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

COMPLAINANT  
Carolyn McCarthy  
BY:  Pat Strong, Esq.  
Fortgang, Soycher & Strong  
573 Hopmeadow Street  
Simsbury, CT  06070

EMPLOYER  
Bristol Press Company  
BY:  Miguel Escalera, Esq.  
Kainen, Starr, Garfield,  
Wright & Escalera  
55 Farmington Avenue  
Hartford, CT  06105

CASE NO.:  FM 93-15

DATE MAILED TO  
INTERESTED PARTIES:  
June 29, 1994

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 and reading the submitted briefs.

Accordingly, I affirm in whole and incorporate the Proposed Decision of the hearing officer issued on May 24, 1994 as my final decision in this matter, a copy of which is attached hereto.

Ronald F. Petronella  
Labor Commissioner

cc:  Attorney Heidi Lane
PROPOSED FINAL DECISION

CAROLYN H. McCARTHY v. THE BRISTOL PRESS PUBLISHING COMPANY

CASE NO.: FM 93-15

DATE PROPOSED DECISION MAILED: May 24, 1994

HEARING DATE: March 24, 1994

HEARING LOCATION: Wethersfield, CT

APPEARANCES:

For the complainant: Attorney Patricia M. Strong; Attorney Mark S. Winslow;
Carolyn H. McCarthy, complainant

For the respondent employer: Attorney Miguel A. Escalera, Jr.; Linda
Klimkewicz, Personnel Administrator, Bristol
Press Publishing Company

For the Administrator: Attorney Heidi Lane

Observers: Craig McCarthy


CASE HISTORY

On July 9, 1993, the complainant filed a complaint with the State of Connecticut, Department of Labor, Division of Occupational Safety and Health and Working Conditions Division (hereinafter referred to as "Working Conditions Division") alleging that her former employer, the Bristol Press Publishing Company (hereinafter referred to as "Bristol Press") violated the provisions of Connecticut General Statutes §§31-55a, et seq., An Act Concerning Family and Medical Leave from Employment (hereinafter known as the "Family and Medical Leave Act").

On July 12, 1993, the Working Conditions Division notified the respondent Bristol Press of the filing of the complaint and requested that the respondent conduct an investigation of the alleged complaint and advise the Working Conditions Division of the results of its investigation. On August 3, 1993, the respondent furnished the Working Conditions Division with a response to the complaint and request that the complaint be dismissed.

The Division of Working Conditions notified the parties on November 15, 1993 that it had investigated the complainant's complaint and determined that no violation of Connecticut General Statutes §§31-51a, et seq., had occurred, and thus was dismissing the complaint. On or around December 3, 1993, the complainant filed a request for a contested case hearing before the Labor Commissioner.

On February 18, 1994, the respondent filed a motion to dismiss the complaint as untimely. On March 24, 1994, a hearing was held at the Connecticut Labor Department, 200 Folly Brook Boulevard, Wethersfield, Connecticut, before Attorney Sheila S. Wells, 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 Conn. Agencies Regs. §§31-51ee-3(c) for not filing her complaint within one hundred and eighty days of employer action which prompted the complaint.

FINDINGS OF FACT

1. The respondent, Bristol Press, is a corporation subject to the Family and Medical Leave Act, Conn. Gen. Stat. §§31-55cc, et seq., at all relevant times. The respondent had between one hundred and one hundred and forty-eight employees in 1991.

2. The complainant had been employed by the subject employer for approximately fifteen years. The complainant was employed as Advertising Director, earning a salary of $850.00 per week until approximately July 7, 1992. On or about that date, the complainant was demoted to the position of Major Accounts Manager. The complainant's salary was scheduled to be reduced approximately two months later.
3. On July 22, 1992, the complainant was hospitalized for depression. On July 23, the complainant’s son notified the respondent that the complainant was ill and that she would be absent from work for an unspecified period of time.

4. On July 23, 1992, the respondent’s publisher and the complainant’s supervisor, Joseph H. Zerbey, IV, sent the complainant a letter to her home requesting that she contact the respondent employer. The letter stated: “It is important for you, or your physician, to contact me as soon as possible concerning the period of time you will be unable to come to work. It would also be helpful if your present condition could be updated.” (Ex. DL 4A).

