

**FAMILY MEDICAL LEAVE
COMPLAINT FM 95-31**

June 16, 1998

*This decision never
became final. Parties
settled and complaint
was withdrawn*

BY CERTIFIED MAIL

COMPLAINANT

Barbara Gierla
by Philip L. Steele, Esq.
5 Linden Place
Hartford, CT 06106

Certified No: Z 016 225-723

V.

EMPLOYER

Aetna Life Insurance
by Edith Rosen, Esq.
Aetna Legal Department
151 Farmington Avenue
Hartford, CT 06158
Certified No: Z 016 225 725

cc: Day, Berry and Howard
ATT: Robert O'Hara, Esq.
City Place
Hartford, CT 06103-3499
Certified No: Z 016 225 739

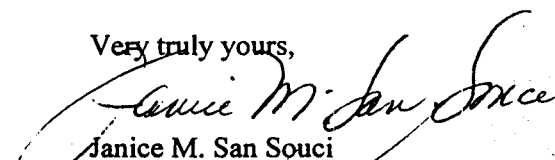
Dear Parties:

Enclosed please find my Proposed Decision in the above matter, sent by certified mail on the date indicated above.

Pursuant to Connecticut General Statutes Section 4-179 and Section 31-1-7 of Connecticut State Agencies Regulations, you have the right to file exceptions and present briefs and to request oral argument before the Commissioner of Labor issues a Final Decision.

If the Commissioner does not hear from you in writing by July 2, 1998 he shall proceed to render his Final Decision without further proceedings or briefs.

Very truly yours,


Janice M. San Souci
Hearing Officer

Attachment: Proposed Decision

cc: Labor Commissioner James P. Butler
Attorney Heidi Lane
Gary Pechie, Director Wage and Workplace Standards

PROPOSED DECISION OF HEARING OFFICER

**IN THE MATTER OF BARBARA GIERLA AND AETNA LIFE INSURANCE COMPANY
FM 95-31**

DATE DECISION MAILED: JUNE 16, 1998

HEARING DATE: MARCH 17, 1998

LOCATION: WETHERSFIELD, CT

HEARING OFFICER: JANICE M. SAN SOUCI

APPEARANCES:

FOR THE COMPLAINANT:

**Barbara Gierla, Complainant
Jan Gierla, Spouse/Witness
Attorney Phillip L. Steele, Esq.**

FOR THE RESPONDENT:

Attorney Robert O'Hara, Esq.

FOR THE DIVISION:

None



CASE HISTORY

On September 8, 1995, the State of Connecticut, Department of Labor, Wage and Workplace Standards Division (hereinafter referred to as the "Division") received a complaint from Attorney Philip L. Steele representing Barbara Gierla (hereinafter referred to as the "Complainant") alleging a violation of Section 31-51dd of the Connecticut General Statutes regarding Family and Medical Leave from Employment.

On September 22, 1995, the Division notified the Aetna Life Insurance Company (hereinafter referred to as the "Respondent"), through its Legal Department, of the Complainant's complaint. The Division additionally requested that the Respondent investigate the complaint and advise him, in writing, of the results of its investigation. The response was to include any information, evidence or argument the Respondent deemed relevant to the Division's investigation.

The Respondent through its attorney, Judith C. Harper, responded to the Division's request on October 18, 1995.

The Division, on October 26, 1995, mailed the Complainant a copy of the Respondent's submission and requested rebuttal to the response within twenty-one calendar days.

The Complainant, through counsel, submitted a response to the Respondent's submission on October 26, 1995.

The Division, on June 28, 1996, notified both parties that the complaint was dismissed based on a finding that the Complainant failed to sustain her burden of proving that a violation of Section 31-51dd had occurred. The Division further advised the Complainant of her right to a hearing before the Commissioner pursuant to Section 31-51ee-4(e) of the Connecticut General Statutes.

The Division, on July 18, 1996, notified the Respondent of the Complainant's request for a hearing.

On August 20, 1996, the Division mailed a "Notice of Pre-Hearing Conference and Contested Case Hearing" to all interested parties. Deputy Commissioner Jean E. Zurbrigen designated Attorney Stephen Lattanzio as the hearing officer for the pre-hearing conference.

