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STATE OF CONNECTICUT
DEPARTMENT OF LABOR
200 FOLLY BROOK BOULEVARD
WETHERSFIELD, CT 06109

COMPLAINANT:
Jeanne Cretella
BY: Alice Mick, Esq.
Brenner, Saltzman, Wallman
& Goldman
P.O. Box 1746
New Haven, CT 06507-1746

EMPLOYER:
Blue Cross and Blue Shield
BY: D. Charles Stohler, Esq.
Carmody and Torrance
50 Leavenworth Street
P. O. Box 1110
Waterbury, CT 06721-1110

DATE MAILED TO INTERESTED PARTIES:
July 17, 1995

FINAL DECISION OF THE LABOR COMMISSIONER

Pursuant to Section 31-1-8 of the Regulations of Connecticut State Agencies, I am issuing my final decision in the above-referenced matter after reviewing the evidence in the case.

I affirm in whole and incorporate the Proposed Decision of the hearing officer issued on June 7, 1995 as my final decision in this matter, a copy of which is attached hereto.

James P. Butler
Labor Commissioner

cc: Ralph V. Dorsey, Hearing Officer

Attorney Heidi Lane, Wage and Workplace Standards Division

PROPOSED FINAL DECISION

JEANNE CRETELLA v. BLUE CROSS AND BLUE SHIELD OF CONNECTICUT, INC.

CASE NO.: FM 93-9

DATE PROPOSED DECISION MAILED: June 7, 1995

HEARING DATE: September 20, 1994

HEARING LOCATION: Wethersfield, CT

APPEARANCES:

For the complainant: Attorney Andrew Houlding

For the respondent employer: Attorney Paul S. Tagatac

For the Administrator: Attorney Heidi Lane

CASE HISTORY

On May 10, 1993, the complainant filed a complaint with the Connecticut Commission on Human Rights and Opportunities (hereinafter referred to as "CHRO") alleging that her former employer, Blue Cross and Blue Shield of Connecticut, Inc. (hereinafter referred to as "Blue Cross and Blue Shield") violated her rights under the law. The complainant requested that the CHRO investigate her complaint, secure her rights under the law, including without limitation, reinstatement to her job and previous benefits, seniority, back wages, payment of medical costs, compensatory and punitive damages, attorney's fees and, if not rehired, future wages.

On June 1, 1993, the complainant filed a complaint with the State of Connecticut, Department of Labor, Division of Occupational Safety and Health and Working Conditions Division[1] (hereinafter referred to as "Working Conditions Division") alleging that her former employer, Blue Cross and Blue Shield, violated the provisions of Connecticut General Statutes Sections 31-55a, et seq., an act concerning Family and Medical Leave from Employment (hereinafter known as the "Family and Medical Leave Act").

The Working Conditions Division notified Blue Cross and Blue Shield on July 30, 1993 of the complainant's complaint and requested that Blue Cross and Blue Shield investigate the complaint and advise the Working Conditions Division in writing of the results of their investigation. Such response was required to include any information, evidence or argument that Blue Cross and Blue Shield deemed relevant to the Working Conditions Division investigation.

On August 23, 1993, Blue Cross and Blue Shield, through its attorneys, Carmody and Torrance, responded to the Working Conditions Division's request. In the August 23, 1993 letter, Blue Cross and Blue Shield indicated that the complainant was never denied a medical leave of absence during her seven years of employment and indeed during her tenure, the complainant took five medical leaves of absence, all of which were paid under the employer's short-term disability policy. Moreover, the respondent argued that the complainant's complaint was time barred and should be dismissed since it was filed more than one hundred and eighty days (180) since the employer's action which prompted the complaint.

On November 3, 1993, the Working Conditions Division mailed a letter to Pamela J. Norley, Esquire, Carmody and Torrance representatives for Blue Cross and Blue Shield, indicating that the Department of Labor had reason to believe that good cause may exist for the late filing of the complainant's Family and Medical Leave Act complaint. The respondent was required to respond to the issues raised in the letter of complaint. The respondent was given until November 23, 1993 to investigate and respond.

