STATE OF CONNECTICUT
Department of Labor
200 Folly Brook Boulevard
Wethersfield, CT 06109

COMPLAINANT Andrew R. Elliott
53 Willow Street
Hebron, CT 06248

Certified No.: P 266 527 815

EMPLOYER Pratt & Whitney
By: Jennifer Slager, Esq.
Day, Berry & Howard
One Canterbury Green
Stamford, CT 06901

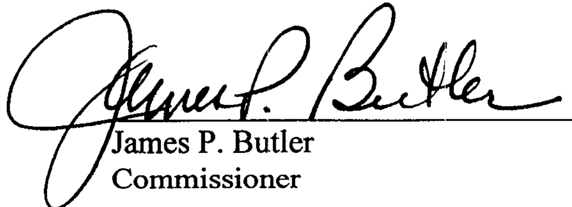
Certified No.: P 266 527 816

CASE NO.: FM 98-33

DATE MAILED TO INTERESTED PARTIES: January 12, 2000

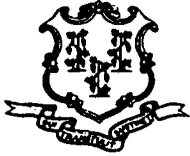
FINAL DECISION

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 November 15, 1999 as my final decision in this matter, a copy of which is attached hereto.



James P. Butler
Commissioner

cc: Attorney Heidi Lane



STATE OF CONNECTICUT

DEPARTMENT OF LABOR

EMPLOYMENT SECURITY DIVISION

3580 Main Street, 2nd Fl. Room 212
Hartford, CT 06120
Tel: (860) 566-5262 Fax: (860) 566-1846

COMPLAINANT

Andrew Elliot
53 Willow Drive
Hebron, CT 06248

EMPLOYER

Pratt & Whitney Aircraft
By: Day, Berry & Howard, LLP
Jennifer L. Slager, Esquire
One Canterbury Green
Stamford, CT 06901

AGENCY

Heidi Lane, Esquire
Department of Labor
Division of Wage and Workplace Standards
200 Folly Brook Boulevard
Wethersfield, CT 06109

DATE MAILED TO INTERESTED PARTIES: November 15, 1999

RE: Case No. FM 98-33
Andrew Elliot v. Pratt & Whitney Aircraft

Dear Commissioner and Parties:

Enclosed please find my Proposed Decision in the above matter.

Pursuant to Connecticut General Statutes Section 4-179, you have the right to file exceptions and present briefs and oral argument before the Commissioner renders a Final Decision.

If the Commissioner does not hear from either party in writing by November 30, 1999, (15 days from date of mailing) he shall proceed to render his Final Decision without further proceedings or briefs.

Very truly yours,

Susan E. Leslie
Hearing Officer

SEL:mm

AN EQUAL OPPORTUNITY/AFFIRMATIVE ACTION EMPLOYER

PROPOSED FINAL DECISION

ANDREW ELLIOT V. PRATT & WHITNEY AIRCRAFT

CASE NO: FM 98-33

DATE PROPOSED DECISION MAILED: NOVEMBER 15, 1999

HEARING DATE: AUGUST 19, 1999

HEARING LOCATION: WETHERSFIELD, CT

APPEARANCES:

For the complainant: Andrew Elliot, complainant; Andrew Elliot, Jr., the complainant's son.

For the respondent: Attorney Keith S. Marks; Attorney Jennifer Slager; Walter Eels, Senior Human Resources Representative, Pratt & Whitney Aircraft.

CASE HISTORY

On October 23, 1998, the complainant filed a complaint with the State of Connecticut, Department of Labor, Wage and Workplace Standards Division (hereinafter referred to as the Division) alleging that his former employer, Pratt & Whitney Aircraft (hereinafter referred to as P & WA) violated the provisions of Connecticut General Statutes Sections 31-51cc, et seq., An Act Concerning Family and Medical Leave from Employment (hereinafter referred to as the Family and Medical Leave Act).

On October 27, 1998, the Division notified the respondent, P & WA, of the filing of the complaint and advised the respondent that it had an opportunity to respond to the complaint in writing within twenty-one days of the mailing of the notice. On November 16, 1998, the respondent furnished the Division with a response to the complaint. The respondent alleged that the Family and Medical Leave Act was in no way relevant to the complainant's termination from the employment.

On November 19, 1998, the Division forwarded a copy of the respondent's response to the complainant and requested that he review it and report any disputed issues to its office within twenty-one days.

On November 24, 1998, the complainant furnished the Division with a response to the respondent's reply to his complaint.