The Respondent did not reply to the Notice of Pre-Hearing Conference within the time limit prescribed in the notice.

The Complainant, on November 26, 1996, submitted an additional request for a hearing before the Commissioner.

A hearing was scheduled for April 29, 1997 before Janice M. San Souci, who was appointed the Hearing Officer by Labor Commissioner, James A. Butler.

Hearing Officer San Souci, on April 11, 1997, postponed the scheduled hearing on a request filed by the Respondent through its outside counsel, Judith S. Loitherstein, of the firm Day, Berry, and Howard. The Complainant did not object to the postponement.

On March 17, 1998, a contested case hearing was held at the Connecticut Labor Department, 38 Wolcott Hill Road, Wethersfield, Connecticut. The hearing was limited to the issue of whether the Complainant had good cause for not filing her complaint within one hundred and eighty (180) days of the employer's action which prompted the complaint.

FINDINGS OF FACT

1. The Complainant last worked as a Senior Analyst in the Guaranteed Product Department from May 25, 1992 through June of 1994.
2. The Complainant began a short-term disability leave on June 7, 1994, the date of her surgery. The disability leave was to extend through September 1, 1994 (see Division Exhibit No.1).

3. In July of 1994, the Guaranteed Product Department split because of the creation of a new company affiliate called "Aeltus." Two of the four analyst positions in the Guaranteed Product Department were eliminated.
4. Richard Baranowski, the Guaranteed Product Department's head, contacted the Complainant on July 14, 1994 notifying her of a meeting scheduled for July 15, 1994.
5. At that meeting, Baranowski advised the Complainant that her position was eliminated and that her last active date of employment for Aetna was July 15, 1994. Baranowski advised the Complainant that her position was eliminated due to downsizing and her job performance as compared with other similarly classified employees of the affected department.
6. The Respondent paid the Complainant 13 weeks of salary continuation payments and 24 weeks of severance payments effective July 14, 1994. The severance and salary continuation payments compensated the Complainant through March 31, 1995.
7. The Respondent placed the Complainant on a long term disability leave through April 30, 1995. The Respondent notified the Complainant regarding the long term disability leave on April 11, 1995.
8. On July 12, 1995, the Respondent notified the Complainant that the long term disability payments were reinstated effective May 1, 1995 based on updated medical information provided by the Complainant's doctor.
9. The Complainant filed a claim for unemployment benefits in the Meriden, Connecticut Job Center. Job Center personnel advised the Complainant to return following exhaustion of the severance payment. The Complainant does not recall when she filed the claim for benefits.

10. The Complainant does not recall when she received the complaint form on which she initiated her complaint under the Family and Medical Leave Act. The Complainant does not recall how she obtained the form. She signed and dated the complaint on August 28, 1995.
11. The Complainant does not recall the date on which she first retained counsel regarding this matter. Attorney Philip Steele was the first attorney with whom she spoke regarding this matter.
12. The Complainant was aware of the Family and Medical Leave Act from notices posted at the work place.
13. The Complainant never contacted the Aetna help line to seek information regarding her benefits or employee rights. The help line telephone number is referenced in a booklet provided to the Complainant by the Respondent at the time of the termination. The help line telephone number and the name and telephone number of a contact person, within Aetna's personnel department, was provided to the Complainant in its letter of termination.
14. Attorney Steele held the completed and signed complaint form through September 6, 1995 believing that the claim was untimely at the time he was first consulted on this matter by the Complainant and his further believing that the Complainant might have "...other causes of action involving her employment with Aetna..." (see Division Exhibit No. 3).
15. Attorney Steele, on September 6, 1995, advised the Division's counsel that the complainant did not file sooner "...because she did not believe that her termination was final and had believed that Aetna would find an appropriate job for her when she was able to return to work....while on disability she still considered herself an Aetna employee...." (see Division Exhibit No. 3).
16. Attorney Steele, on September 6, 1995, advised the Division's counsel that the Complainant initially filled out the complaint from "...back in May before she first came to see me...."

17. The Complainant does not now contest that her employment was terminated in July of 1994 or claim that she received improper notice of her termination.

STATEMENT OF LAW

Connecticut Agencies Regulations §31-55ee -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 eighty day period may be considered timely filed for good cause, as defined in subsection (d) of this section.