On December 8, 1993, letters were mailed to the attorneys of record indicating that the Working Conditions Division had investigated the matter and found that the State's burden of establishing that the complainant was

discriminated against in violation of the Family and Medical Leave Act could not be sustained. Moreover, the letter indicated that even if good cause could be established for the late filing, the evidence did not support a finding of a violation. The Working Conditions Division dismissed the complainant's complaint. The complainant was advised in the same letter that if she did not agree with this decision, she had a right to a hearing before the Commissioner, provided a written request for such a hearing was received by the Department or postmarked within twenty-one (21) calendar days of the mailing of the letter.

On December 29, 1993, the complainant requested a hearing before the Commissioner.

On September 20, 1994, a hearing was held at the Connecticut Labor Department, 200 Folly Brook Boulevard, Wethersfield, Connecticut before Ralph V. Dorsey, who was appointed the Hearing Officer in the matter by Labor Commissioner Ronald F. Petronella. The hearing was confined to the issue of whether the complainant had good cause within the meaning of Connecticut Agencies Regulations Section 31-51ee-3(c) for not filing her complaint within one hundred and eighty days (180) of the employer action which prompted the complaint.

FINDINGS OF FACT

1. The respondent, Blue Cross and Blue Shield of Connecticut, Inc., is a corporation subject to the Family and Medical Leave Act, Connecticut General Statutes Sections 31-55cc, et seq., at all relevant times.

2. The complainant had been employed by the subject employer from 1984 until October 1, 1991. The complainant was initially hired as a clerk and promoted to a claims processor in 1989. At the time of separation, the complainant had been demoted to a clerk.

3. Prior to employment with the subject employer, the complainant suffered from a psychiatric disorder. At all times during her employment with Blue Cross and Blue Shield the complainant was regularly treated by a psychiatrist and took medication to stabilize her mental condition.

4. At the time of hire, the complainant disclosed to the employer, that she was taking Prolixin, Lithium and Cogentin (psychotropic medications) and had received psychiatric therapy.

5. The complainant's supervisors and personnel were aware of her illness. From 1984 to the date of separation, the complainant was hospitalized two to three times. The complainant was given a leave of absence each time and reinstated to her position as a clerk when she was able to return to work.

6. The complainant took a disability leave in September 1985 which was listed on Blue Cross and Blue Shield forms by her attending psychiatrist as "exacerbation of schizo affective disorder." The complainant returned to work for more than one year before her third attack. During this episode in 1987, the employer's nurse had regular consultations with the psychiatrist about the complainant's psychiatric condition.

7. Despite prolonged psychiatric illnesses and periods of hospitalization, the complainant was able to perform her job as a clerk and receive satisfactory evaluations.

8. The complainant was honored on at least one occasion in the company newsletter.

9. In November of 1989, the complainant had a short period of hospitalization. The complainant was able to return to work December 1989.

10. In the spring of 1991, the complainant began to experience symptoms of psychosis and felt compelled to wash her hands very frequently. The complainant's work was often interrupted and she became less productive.

11. Blue Cross and Blue Shield records reflect that the complainant would wedge the ladies' room door open so that she could exit without touching the door; that she would also clean her hands with hand wipes at her desk; that she was observed cleaning her pocketbook with hand wipes; that her hands became chapped and sore and required medical attention; and that she would refuse to touch common items with her bare hands.

12. During a fire drill, she refused to push open the panic bar on the emergency exit.

13. The complainant was being treated on an out-patient basis at Hamden Mental Health Services through 1990-1991. The doctor's information indicates that after the separation from Blue Cross and Blue Shield the complainant experienced auditory hallucinations and commands that forbade her to go to the hospital.

14. As a result of the above-mentioned behavior, the complainant was demoted to her prior clerk's position.

15. The complainant was unable to ask for help due to the nature of her illness. The complainant's behavior put the employer on constructive notice of her illness.

16. During June of 1991, the complainant's supervisor requested advice from personnel on how to deal with the complainant. In the supervisor's request he specifically noted that the complainant's behavior was affecting her work performance. The supervisor was advised to place the complainant on work performance warning.

17. The complainant was issued several warnings regarding performance issues. The employer treated the complainant's behavior as disciplinary.

18. The complainant was separated October 1, 1991. During the final meeting with the employer, the complainant queried if she was being fired. The complainant was told "Don't think of it as being fired. Think of it as a termination of your job, and when you feel better, come back."

19. The complainant was ill and believed she could be reinstated into her job when she felt better. The complainant did not protest the employer's actions at that time.

20. The complainant was hospitalized after the separation for two weeks and thereafter involved in a day hospital treatment program for several months. The complainant was rehospitalized for two weeks at the end of May of 1992 and again participated in a day treatment program.