On April 12, 1999, Gary Pechie, the Director of the Wage and Workplace Standards Division, notified the parties that the Division had investigated the complainant's complaint and determined that no violation of the Family and Medical Leave Act had occurred. In addition, the letter advised the complainant of his right to a hearing before the Labor Commissioner pursuant to Section 31-51qq-44(e) of the Connecticut General Statutes.

On April 14, 1999, the complainant filed a request for a contested case hearing before the Labor Commissioner.

On April 21, 1999, the Division acknowledged the complainant's request and notified the respondent that the complainant had requested a hearing before the Labor Commissioner.

On May 20, 1999, James Butler, the Labor Commissioner, notified the parties that a a pre-conference hearing would be scheduled if requested by both parties and that Attorney Sheila Wells had been designated the Hearing Officer for that hearing. The parties had until June 11, 1999, to request such a hearing. The respondent declined to participate in a pre-conference hearing.

On July 1, 1999, James Butler, the Labor Commissioner, notified the parties that Associate Appeals Referee Susan Leslie had been designated the Hearing Officer and that a hearing of the complainant's complaint had been scheduled for August 19, 1999.

On August 10, 1999, the respondent filed a motion to dismiss the complaint on the grounds that the complaint was untimely filed.

On August 11, 1999, Hearing Officer Susan Leslie notified the parties that in addition to the issue of whether the respondent had violated any of the provisions of the Family and Medical Leave Act, the hearing on August 19, 1999, would also cover the issue of whether the complainant had good cause, pursuant to Connecticut Agencies Regulations Section 31-51qq-43 (c) and (d), for filing his complaint more than one hundred and eighty days beyond the date of the action which prompted the complaint.

On August 19, 1999, a contested hearing was held at the Connecticut Labor Department, 200 Folly Brook Boulevard, Wethersfield, Connecticut, before Hearing Officer Susan Leslie. The hearing was confined to the issue of whether the complainant had good cause within the meaning of Connecticut Agencies Regulations Section 31-51qq-43(d) for not filing his complaint within one hundred and eighty days of the employer action which prompted the complaint.

FINDINGS OF FACT

1. The complainant had been employed by the respondent for approximately nineteen years beginning in June 1978. He worked as a developmental mechanic at the respondent's East Hartford facility. For twelve years, the complainant worked on the third shift. In 1994, he was transferred to the first shift. He last performed services for the respondent on May 22, 1997.

2. The respondent possesses a notice entitled "YOUR RIGHTS under the FAMILY AND MEDICAL LEAVE ACT OF 1993." The notice contains an advisement that the U. S. (Federal) Department of Labor, Wage and Hour Division is authorized to investigate and resolve complaints of violations. The respondent posted the notice at prominent places within its facilities for all of its employees to read. The respondent did not post a notice of an employee's rights under the state (Connecticut) Family and medical Leave Act.

3. The complainant read the notice concerning the Family and Medical Leave Act of 1993. He took note of the fact that the notice specified that an employer must have a thirty day notice of a leave of absence under this act.

4. On April 28, 1997, the complainant submitted a written request to the employer for time off under the Family and Medical Leave Act for the period June 16 to September 2, 1997, for the purpose of caring for his children during their summer recess from school. The complainant cited in his request that his department had been unable to temporarily transfer him to the second shift for this period. He also explained that his request was due to the fact that his family had been unable to find acceptable daycare for his children.

5. The complainant has two children whose ages in 1997, were six (6) and ten (10).

6. On May 6, 1997, Daniel Durant, the complainant's immediate supervisor, met with the complainant and the complainant's union steward (International Association of Machinists, Lodge No.1746), Roger Brown, to discuss the complainant's grievance regarding the denial of his request for a temporary transfer to the second shift as well as his request for leave under the Family and Medical Leave Act. Durant informed the complainant that the need to care for children, unless the children were seriously ill, did not constitute a qualifying event under the Family and Medical Leave Act and as such, his request for such leave was denied. The complainant confirmed with Durant that neither of his children had a serious illness. The complainant disagreed with Durant's decision and requested that Brown investigate the matter with the union hall.

7. On May 9, 1997, the complainant, Durant and Brown met again to discuss the issue of the transfer and the request for a leave of absence pursuant to the Family and Medical Leave Act. Brown informed the complainant that he had researched the matter with the union and determined that the complainant did not qualify for a leave of absence under this Act. Brown also advised the complainant that the respondent had not violated the union contract by denying his request for a temporary transfer to the second shift.