5. On July 30, 1992, Dr. Merle Robinson wrote to the respondent indicating that the complainant had been under his care since July 22, 1992 and was presently unable to return to work for medical reasons. Dr. Robinson advised the respondent that he would continue to assess the complainant’s ability to return to work and would update the respondent as the treatment progressed. (Ex. DL 4B).

6. On August 10, 1992, Zerbey wrote to Dr. Robinson, requesting information regarding the complainant’s condition and an estimate of when she would be able to return to work. (Ex. DL 4C).

7. On August 11, 1992, Dr. Wendy Cohen sent the respondent a letter indicating that the complainant had been hospitalized from July 22, 1992 until August 11, 1992, that she was at that time unable to return to work for medical reasons, and that Dr. Noonan would continue to assess her ability to return to work and update the respondent as to the progress of her treatment. (Ex. DL 4D).

8. Zerbey sent the complainant a letter, dated September 1, 1992, stating:

   I have received two letters from doctors at the Charles River Hospital concerning your absence. Neither letter indicated any time frame concerning your ability to return to work.

   Since we must continue to manage operations here at the newspaper in an orderly manner I have made the following decision. The job of Major Accounts Manager which you held since July 7th until your recent leave of absence has been eliminated. The vacant position of advertising director will be filled sometime in September.

   As you were told on July 7, 1992, your weekly pay will be reduced effective September 7, 1992. The new weekly amount will be $550.00 and you will continue to receive that as long as you qualify for the leave of absence you are now using.
When you are able to return, please call me. We will discuss the availability of work at The Bristol Press at that time. (Ex. R 88)

9. The position of Advertising Director was filled in October, 1992.

10. On September 16, 1992, November 24, 1992 and January 15, 1993, Dr. Noonan notified the respondent in writing that the complainant was under his care, "unable to return to work due to medical reasons," and that the respondent would be updated regarding the complainant's ability to return to work. (Exs. DL 4E, DL 4G, DL 4H).

11. In September, 1992, the complainant sent Zerbey a certified, handwritten letter asking about the availability of work and requesting that he contact her.

12. On September 23, 1992, in response to the certified letter received from the complainant the previous day, Zerbey wrote the complainant stating that Dr. Noonan had indicated that she was unable to return to work and requested:

   When you have a letter from your physician stating that you are able to return to work, please contact me for an appointment. We will then discuss the availability of work at The Bristol Press." (Ex. DL 4F)

13. The complainant made phone calls to various state agencies while she was hospitalized in August, 1992, and thereafter. The complainant felt that her thinking was not entirely clear, and she was confused about the relationship between various state agencies.

14. The complainant filed a claim with the Workers' Compensation Commission on November 23, 1992. The complainant filed the claim with the assistance of her therapist. The complainant was at that time represented by Attorney Robert L. Fiedler, who was aware of the filing of the Workers' Compensation complaint and was listed as attorney for plaintiff in the pretrial memo schedule of damages or demand. (Exs. R 8H and 8I).

15. Shortly after her release from the hospital in August, 1992, the complainant began searching for other employment.

16. The complainant had been placed on sick leave status as of July 22, 1992. She received twenty-six weeks of paid sick leave pursuant to the respondent's policy of paying all of its employees twenty-six weeks of long-term sick benefits to be consistent with the benefits provided to its union employees under the terms of a collective bargaining agreement.
17. On January 21, 1993, the complainant’s paid sick leave expired and the complainant received her last sick leave check dated January 21, 1993. The complainant received an additional two days of sick leave in July, 1993, after the Personnel Administrator discovered the complainant had been shorted two days.

18. The complainant, with the assistance of Attorney Fiedler, filed a complaint with the State of Connecticut, Commission on Human Rights and Opportunities on January 11, 1993.

19. On or about January 27, 1993, the complainant filed a claim for unemployment compensation benefits.

20. On January 27, 1993, Dr. Noonan wrote Zerbey a letter indicating that the complainant had been seen for re-evaluation of her ability to return to work on January 22, 1993. Noonan wrote:

Mrs. McCarthy remains preoccupied with the circumstances which led to her obtaining sick leave from her place of employment. The very thought of being obliged to return to working with her previous employer causes great anxiety such that this remains an impossibility. Therefore, in my opinion, Mrs. McCarthy continues to be totally disabled from her previous employment; however, if a suitable job presented in another environment, she might well be able to accept such a position. (Ex. DL 41)

21. On January 29, 1993, Attorney Miguel A. Escalera, Jr. wrote to the complainant on behalf of the respondent:

I represent the Bristol Press Publishing Company in connection with any claims arising from Ms. Carolyn McCarthy’s employment for the Bristol Press.