21. The complainant filed for unemployment benefits with an effective date of October 6, 1991. The complainant was approved on the separation but denied on the issue of availability from November 14, 1991. The complainant filed an appeal which was heard on November 27, 1991 and reversed in the complainant's favor on December 4, 1991. The complainant began receiving checks effective week ending November 9, 1991 and continued to receive unemployment benefits until claim week ending May 2, 1992. After claim week ending May 2, 1992, the complainant was placed on Emergency Unemployment Compensation and received benefits beginning claim week ending May 9, 1992 through claim week ending January 16, 1993.

22. During the fall of 1992, the complainant felt stable and able to return to work. The complainant contacted Blue Cross and Blue Shield on several occasions by telephone. The complainant contacted the employer, relying on her supervisor's previous statement. The complainant was told to complete a job application.

23. The complainant contacted legal counsel during late fall 1992 or early winter 1993. The complainant was advised to submit a written application for reinstatement.

24. The complainant completed an application for employment January 1993. Later the same month, the complainant contacted personnel and was advised that no work was available.

25. After Blue Cross and Blue Shield denied the complainant employment, the complainant's physician wrote a letter to the director of human resources at Blue Cross and Blue Shield requesting reemployment for the complainant.

26. After receiving no response from the physician's letter, the complainant's attorney contacted Blue Cross and Blue Shield personally. The call was made in an attempt to get the complainant's job back.

27. On April 22, 1993, the complainant's counsel wrote a letter to the employer indicating that the complainant had decided to pursue legal remedies. On May 10, 1993, the complainant filed a complaint with the Connecticut Commission on Human Rights and Opportunities. On June 1, 1994, the complainant filed a complaint with the State of Connecticut, Department of Labor, Division of Occupational Health and Safety and Working Conditions Division.

DECISION

Section 31-55dd of the Connecticut General Statutes provides as follows:

> Sec. 31-51dd. Family and medical leave: Prohibition of discrimination. No employer who is subject to the provisions of section 31-55cc shall discharge, or cause to be discharged, or in any manner discriminate against any eligible employee because such employee has exercised the rights afforded to him pursuant to the provisions of said section.

Pursuant to Conn. Gen. Stat. {31-55ee(a), the Labor Commissioner has promulgated regulations which establish the procedures and guidelines necessary to implement the provisions of {{31-55cc to 31-55gg, inclusive.[2] Conn. Agencies Regs. {31-51ee-3 provides, in pertinent part, that:

> (b) Complaints shall be filed with the Labor Department on such form(s) as are prescribed and furnished by the Labor Department or by letter. The Labor Department may seek any additional information it deems necessary to initiate an investigation.
>
> (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 eight day period may be considered timely filed for good cause, as defined in subsection (d) of this decision.
>
> (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.

In support of its complaint, the complainant contends that good cause has been shown for filing her complaint more than one hundred and eighty days after the employer action which prompted the complaint.

In her June 1, 1993 complaint, the complainant has requested that the commissioner accept jurisdiction over the complaint even though it was filed more than one hundred and eighty days after the employer eliminated the complainant's position in October 1991. In her September 20, 1994 Complainant's Memorandum of Law Re: Timeliness of Claim the complainant alleges that the employer's action, in violation of the Family Medical Leave Act, which led to her filing of her complaint, was her termination October 1, 1991. Moreover, the complainant contends that the respondent is estopped from seeking to time-bar the complaint by virtue of the respondent's representations to complainant at the exit interview ("Don't think of it as being fired. Think of it as termination of your job, and when you feel better, come back."); that the respondent engaged in a continuing course of discriminatory conduct extending through January 1993; that the limitation for filing the complaint should be equitably tolled where complainant was prevented by her medical illness from exercising her rights; that the complainant was prevented by good cause; and, that the twenty first amendment of the Connecticut Constitution would be violated if the complainant is prohibited from exercising her right to seek a remedy for respondent's discriminatory conduct.

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

Section 31-55ee-3/3 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 circumstance which would prevent a reasonable, prudent individual in the exercise of due diligence from the timely filing of his or her complaint.

Duly enacted regulations which, by prescribing rules and regulations for the operation and enforcement of a law, provide details which 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 & Co. v. Tone, 125 Conn. 300, 312 (1939), State v. White, 204 Conn. 410, 419 (1987).