8. The complainant did not believe that either Durant's or Brown's interpretation of the Family and Medical Leave Act was accurate.

9. On May 19, 1997, the complainant visited the respondent's medical clinic for follow-up treatment of a shoulder problem. He was treated by Dr. Kathleen Maurer, MD. On this day, the complainant was particularly disturbed regarding the treatment he had received from the respondent with respect to the denial of his transfer request and the denial of the leave request. He notified Dr. Maurer, as the respondent's medical representative, that he was placing her "on notice" that he intended to "check this all out with state and federal authorities."

10. Dr. Maurer felt threatened by the complainant's comment, and notified the respondent's human resources department of the complainant's conduct. The respondent initiated an investigation.

11. On May 22, 1997, the respondent notified the complainant that he was being placed under suspension, pending further investigation, for his behavior toward Dr. Maurer on May 19, 1997.

12. The respondent determined that a decision regarding whether to terminate the complainant would not be reached until its medical staff consulted with the complainant's personal physician.

13. The complainant had several discussions with his union during his suspension regarding his return to work. The complainant believed that he would be successful in returning to his employment.

14. During his suspension, the complainant consulted with his attorney, Anthony Palomino, with respect to his employment status. The complainant told his attorney the circumstances under which he had been suspended including the comment to Dr. Maurer about his intention to follow-up with authorities following the respondent's denial of his leave and transfer requests.

15. During his suspension, the complainant did not pursue any avenue of redress with respect to the respondent's denial of his request for a leave of absence under the Family and Medical Leave Act.

16. During his suspension, the complainant cared for his children during their summer recess.

17. The respondent terminated the complainant effective August 6, 1997, for violation of company rules.

18. Shortly after his termination from employment, the complainant consulted with Attorney Palomino with respect to the filing of a complaint against the respondent with the Connecticut Commission on Human Rights and Opportunities. Attorney Palomino recommended that the complainant not pursue such a complaint. The complainant was not satisfied with Attorney Palomino response and had no further communication with him after late August or September 1997.

19. On December 31, 1997, the complainant filed a written complaint with the Connecticut Commission on Human Rights and Opportunity (C.H.R.O.) alleging that the respondent had terminated him as a result of his bi-polar disorder and that the respondent had violated Title VII of the Civil Rights Act of 1964, and the Americans With Disabilities Act. Subsequently, the complainant filed a second complaint with C.H.R.O. alleging improper representation by his union.

20. Between August 1997 and May or June 1998, the complainant sought other legal representation. He spoke to five or six attorneys about the circumstances leading to his separation from the employment including his discussion with Dr. Maurer that he planned to follow up on the respondent's denial of his leave and transfer requests. He also showed them the records in his personnel file which he received from the respondent after his termination. As of June 17, 1998, he had retained Attorney Barbara Gardner to represent him with respect to the complaints he had filed with the Commission on Human Rights and Opportunities against the respondent and against his subsequent employer. He had one or two discussions with Attorney Gardner concerning this matter. In these discussions he

- explained the circumstances of his separation from his employment with the respondent including the respondent's denial of both his leave and transfer requests.

21. The complainant does not recall specifically whether he had any conversation with Attorney Gardner with respect to the possibility of filing a complaint regarding the respondent's denial of a leave of absence under the Family and Medical Leave Act.

22. On or around October 20, 1998, the complainant viewed the United States Department of Labor's web site. He learned that he could file a complaint regarding the respondent's denial of his request for a leave of absence under the Family and Medical leave Act with either the U.S. Department of Labor or with the Connecticut Department of Labor. He also learned that there was a two year filing period to file such a complaint with the U.S. Department of Labor. He immediately telephoned the Connecticut Department of Labor to inquire about the procedures for filing a complaint. The individual to whom the claimant spoke sent him a complaint form to complete.

23. The complainant completed the complaint form and mailed it to the State of Connecticut Department of Labor, Wage and Workplace Standards Division along with a two page explanatory letter. The complaint form was received by that division on October 23, 1998. The complainant also sent a copy of the form and his letter to Alexis Herman, the U.S. Secretary of Labor.

24. After the respondent discharged the complainant, he began seeking new employment. He commenced work at Windsor Automotive on October 27, 1997. This employment ended on March 9, 1998.

25. The complainant filed a complaint with C.H.R.O. alleging that Windsor Automotive had unfairly discharged him from his employment.

26. The complainant has bi-polar disorder. The respondent learned of the complainant's condition several years prior to his separation. The claimant was under medication for this disorder between August 1997 and December 1998.