The Bristol Press has received a series of letters from psychiatrists that have been caring for Ms. McCarthy from July 22, 1992, to the present. As you know, Ms. McCarthy has been absent from work since July 22, 1992. The Bristol Press advised Ms. McCarthy on September 23, 1992, that when she was medically about to return to work, she should contact the Bristol Press to discuss work availability.

By letter dated January 27, 1993, Ms. McCarthy’s psychiatrist reported that Ms. McCarthy’s return to work at Bristol Press remains an impossibility because ‘the very thought of being obliged to return to her previous employer causes great anxiety.’ Coincidentally, on January 27, 1993, Ms. McCarthy applied for unemployment compensation.
It appears from the foregoing that Ms. McCarthy has severed her employment from the Bristol Press. If, to the contrary, Ms. McCarthy intends to continue in the employ of the Bristol Press, please notify me within seven days of the date of this letter.

Unless I hear from you within seven days, I will assume that Ms. McCarthy has terminated her employment with the Bristol Press.

22. The complainant's attorney, Richard L. Fiedler, wrote in response:

You ask whether Ms. McCarthy has severed her employment relationship or whether she intends to remain in the employ of your client. Ms. McCarthy has not "severed" her employment relationship but rather, as Dr. Noonan's note reflects, your client's conduct which caused this claim has made it impossible for her to return to her former position. Further, while Ms. McCarthy would like to remain in the employ of your client, she is unable to do so, as you know, for medical reasons.

23. At the March 24, 1994 hearing, the complainant clarified her attorney's statement that it was impossible for her to return to work for the employer and explained that she could not return to work with the respondent's publisher, Zerbey. The complainant stated that she could work for other employers or for the Bristol Press, were it not for Zerbey.

24. On March 25, 1993, the claimant received the first of five weekly checks for accrued vacation entitlement. This type of payment is made after an employee has become separated from his or her employment with the respondent.

25. In or around April, 1993, the complainant consulted Attorney Patricia M. Strong. The complainant continued to and still does retain Attorney Fiedler as well. Because the complainant was unsure as to whether she had filed a complaint under the Family and Medical Leave Act, Attorney Strong suggested that the complainant contact the Labor Department to determine whether a complaint had been filed.

26. On July 9, 1993, the complainant filed a complaint with the State of Connecticut, Department of Labor, alleging that her employer violated the provisions of the Family and Medical Leave Act.
DECISION ON RESPONDENT'S MOTION TO DISMISS

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. 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 motion, the respondent contends that the complainant has failed to show good cause for filing her complaint more than one hundred and eighty days after the employer action which prompted the complaint.

In her July 9, 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 September, 1992. In her March 24, 1994 memorandum in opposition of respondent’s motion to dismiss, the complainant has amended her complaint to allege that the employer action in violation of the Family and Medical Leave Act which led to her filing of her complaint was her termination from employment in January, 1993, when there was no work available for her because her job had been eliminated and her former position as Advertising Director had been filled in October, 1992.
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 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 Agency is not estopped from dismissing the complainant’s complaint.

The complainant maintains that by commencing an investigation of the complainant’s complaint, the Working Conditions Division has accepted jurisdiction over the complainant’s complaint. By taking such action, the complainant maintains that the Commissioner is now precluded from asserting that the complaint was untimely filed. The complainant’s contention is essentially that the Commissioner has waived the right to find the complainant’s complaint untimely or is now estopped from ruling that the complaint is untimely.

Waiver is the intentional or voluntary relinquishment of a known right, or conduct which warrants an inference of the relinquishment of such a right. BLACK’S LAW DICTIONARY 1417 (5th ed. 1979). The Commissioner indicated in his January 26, 1994 notice of hearing that the Working Conditions Division had noted the issue of late filing but did not reach a decision as to whether good cause existed for the late filing. (Ex. DL 7). Presumably, Working Conditions Division did not need to reach the late filing issue because it found no violation of the Family and Medical Leave Act. Since he gave notice of the late filing issue in the hearing notice, the Commissioner has not waived his right to consider the issue and dismiss the complaint for failure to be timely filed.