1. The complainant has failed to produce first-hand evidence to support her contention of good cause.

The Hearing Officer is not strictly bound by the formal rules of evidence and, therefore, must accept evidence that would otherwise be excluded under these

formal rules. However, hearsay evidence which is properly objected to may not constitute substantial evidence to support a finding of fact unless its reliability is established under the four-part test set forth by the United States Supreme Court in Richardson v. Perales, 402 U.S. 389 (1971). These four facts are: (a) the nature and atmosphere of the proceeding (administrative convenience); (b) the availability of the witness-declarant (the difficulty of securing the presence of the witness-declarant); (c) the lack of bias or interest of the witness-declarant (how neutral is the party); and (d) the quality and probative value of the out of court statement(s) (under what circumstances was the evidence prepared). Only after weighing these factors can the Hearing Officer determine whether the evidence is reliable or trustworthy.

In the instant case, a Hearing Notice was mailed to interested parties on August 18, 1994, requesting an appearance pursuant to Section 31-51ee-4(e)e(2) of the Regulations of Connecticut State Agencies. The notice specifically advised parties that the proceeding would take place on September 20, 1994 at 9:30 a.m. in Room 201 of the Executive Wing at the Department of Labor, 200 Folly Brook Boulevard, Wethersfield, Connecticut. The notice also advised that the complainant had the right to appear at the hearing with or without counsel, and submit testimony and be fully heard.

The complainant did not appear at the hearing. When the Hearing Officer questioned the complainant's counsel regarding her non-appearance, the counsel specifically indicated that he was unaware that he was responsible for bringing the complainant to this proceeding. At that juncture, counsel requested a continuance in order to provide first-hand testimony from the complainant. This continuance was denied by the Hearing Officer on the basis of the counsel's failure to bring his witness and on the basis that the counsel failed to contact the Hearing Officer prior to the proceeding to determine whether the testimony of the complainant was necessary. The lower portion of the notice for the hearing specifically advised that "Any further inquiries regarding this matter should be directed to" the Appeals Referee.

In considering whether to offer a continuance, the Hearing Officer must examine the following factors: (a) the degree of fault of the offering party in not producing the witness. This should include an inquiry into: (i) the availability of the witness; (iii) whether the offering party was represented; and (iv) prior requests or opportunity for a postponement or the issuance of a subpoena by the offering party; and (b) the hardship to the opposing party and administrative inconvenience. The Hearing Officer should then balance these factors to determine whether a continuance is warranted. Jargas v. Bodine Corporation, 290-87-BR (5/8/87).

In the instant case, the Hearing Officer informed the complainant's attorney that the proffered evidence was not first-hand information and asked the representative whether he was aware of the consequences of not producing the live witness. (An attorney has a specific responsibility to his client and understands that any proceeding would require the best evidence, specifically that witness with first-hand knowledge to testify, if available.) The attorney failed to provide any good reasons for his failure

to provide first-hand witness at the proceeding. Bacote v. AGC, Inc., 435-BR-89 (6/29/89). Thus failing to provide any good cause reason for his failure to provide the first-hand witness, the Hearing Officer does not find that the current record establishes any good cause reason for the complainant's failure to file a complaint within the requisite one hundred and eighty day period after the employer action which prompted the complaint.

2. The complainant has not established good cause for the late filing of her complaint.

A statute of limitations is a statute of repose, with the object being to prevent the unexpected enforcement of stale claims. Lametta v. Connecticut Light & Power Co., 139 Conn. 218, 92 A.2d 731 (1952). The United States Supreme Court, interpreting the statutory time limit for filing charges under Title VII of the Civil Rights Act of 1964, has held that such filing requirements are subject to equitable modification. See Zipes v. Trans World Airlines, 455 U.S. 385 393, 102 S.Ct. 1127, 1133 n. 11, 7 L.E.d. 2d 234 (1982). The regulations governing the Family and Medical Leave Act, which provide that a complaint filed after the one hundred and eighty day filing period may be considered timely filed if the complainant had good cause for late filing, defines good cause for untimely filing as any circumstance that would prevent a reasonably prudent individual in the exercise of due diligence from the timely filing of a complaint.