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

DECISION

In support of her complaint, the Complainant, through counsel, argues that she established good cause for filing her complaint more than one hundred and eighty (180) days after the employer's action which prompted the complaint.

At the March 17, 1998 hearing, the Complainant requested that the Commissioner exercise jurisdiction over the complaint even though it was filed more than one hundred and eighty (180)

days after the employer eliminated the Complainant's position on July 14, 1994. In a September 6, 1995 letter submitted with the complaint, the Complainant argues that she delayed in filing the complaint because she did not believe her termination was final and that she remained an employee of the Respondent during the period she received severance and disability payments.

The Hearing Officer notes that this contention is materially inconsistent with contentions raised at the March 17, 1998 hearing when the Complainant's counsel argued that she did not contest the finality of her employment with Aetna; that Aetna properly notified her of termination; and that she believed her termination of employment occurred in July of 1994. The Complainant's sole basis for the Commissioner assuming jurisdiction over the untimely filed complaint was that she was prevented from filing a timely complaint because of human error by employees of the Connecticut Department of Labor.

In ruling upon the issue of what constitutes good cause for late filing of a Family and Medical Leave Act complaint under Connecticut Law, the Commissioner, Department of Labor, has issued final decisions drawing on state and federal discrimination law as well as the late appeal provisions of Connecticut's Unemployment Compensation Act, Conn. General Statutes Section 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 looked at Downie v. Electric Boat Division 504 F. Supp. 1082 (1980). In that case, when ruling on the doctrine of equitable tolling under the Federal Age Discrimination in Employment Act, 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 noted that a party desiring equitable tolling bears a heavy burden and did not toll a one hundred and eighty day filing period despite the employer's failure to post a notice.

In Cretella, the Commissioner also adopted the hearing officer's use of 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. Section 31-222, et seq., for principles of what might establish good cause. See Conn. Agencies Regs. Section 31-237g-15. The Commissioner ruled that 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 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 or physical or mental impairment prevented the Complainant from filing a timely complaint. The final decision issued by the Commissioner further stated that 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 or 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 complainant in the instant case was advised of the termination of her employment on July 15, 1994. The record establishes that her complaint to the employer's action was filed on September 6, 1995 beyond the statutorily prescribed one hundred and eighty (180) day period for filing a timely action. The Complainant's testimony in this matter indicating that she reported to the Connecticut Labor Department a short time after her termination, and detrimentally relied on alleged advice that she should file a worker's compensation claim in lieu of taking any action under the Family and Medical Leave Act, is vague and non-persuasive. The Complainant does not know the date on which this visit occurred and testified that she signed a "log" when reporting to the Department's headquarters. No documentary evidence was offered at the hearing to support the allegation. The hearing officer notes that not only was the purported log sheet not offered as evidence, it was apparently not even sought as evidence in support of the allegation. The Complainant further contends that she filed a claim for worker's compensation on the same day as her purported visit to the Labor Department following the advice provided by Labor Department personnel that day. The Complainant, however, could not provide the date on which she filed the worker's compensation claim nor provide a copy of the claim submitted.

The Complainant's testimony, standing alone, is insufficient to support a conclusion that she reported to the Connecticut Labor Department within the one hundred eighty (180) day complaint period. Absent a finding that she reported to the Department of Labor, the hearing officer cannot conclude that she detrimentally relied on inaccurate information allegedly provided by the representatives of the Agency in question.

The Complainant testified that she made a second contact with the Connecticut Labor Department on an unknown date in 1995 when she filed a claim for unemployment benefits at the Department's Job Center in Meriden, Connecticut. No testimony was offered which would support a conclusion that any discussion occurred between the Complainant and Labor Department representatives regarding the Complainant's contention that the respondent violated the provisions of Connecticut's Family and Medical Leave Act provisions. The Complainant, in response to the Hearing Officer's questions, testified that on this contact with the Labor Department she was advised solely to return to file her claim for unemployment benefits after the expiration of the severance and disability payments made to her by the Respondent. No details were provided at the hearing, by the Complainant, that support a finding that the visit to the Job Center was within the complaint period; or that any employee of the Department provided erroneous information, was negligent in the performance of his/her duty, or otherwise acted in a fashion that deterred the Complainant from filing a complaint. There is **nothing** in the record of this complaint which indicates that the alleged violation was raised as a topic of inquiry by the Complainant during her visit to the Job Center.