Nor is the Commissioner estopped from considering the issue of late filing. Estoppel is defined by the Connecticut courts by two elements: First, a party must say or do something which is intended or calculated to induce another to believe in the existence of certain facts and to act upon that belief and, second, the other party, influenced thereby, must actually change her position or do something to her injury which she otherwise would not have done. Estoppel requires the misleading conduct of one party to prejudice the other. Morrow v. Morrow, 165 Conn. 665, 345 A.2d 561, 563 (1974).
The Connecticut courts and other state courts have held that as a general rule equitable estoppel may not be invoked against government agencies except in a limited context in carefully defined situations.

[Estoppel against a public agency is limited and may be invoked (1) only with great caution; (2) only when the action in question has been induced by an agent having authority in such matters; and (3) only when special circumstances make it highly inequitable or oppressive not to estop the agency.

Kimberly Clark Corp. v. Dubro, 204 Conn. 137, 148; 527 A.2d 679, 684 (1987). The exception applies only where the party claiming estoppel would be subject to a substantial loss if the agency were permitted to negate the acts of its agent. Id.

In this case of first impression on the issue of whether there was good cause for late filing, Working Conditions 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 Working Conditions 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 requirements and whether it had jurisdiction to issue a complaint against the respondent. By considering the merits of the complaint first, the Working Conditions Division did not intend to, nor did it, induce the complainant to take any action or to act on any belief. The Division gave the complainant the opportunity to have the substance of her complaint considered. Although it would have been more logical and appropriate for the Administrator to reach the late filing issue before considering the merits, this course of action might have resulted in the dismissal of the complaint for lack of jurisdiction without ever considering the merits of the complaint.

Furthermore, there is no evidence that the complainant relied to her detriment on Working Conditions Division’s investigation of her complaint or that she changed her position based on the agency’s actions following her filing of her complaint. The Working Conditions Division’s investigation followed and thus in no way affected the complainant’s filing of her complaint. The complainant has not demonstrated that she has suffered a substantial loss or that there are any special circumstances that would make it inequitable not to estop the Labor Department from dismissing the complaint on jurisdictional grounds. The complainant has not established that the requisite elements of equitable estoppel have been established or that the agency is subject to estoppel.
2. The complainant has not established good cause for her 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.Ed. 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.


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 Cruze 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
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, where the plaintiff was hospitalized for less than a month
during the filing period, the charge was untimely filed. Bassett v.

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
might establish good cause. See Conn. Agencies Regs. §31-237g-15. Some of
the factors is 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 entered the hospital and commenced her
medical leave of absence on July 22, 1992. At that time, she had already
been demoted from Advertising Director to Major Accounts Manager. On
September 1, 1992, the respondent advised the complainant that the position
of Major Accounts Manager had been eliminated and that, as she had
previously been advised, the salary she had earned as Advertising Director
was being decreased. Sometime in October, 1992, the respondent hired a
replacement for the position of Advertising Director.
Whether the alleged violation of the Family and Medical Leave Act was, as the complainant suggested in her complaint, the elimination of the Major Accounts Manager position on or about September 1, 1992, the filling of the position of Advertising Director in October, 1992, the respondent’s response to the claimant’s September communication, or any of the above-stated actions, these incidents all occurred more than one hundred and eighty days prior to the filing of the complaint on July 9, 1993. Indeed, any employer action which took place within the time the complainant commenced her leave of absence on July 22, 1992 through November 16, 1992, or after the sixteen weeks of medical leave to which the complainant was entitled pursuant to Conn. Gen. Stat. §§31-55ff(b) and 31-51cc(b) of the Family Medical Leave Act, was more than one hundred and eighty days prior to the filing of the complaint.

The complainant in the instant case became aware of the respondent’s elimination of her position and its intent to hire another individual for the Advertising Director position in early September, 1992. Although the complainant was no longer hospitalized by September, 1992, she was still under medical care for depression and would not be released to return to work for four more months. The complainant began her search for other work as early as August, 1992, and she began to contact various state agencies shortly thereafter. The complainant testified that her mind was still not clear at this time and she was confused about the relationship between the various state agencies. However, the complainant produced no medical documentation establishing that she had suffered from a physical or mental impairment of such a nature that it interfered with or prevented her from filing a timely complaint.