In interpreting the Family and Medical Leave Act, it is appropriate to look for guidance in the theories and concepts developed in case law expounding federal discrimination law under Title VII of the 1964 Civil Rights Act. See Ford v. Blue Cross & Blue Shield of Connecticut, Inc., 216 Conn. 40 (1990); Diane Cormier v. Textron Lycoming, FM 91-1 (12/3/92). The Connecticut courts have often looked to federal employment discrimination law for guidance in enforcing the Connecticut anti-discrimination laws. See State v. Commission on Human Rights and Opportunities, 211 Conn. 464 (1989).

Ruling on the doctrine of equitable tolling, the United States District Court, District of Connecticut, noted 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 same court further stated that representation by counsel during the statutory filing period provides an employee with access to a means of acquiring knowledge of his or her rights and responsibilities, and that tolling is inappropriate where an individual is represented by counsel during the filing period. Downie v. Electric Boat Division, 504 F. Supp. 1082 (1980). Compare Cruce v. Brazosport Indep. School Dist., 703 F.2d 862 (4th Cir. 1981), in which the Fourth Circuit Court of Appeals, noting that a party desiring equitable tolling bears a heavy burden, did not toll a one hundred and eighty day filing period despite the employer's failure to post a notice.

In Franci v. Avco Corp., Avco Lycoming Division, 583 F. Supp. 250 (1982), the United States District Court, District of Connecticut, relied on two

factors, the plaintiff's good faith reliance on the possibility of being recalled by his employer and the employer's lack of prejudice, to toll the filing period of a charge of a violation of the Age Discrimination in Employment Act. The Third Circuit Court of Appeals refused to toll the filing period where the plaintiff had not instituted proceedings in a state court and had not complied with the EEOC's one hundred and eighty day limitation period, despite the plaintiff's personal problems of caring for her minor child and seriously ill mother and her receipt of professional counseling during the filing period. Kocian v. Getty Ref. & Mktg. Co., 707 F.2d 748 (3d Cir. 1983). However, the Eighth Circuit Court of Appeals would consider an action timely filed if, as the plaintiff alleged, it was filed four years after her termination because the EEOC had twice rejected her timely charge because of its erroneous interpretation of the law regarding its jurisdiction. Jennings v. American Postal Workers Union, 672 F.2d 712 (8th Cir. 1982).

The United States District Court for the Southern District of Ohio has noted that while tolling a claim filed under the Age and Discrimination in Employment Act may be appropriate if the charging party is adjudicated as mentally incompetent or institutionalized under a diagnosis of mental incompetence. However, where the plaintiff was hospitalized for less than a month during the filing period, the charge was untimely filed. Bassett v. Sterling Drug, Inc., 578 F. Supp. 1244 (S.D. Ohio 1984).

It is helpful in construing the good cause provision to look at the regulations and case law interpreting the good cause provision of another program administered by the Labor Commissioner, the Unemployment Compensation Act, Conn. Gen. Stat. {{31-222, et seq., for principles of what might establish good cause. See Conn. Agencies Regs. {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 individual became aware of or, through the exercise of due diligence, should have become aware of the employer conduct which led 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 or physical or mental impairment prevented the complainant from filing a timely complaint. The party's familiarity with the Family and Medical Leave Act is certainly 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 late filing. Good cause might exist if a party is 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 person had good cause for untimely filing. Many of these factors parallel the considerations in the equitable tolling cases.

In the instant case, the complainant was advised of her termination October 1, 1991. The complainant was hospitalized after the separation for two weeks and thereafter involved in a day hospital treatment program for several months. The complainant filed for unemployment benefits with an

effective date of October 6, 1991. The complainant was approved on the separation but denied on the issue of availability November 14, 1991. The complainant filed an appeal which was heard on November 27, 1991 and reversed in the complainant's favor on December 4, 1991. The complainant began receiving unemployment checks effective week ending November 9, 1991 and continued to receive unemployment benefits until claim week ending May 2, 1992. After claim week ending May 2, 1992, the complainant was placed on emergency unemployment compensation and received benefits beginning claim week ending May 9, 1992 through claim week ending January 16, 1993. While on unemployment benefits, the complainant was rehospitalized for two weeks at the end of May 1992 and again participated in a day treatment program.