27. The complainant filed unemployment compensation claims for weeks in July, August, September and October 1997. He certified that during this period he was able and available for work.

28. In early 1998, the complainant filed a complaint with the National Labor Relations Board alleging lack of representation by his union.

ISSUE

The initial issue of this complaint is whether the complainant, Andrew Elliot, had good cause for filing his complaint with the State of Connecticut, Department of Labor beyond the one hundred and eighty (180) day filing period.

PROVISIONS OF LAW

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 the provisions of said section.

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

> (b) Complaints shall be filed with the Labor Department on such forms(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 eighty day period may be considered timely filed for good cause, as defined in subsection (d) of this section.
>
> d) "Good cause" means any circumstance 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 COMPLAINANT'S CONTENTIONS

In support of his late complaint, the complainant contends that a variety of factors caused him to delay filing his complaint until October 23, 1998. He first maintains that he was unaware of the deadline because he did not have an opportunity to go back and review the respondent's posted notices concerning the Family and Medical Leave Act due to his suspension on May 22, 1997. He

further maintains that between May 1997 and October 1998, he was preoccupied with various other matters including seeking employment; working; filing complaints with the Commission on Human Rights and Opportunities, the National Labor Relations Board, the Workers' Compensation Commission, and O.S.H.A.; seeking legal representation; and pursuing his family's rights and benefits under the Social Security Administration. The complainant also maintains that his bi-polar condition should be considered. Finally, the complainant argues that his complaint is not late because it was filed within the two year period designated by the U.S. Labor Department for the filing of such complaints. The complainant also questions why the timeliness issue was not previously addressed by the Division in its investigation.

THE RESPONDENT'S ANSWER

The respondent/employer contends that the complaint should be dismissed as untimely because the complaint was not filed until more than 425 days after the complainant was permanently terminated from his position with the respondent. The respondent further contends that the complainant did not have good cause for filing a late complaint. The respondent argues that the complainant was sufficiently familiar with the provisions of the Family and Medical Leave Act by virtue of the notices regarding the Act which the respondent posted at his work site. In addition, the respondent maintains that since the complainant had legal counsel through August 1997, and again in June 1998, his delay in filing the complaint demonstrates a lack of due diligence in pursuing the complaint. Finally, the respondent contends the lengthy delay in filing the complaint has prejudiced the respondent because a number of its witnesses whose testimony may be required at the hearing have since retired or left the employ of the employer, including one who has moved out of state. The attempts to secure such witnesses would be costly and difficult.

ANALYSIS

At the outset, the fact that the Division did not address or rule on the issue of the timeliness of the complaint, does not prevent it from being addressed at this stage in the proceedings. The Division chose to investigate the complainant's complaint before it reached the good cause issue. Since it found no violation of the Family and Medical Leave Act, there was no need for it to reach the late filing issue. Presumably, if the Division had found that the respondent had violated the Family and Medical Leave Act it would have had to make a determination as to whether the complainant complied with the Act's filing requirement. By investigating the merits of the complaint first, the Division gave the complainant an opportunity to have the substance of his complaint considered. Although it would have been more logical and appropriate for the Division to reach the late filing issue before considering the merits, this course of action might have resulted in the Division's dismissal of the complaint for lack of jurisdiction without it ever considering the merits of the complaint. See McCarthy v. Bristol Press Company, FM 93-15 (6/29/94).

In interpreting what constitutes good cause for the late filing of a Family and Medical Leave Act complaint under Connecticut Law, it is appropriate to look for guidance in the theories and concepts developed in case law set forth in 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).

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 advice the 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. See Downie v. Electric Boat Division, 504 F. Supp.1082 (1980).

The Courts have also looked at whether personal problems or mental incompetence tolls the filing period. 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. See Kocian v. Getty Ref. & Mktg. Co, 707 F.2d 748 (3d Cir. 1983).

The United States District Court for Southern District of Ohio has noted that while tolling a claim 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, where the plaintiff was hospitalized for less than a month during the filing period, the charge was untimely filed. See Bassett v. Sterling Drug, Inc., 578 F. Supp. 1244 (S.D. Ohio 1984)

It is also helpful in construing the good cause provision of the Family and Medical Leave Act 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, Connecticut General Statutes Sections 31-222, et. seq., for principals of what might establish good cause. See Conn. Agencies Regs. Sec. 31-237g-15. In Cretella v. Blue Cross Blue Shield of Connecticut, FM-93-9 (7/17/95), the Labor Commissioner looked to the Unemployment Compensation Law and stated that some of the factors which might be considered in determining whether an individual had 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 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; whether there were factors outside the individual's control or physical or mental impairment which prevented the complainant from filing a timely complaint. In addition, the Commissioner stated that a 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 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 person had good cause for untimely filing. Many of these factors parallel the considerations in the equitable tolling cases.

