union's position on the same day that he conversed with the complainant. There is no evidence that Adams or Swain deliberately tried to deprive the

complainant of this information for several months.[1] Rather. they did render the union's arbitration decision within the time limitations contained in the collective bargaining agreement, and responded to the complainant's telephone messages in a timely manner. Moreover, the complainant was unable to explain why he only made sporadic attempts to contact Swain over several months until Swain finally responded to his telephone calls. Thus, the weight of the evidence establishes that by November 1, 2002, the complainant was aware that his discharge was final. At the most, the expiration of the complaint period could be extended for one hundred and eighty days after November 1, or to May 1, 2003.

3. **The complainant did not act with due diligence after he was advised that his discharge was final.**

The final issue is whether the complainant acted with due diligence once he was advised that the discharge was final. Precedent law under the Connecticut Unemployment Compensation Act has established that even where a party may have initially had good cause for not filing an appeal from the agency's adverse determination, the party's continued delay in filing an appeal cannot be excused once the reason for the late filing no longer exists. See *Chan v. City of New Haven*, Board Case No. 915-BR-88 (1/24/89), aff'd Superior Court, judicial district of New Haven, Docket No. 280193 (May 1, 1989). A party's indecisiveness, or deliberate decision not to file an appeal or delay in seeking clarification of the appeal rights within the statutorily prescribed appeal period does not allow the appeals division or board of review to exercise jurisdiction over an untimely filed appeal. See, e.g., *Lavallee v. The Dow Chemical Company*, Board Case No. 411-BR-89 (6/12/89); *Dennis v. Hall Neighborhood House*, Board Case No. 492-BR-88 (7/6/88). The same principles may be applied to a complainant's late filing of a complaint under the provisions of the Connecticut Family and Medical Leave Act.

As previously stated, the respondent properly posted information concerning the Family and Medical Leave Act in the shop. Upon his July 26, 2002 discharge, the complainant requested and received

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[1]Even if the union intentionally withheld the information from the complainant, his relief lies in a complaint based on the collective bargaining agreement rather than a complaint based on the Family and Medical Leave Act. In a case concerning the statute of limitations for a postal employee's Labor Management Relations Act claims against the union based on a failure to bring a Family and Medical Leave Act grievance, the court found that the filing period began to run when the employee knew or should have known of the outcome of her second grievance, which challenged her termination for unexcused absences because the resolution of the second grievance in the employee's favor could have afforded the employee with relief for the union's failure to file the first grievance. Thus, in an action brought under the collective bargaining agreement, a disciplinary action, including a discharge decision announced to an employee in a Notice of Removal, may be delayed pending the resolution of a grievance brought against the action. See *Snay v. U.S. Postal Service and American Postal Workers Union Local 390*, 31 F.Supp.2d 92, 98 (N.D.N.Y. 1998).

a packet from the Wage and Workplace Standards Division, which contained instructions for filing a Family and Medical Leave Act complaint. The complainant was negligent and did not read the information packet, even after November 1, 2002, when he was advised that the discharge was final. Had he done so, he could have filed a timely complaint by January 22, 2003. Moreover, in May 2003, his attorney advised him that he had a limited time period in which to file a Family and Medical Leave Act complaint. Despite this advice, which should have triggered his immediate action, the complainant chose not to file the complaint. Rather, he traveled to Georgia for the next two months. In fact, after he returned to Connecticut in July 2003, he did not file the Family and Medical Leave Act complaint until August 28, 2003. The complainant has not shown due diligence in this matter.

The record establishes that on July 26, 2002, the complainant was advised that he was discharged. The period to file a timely complaint expired on January 22, 2003. The complainant filed his complaint on August 28, 2003, beyond the statutorily prescribed one hundred and eighty day period for filing a timely action. Based on the cited factors, this hearing officer concludes that the complainant has not established circumstances which would have prevented a reasonably prudent individual in the exercise of due diligence from timely filing the complaint.

DISPOSITION

The designated representative of Labor Commissioner Shaun B. Cashman and the authorized hearing officer in this matter finds that the complainant, Howard Williams, has not established good cause for his failing to file a timely complaint as required under Sections 31-51qq-43(c) and (d) of the Regulations of Connecticut State Agencies. Accordingly, the undersigned hearing officer has reached the following proposed decision:

> The complainant has failed to establish good cause for his late filing of the complaint, or to otherwise file a timely complaint as required. The motion to dismiss is **granted**. The complaint is **dismissed** for lack of jurisdiction.

John P. Vagnini
Hearing Officer