During the fall of 1992, the complainant felt stable and able to return to work. The complainant contacted Blue Cross and Blue Shield on several occasions by telephone. The complainant contacted legal counsel during late fall 1992 early winter 1993. The complainant was advised to submit a written application for reinstatement. The complainant completed the application for employment January 1993 and later the same month was advised that there was no work available. Subsequently several contacts were made to Blue Cross and Blue Shield through the complainant's physician and attorney requesting that the complainant be allowed to return to work. Ultimately, on April 22, 1993, the complainant's counsel wrote a letter to the employer indicating that the complainant had decided to pursue legal remedies. On May 10, 1993, the complainant filed a complaint with the Connecticut Commission on Human Rights and Opportunities and on June 1, 1993, the complainant filed a complaint with the State of Connecticut, Department of Labor, Division of Occupational Health and Safety and Working Conditions Division.

Whether the alleged violation of the Family Medical Leave Act was the October 1, 1991 statement by the respondent and subsequent termination, the complainant initiation of a claim for unemployment with an effective date of October 6, 1991, the complainant's contact with Blue Cross and Blue Shield fall 1992, the complainant's retention of counsel late fall early winter 1992, the complainant's application for employment January 1993, or any of the above-stated actions, those incidents all occurred more than one hundred and eighty days prior to the complainant's June 1, 1993 complaint.

The complainant in the instant case became aware of the respondent's termination of her position as early as October 1, 1991. Moreover, the complainant's approval of her unemployment claim effectively advised any individual that she had the requisite mental status to apply for benefits as well as the requisite notice of her separation. (A condition for unemployment is that a compensable separation occur from the work environment and that the claimant is able and available for work.) Between the October 1, 1991 separation and 1992 attorney contact, the complainant was hospitalized on several occasions and participated in day treatment programs. However, the complainant effectively advised all parties that she was able to work and actively seeking work from the inception of her unemployment claim until she last collected benefits which was January of 1993. Thus again the claimant has failed to meet her good cause burden due to her own proffered statement of a compensable separation and availability for

work throughout a continuous period almost directly following the separation from employment.

3. Respondent did not act promptly after she had adequately recovered from her episode of mental illness .

The complainant's eligibility for unemployment assumes the character of availability for work, since in order to receive benefits you must establish your availability to work and maintain a work search efforts list of three or more employer contacts per week. The complainant did not appear at the Family Medical Leave Act proceeding or produce medical documentation to establish that she suffered from a continuing physical and/or mental impairment of such nature that it interfered with her availability for work and from her filing a timely Family Medical Leave Act complaint.

The complainant retained counsel late fall 1992 and filed a CHRO complaint on May 10, 1993. Between retention of counsel and the Family Medical Leave Act complaint the complainant was in touch with the employer on several occasions regarding returning to work. The complainant's attorney and physicians were also in touch with the employer during the same period by telephone and/or letter.

Even if the complainant had shown good cause for not filing her complaint before June 1, 1993, she has not explained her delay in filing between the period of acquiring counsel and the June 1, 1993 date. The complainant has not established circumstances which would have prevented a reasonably prudent person in the exercise of due diligence from the timely filing of her complaint, and thus she has not shown any good cause reason for the untimely filing.

B. THE TWENTY-FIRST AMENDMENT OF THE CONNECTICUT CONSTITUTION IS NOT APPLICABLE WHERE A PARTY HAS NOT OBJECTIVELY SHOWN A GOOD CAUSE REASON FOR ITS FAILURE TO FILE A TIMELY COMPLAINT.

Since the complainant did not attend the hearing despite notice of the necessity of her appearance, the issue of the Twenty-First Amendment cannot be addressed by the Hearing Officer. In order to respond to a Twenty-First Amendment protection for those possessing physical and mental disabilities, the Hearing Officer has the responsibility to assess through competent medical information or through first-hand testimony, whether a mental disability exists and therefore whether the person making such a request is afforded protection by the appropriate amendment. Since the claimant did not appear at the proceeding, the Hearing Officer has no evidence to establish a continuing mental illness as of the date of the proceeding and thus is without recourse but to find that there is no Twenty-First Amendment violation. (No medical documentation was supplied at the time of the proceeding.)

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 her late filing or to otherwise file a timely complaint. The complaint is dismissed.

Ralph V. Dorsey
Hearing Officer

FOOTNOTES

1/The Division has been reorganized and is now called the Wage and Workplace Standards Division.

2/Section 31-51cc. Family and medical leave: Definitions of leave; eligibility.