Finally, the hearing officer notes a significant material inconsistency in the reasons offered by the Complainant for the untimely filing of her complaint. In her initial complaint of September 6, 1995, the reason for the late complaint is noted as being based on her mistaken belief that the termination was not final and that the Complainant believed that she remained an Aetna employee while receiving disability and severance payments. No mention was made that the delay in filing the complaint was due to human error caused by Labor Department employees. The Complainant now argues that she was aware of her termination by Aetna on July 15 1994; does not dispute the finality of her employment with Aetna; and concedes that Aetna properly notified her of her termination in July of 1995.

An administrative agency is not required to believe any witness, even an expert. Nor is an agency required to use in any particular fashion any of the materials presented to it as long as the conduct of the hearing is fundamentally fair. Manor Development Corporation v. Conservation Commission of the Town of Simsbury, 41 Conn. L. J. No. 47, p. 24 at 26.

The mere fact that there has been testimony supporting a fact does not by itself mean that the fact has been proven. Howell v. Administrator, 174 Conn. 529, 533. . 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 hearing officer finds the complainant's testimony vague, inconsistent and lacking in specificity. The hearing officer, because of the inconsistencies and lack of specificity, finds that the Complainant's testimony lacks credibility and accords it little weight or probative value in reaching her conclusion. The Complainant's testimony, standing alone, is not sufficient to sustain her burden of proving that she had good cause for her failure to file a complaint within the one hundred eight days (180) prescribed by statute.

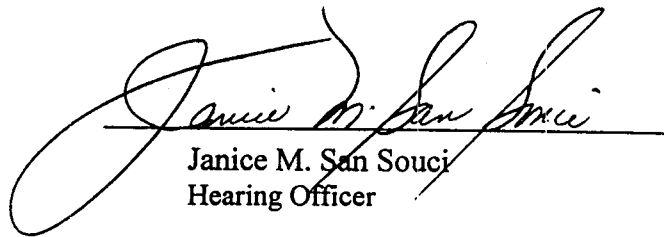
Even assuming the Complainant's allegations as to seeking assistance and receiving erroneous advice from the Department of Labor shortly after the termination are true, the complainant has not established that she acted with due diligence in filing the complaint. The Complainant was aware of the Family and Medical Leave Act provisions from a notice posted at her place of work. The Complainant made no attempt to clarify her confusion or seek information from her employer, or other sources, although provided a telephone number by the Respondent for inquiries or assistance with any questions regarding her benefits and rights. When the Complainant filed her claim for unemployment benefits, she made no inquiry of personnel despite her alleged confusion and remaining questions regarding the validity of her termination from Aetna.

The record finally establishes that the Complainant sought legal counsel on an unknown date in 1995, presumably after the one hundred eighty (180) day period for filing a timely complaint had tolled. Based on the September 6, 1995 letter of complaint, the hearing officer notes that Complainant's counsel acknowledges that the Complainant possessed the completed, yet unsubmitted, complaint form since May of 1995 prior to his initial consultation with her. When and how the Complainant obtained the complaint form itself is unknown as well as how long the

Complainant held the complaint form prior to completing it in May of 1995. Although counsel declined to indicate when the Complainant first saw him, it is clear from the record that he was aware his client possessed the completed complaint form and that he delayed its submission for an unknown time period during which he sought to negotiate a settlement with the Respondent. Minimally, therefore, the Complainant and her attorney jointly contributed to a five-month delay (May to September of 1995) after obtaining the complaint form and the actual submission of the complaint. The hearing officer notes that once the Complainant retained counsel in this matter she is deemed to be fully aware of her rights. See Cretella v. Blue Cross, Blue Shield of Connecticut, supra. Therefore, the Complainant's failure to promptly file her complaint upon obtaining counsel constitutes a further lack of due diligence in the filing of this complaint.

The designated representative of the Labor Department Commissioner and the authorized hearing officer in this matter finds that the Complainant has not established that she had good cause for her failure to file a timely complaint. The hearing officer additionally finds that the Complainant did not act with due diligence in filing the complaint. 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 for lack of jurisdiction.



Janice M. San Souci
Hearing Officer