Although the complainant was vaguely aware of the existence of the Family and Medical Leave Act, the respondent was not specifically required by statute or regulation and apparently did not post any information in the workplace regarding the Family and Medical Leave Act. This lack of notice of the requirements of the Act, along with the complainant’s confusion regarding her belief that the Human Rights and Opportunities Commission was located within the Labor Department, might justify concluding that the complainant’s failure to file in a timely manner was due to good faith error. However, the complainant had retained an attorney by November, 1992, had filed a claim for workers’ compensation on November 23, 1992, and filed a complaint with the Connecticut Commission on Human Rights and Opportunities on January 11, 1993. Furthermore, the complainant consulted another attorney, Attorney Strong, sometime in April, 1993, still within one hundred and eighty days of November 11, 1992. Attorney Strong questioned the complainant regarding whether she had filed a complaint pursuant to the Family and Medical Leave Act and, because the complainant was uncertain, Attorney Strong advised the complainant to contact the Labor Department to determine whether a complaint had been filed. At the time she was given this advice, the complainant had been released by her doctor for more than two months to return to work. She had filed a claim for unemployment compensation benefits on January 27, 1993 with the Labor Department.

Even if the complainant had shown good cause for not filing her complaint before April, 1993, she has not explained her delay in filing between being advised to contact the Labor Department in April and the filing of her complaint on July 9, 1993. 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 her complaint, and thus she has not shown good cause for her untimely filing.
B. THE COMPLAINANT HAS NOT ESTABLISHED THAT SHE FILED A TIMELY COMPLAINT BY AMENDING HER JULY 9, 1993 COMPLAINT.

At the hearing on March 24, 1994, the complainant first raised a contention that the respondent violated the Family and Medical Leave Act by a second action on January 25, 1993, when she was removed from the payroll and her employment terminated. The complainant is trying to amend her complaint more than nine months after it was filed to allege a violation which would have occurred within one hundred and eighty days of her filing date in order to avoid the late filing issue. The Act does not provide for amending a complaint.

Section 31-51dd of the Connecticut General Statutes provides:

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.

In the instant case, the complainant was on a twenty-six week, paid sick leave. The Family and Medical Leave Act only required the respondent to grant the complainant a sixteen week, unpaid leave, at the expiration of which time the respondent was required to allow the complainant to return to her original position, or if the original job was not available, to provide an equivalent position or, if she was medically unable to perform her original job at the expiration of her leave, to transfer the employee to a position for which she was physically suited where such work was available. Conn. Gen. Stat. §31-51cc(b). The complainant maintains that by not offering the complainant suitable work on January 25, 1993 and removing her from the payroll, the respondent violated the Act. Any alleged violation, occurring two months after the expiration of the employee’s leave entitlement, must not relate to a violation of the requirement that the claimant be returned to work but to a charge that the employer discharged the complainant or discriminated against her because she exercised her rights under the Act.

One of the primary issues in determining whether charges have been timely filed is a determination of when the alleged violation occurred. The proper focus is the time of the discriminatory act rather than the time the consequences of the alleged discrimination became more painful. See Delaware State College v. Ricks, 449 U.S. 250, 101 S. Ct. 4198, 66 L.Ed. 2d 431 (1980). In a case involving a claim of discriminatory discharge or termination, the time period is generally held to run from the date that the employee was notified of the termination rather than when the employee is removed from the payroll. See, e.g., Kryzewski v. Metropolitan Gov’t of Nashville, 584 F.2d 802 (6th Cir. 1978); Wedge v. Fenn Manufacturing Co., 1 CHRR 1452 (1973). An exception to this rule exists where an employer actively misleads the employer as to the reason for its taking the action. See, e.g., Wilkerson v. Siegfried Ins. Agency, Inc., 683 F.2d 344 (10th Cir. 1982); or where the statute of limitations on the alleged discriminatory
discharge has run before the employee receives communication of the decision to discharge. See Cervantes v. IMCO, 724 F.2d 511 (5th Cir.), reh'g denied, 728 F.2d 255 (5th Cir. 1984). In Cervantes, the plaintiff was injured on the job and out on a disability leave for over a year. When he attempted to return to work, the employer informed him that his employment was terminated at the time he went out on the leave. The Fifth Circuit Court of Appeals held that the filing period commenced at the time when the decision to discharge the employee was communicated to him when he tried to return to work.