(a) For the purposes of sections 31-55cc to 31-55gg, inclusive:

(1) "Person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives or any organized group of persons;

(2) "Employer" means a person engaged in any activity, enterprise or business who has employees, but shall not include the state, a municipality or a local or regional board of education or a private or parochial elementary or secondary school;

(3) "Employee" means any person engaged in service to an employer in the business of his employer;

(4) "Eligible employee" means any person engaged in service to an employer in the business of his employer for (A) twelve months or more and (B) one thousand or more hours in the twelve-month period preceding the first day of the leave:

(5) "Serious illness" means a disabling physical or mental illness, injury, impairment or condition that involves (A) inpatient care in a hospital, as defined in section 19a-490, a nursing home licensed pursuant to chapter 368v or a hospice or (B) outpatient care requiring continuing treatment or supervision by a health care provider;

(6) "Parent" means a natural parent, foster parent, adoptive parent, stepparent or legal guardian of an eligible employee or an eligible employee's spouse;

(7) "Child" means a natural, adopted or foster child, a stepchild or a legal ward provided such child or ward is (A) under the age of eighteen or (B) eighteen years of age or older and unable to care for himself because of a serious illness.

(b) Except as provided in subsections (c) and (d) of this section and section 31-51ff, each eligible employee shall be entitled to a maximum of sixteen weeks of unpaid leave of absence within any two-year period. Such leave may be taken as (1) a family leave of absence upon the birth or adoption of a child of such employee, or upon the serious illness of a child, spouse or parent of such employee or (2) a medical leave of absence upon the serious illness of such employee. Such two-year period shall commence with the first day a leave of absence is taken pursuant to this subsection. Upon the expiration of any such leave of absence, the eligible employee shall be entitled to (A) return to the employee's original job from which the leave of absence was provided for, if not available, to an equivalent position with equivalent pay, except that in the case of a medical leave, if the employee is medically unable to perform the employee's original job upon the expiration of such leave, the employer shall transfer such employee to work suitable to this physical condition where such work is available, and (B) all accumulated seniority, retirement, fringe benefit and other service credits the employee had at the commencement of such leave. Employers may allow such service credits to accrue during the period of the leave of absence.

(c) If a husband and wife are employed by the same employer, the total number of weeks of leave to which both may be entitled under this section shall be the maximum allowed to an individual eligible employee in any two-year period except if the leave is a medical leave or for the serious illness of a child each spouse shall be entitled to the maximum leave provided in such period.

(d) To the extent the eligible employee is entitled to any other leave or benefits, the benefits granted by this section for a family or medical leave of absence shall be reduced by the amount of other leave or benefits provided by the employer to an eligible employee upon (1) the birth or adoption of a child, (2) the serious illness of a child, spouse or parent or (3) the serious illness of the employee.

(e) Any eligible employee who requests a medical leave of absence due to such employee's serious illness or a family leave of absence due to the serious illness of a child, spouse or parent pursuant to subsection(b) of this section shall provide the employer with at least two weeks' advance notification, if possible, and shall provide his employer with written certification from the physician or other health care provider of such employee, child, spouse or parent of the nature of such illness and its probable duration. Upon the request of the employer, the eligible employee requesting a medical leave of absence shall submit himself to examination by a physician or surgeon selected and paid for by the employer. If the need for the leave is foreseeable based on planned medical treatment, the eligible employee shall make a reasonable effort to schedule the treatment so as not to unduly disrupt the operations of the employer, subject to the approval to the health care provider of the eligible employee, his child, spouse or parent. Any eligible employee who takes a medical leave of absence pursuant to subsection (b) of this section shall provide his employer with at least two weeks' advance notification of the date he intends to return to work.

(f) Any eligible employee who requests a family leave of absence pursuant to subsection (b) of this section shall (1) provide the employer with prior notice of an expected birth or adoption in a reasonable manner if such leave is foreseeable and (2) submit to the employer, prior to the inception of such leave, a signed statement of such employee's intent to return to the employee's position upon the termination of such leave. Any eligible employee who takes a family leave of absence pursuant to subsection (b) of this section shall provide his employer with at least two weeks' advance notification of the date he intends to return to work.

3/Section 31-51ee-4(a) of the Connecticut Agencies Regulations provides that:

The Labor Department shall investigate complaints filed in accordance with Section 31-51ee-3 of these regulations as expeditiously as possible. The Labor Department may, at its discretion, investigate separate complaints in a consolidated manner.