The record reveals that on May 6, 1997, the respondent denied the complainant's request for a leave of absence under the Family and Medical Leave Act; that on May 22, 1997, it suspended the complainant from his employment; and that on August 6, 1997, it terminated him from his employment. Even assuming that the respondent's final action in terminating the complainant for the incident involving the respondent's physician was the action which prompted the complaint, rather than its earlier action in denying the complainant's leave request, the last day for filing a complaint pursuant to Connecticut law was February 2, 1998. The complainant did not file his complaint until October 23, 1998, over eight months beyond this deadline.

The respondent did not provide notice of the complainant's rights under Connecticut Family and Medical Leave Act. The notice posted by the respondent relates only to his rights under the Federal Family and Medical Leave Act. Nonetheless, the record reveals that the claimant was represented by counsel from May 1997 until late August 1997 and again in June 1998. This representation gave the claimant an access to a means of acquiring information about the filing procedures. Thus, although the claimant may not have been aware of the specific filing procedures, his attorneys had the necessary knowledge to advise the claimant on these procedures. See Downie v. Electric Boat Division 504 F. Supp. 1082 (1980). The record reveals that the claimant spoke with at least seven attorneys; Palomino, Gardner and at least five others that he interviewed before hiring Gardner. When he consulted with them he explained the circumstances of his suspension and discharge including the incident with Dr. Maurer as well as the respondent's denial of his leave and transfer requests and his intent to check it out with state and federal authorities. Since the complainant had consulted with these attorneys, he is charged with possessing sufficient knowledge of the proper procedures for filing a timely complaint. Therefore, his delay in filing the complaint can not be excused on the grounds that he did not have proper knowledge of the procedures.

The complainant's argument that his medical condition should be taken into account is without merit. During the one hundred and eighty day period for the filing of a timely complaint, the complainant was not hospitalized nor was he incompetent. Although he was taking medication at this time for his condition it did not prevent him from either looking for work or from employment itself. In fact, the complainant certified on his unemployment compensation claims that he was able and available for work and was actually fully employed during the latter half of the filing period. Certainly, if the complainant was mentally capable of full-time employment, he was mentally capable of investigating the procedures for filing a complaint as well as the actual filing of a complaint. Further, while it is recognized that the complainant had other pressing personal matters to attend to such as his three C.H.R.O. complaints, these personal obligations were not outside of his control and thus, they did not prevent him from filing a complaint within the deadline or thereafter when he was in contact with various attorneys.

Finally, although the complainant's complaint may have been timely filed pursuant to the standards to file a complaint against the Federal Family and Medical Leave Act, the subject complaint is not against the Federal Family and Medical Leave Act, but rather against the Connecticut Family and Medical Leave Act. Therefore, it is inappropriate to apply the federal timeliness standards.

Based on all of the foregoing factors this hearing officer finds that the complainant has not established circumstances which would have prevented a reasonably prudent individual in the exercise of due diligence from the timely filing of his 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 his late filing or to otherwise file a timely complaint. The motion to dismiss is granted. The complaint is dismissed for lack of jurisdiction.

This hearing officer notes that even if good cause could be found for the late filing of the complaint, the complainant, nonetheless, would not likely prevail on the merits of his complaint. Section 31-51ll of the Connecticut General Statutes provides the following: Family and medical leave: Eligibility. An eligible employee shall be entitled to a total of sixteen work weeks of leave during any twenty-four month period for one of the following: 1) Upon the birth of a son or daughter of the employee; 2) Upon the placement of a son or daughter with the employee for the adoption or foster care; 3) In order to care for the spouse, son or daughter or parent of the employee, if such spouse, son, daughter or parent has a serious health condition; or 4) Because of serious health condition of the employee. The complainant requested the leave of absence in order to care for his two healthy school aged children during their summer recess because he could not find other suitable day care. A leave of absence to care for children due to a lack of day care is not a qualifying event under the Family and Medical Leave Act. Therefore, although no hearing was conducted on the merits, it does not appear that the respondent violated the terms of the Family and Medical Leave Act by denying the complainant's leave request.

Susan E. Leslie
Hearing Officer

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