The above-cited cases would direct consideration of when the alleged violation occurred to the time the respondent advised the complainant on September 1, 1992 that it was eliminating her position. The claimant had been removed from the Advertising Director's position two months earlier. To establish that the respondent discharged or discriminated against the complainant in January, 1993, the complainant would have to show some action on the respondent's part other than the natural consequences of its previous acts. The complainant has not alleged facts or produced evidence that she attempted to return to work for the employer and that the employer took any action at that time against her other than removing her from the payroll when her paid leave of absence expired and she was unable to return to work for the employer. There is no indication that the respondent misled the complainant as to the reasons for taking the action it took in September, 1992.

The March 24, 1994 hearing was confined to the issue of late filing. Some evidence of the merits of the complaint was necessarily introduced in order to consider the filing issue, but the parties have not had the latitude to introduce all of their evidence on the issues raised by this case. Nonetheless, despite raising a new contention, the complainant has offered no evidence which would support her theory that the respondent discharged the complainant.

The complainant maintains that, even though she was notified on September 1, 1992 that her position was eliminated, she did not discover until January 25, 1993 that the employer had no suitable work for her. However, in her initial July 9, 1993 complaint, the complainant requested that the Commissioner accept jurisdiction of her complaint since it was filed more than one hundred and eighty days after the alleged violation. The complainant has attempted, more than nine months following the filing of her complaint and approximately a year and one-half after the employer action which led to her filing a complaint, to frame a complaint which would be timely under the Family and Medical Leave Act. The amended complaint appears to be an after-the-fact rationalization.

The complainant's contentions regarding alleged harassment and discriminatory conduct prior to her taking her leave, which she has maintained led to her illness and which underly the instant complaint, must be addressed in another forum.
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 motion to dismiss is granted. The complaint is dismissed.

[Signature]

Attorney Sheila S. Wells
Hearing Officer
FOOTNOTES

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

2/ It appears from Ex. R 88 that the pay decrease referred to in the September 1, 1992 letter from Zerbey to the complainant had been announced to the complainant on July 7, 1992, prior to her commencing her medical leave. No testimony was taken about the pay decrease.

3/ 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.

4/Section 31-5lee-4(a) of the Connecticut Agencies Regulations provides that:

The Labor Department shall investigate complaints filed in accordance with Section 31-5lee-3 of these regulations as expeditiously as possible. The Labor Department may, at its discretion, investigate separate complaints in a consolidated manner.
Section 31-5lee-3 on the Connecticut Agencies Regulations provides:

(a) Any employee, or his authorized representative, may file a complaint with the Labor Department if he believes that:
(1) his employer has violated any provision of the Act with respect to such employee; or
(2) he has been discharged or discriminated against in any manner by an employer who is subject to the Act because he exercised rights afforded to him by the Act. The Labor Department will inform any employee who files a complaint, pursuant to this section, that involves disability relating to pregnancy of her right to file a complaint with the commission on human rights and opportunities as provided in section 46a-82 of the General Statutes.
(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.

In order to address an allegation that an employer violated the Act or discharged or discriminated against an employee who exercised rights afforded by the Family and Medical Leave Act when that employee files a complaint after the one hundred and eighty day filing period, the Commissioner will have to conduct an investigation to address not only the merits of the complaint but the reasons for the untimely filing. Thus, the mere commencement of an investigation cannot be held to establish that a complaint was either filed within the one hundred and eighty day period or for good cause.

5/In the July 12, 1993 notice of the filing of the complaint, the Working Conditions Division notified the respondent of the alleged complaint and requested that it investigate and advise the agency of the results of the investigation. The Working Conditions Division dismissed the complainant's complaint on November 15, 1993 on the merits without considering whether it had been timely filed. In his January 26, 1994 hearing notice in response to the complainant's request for a hearing, Labor Commissioner Petronella indicated that: "The Division noted the issue of late filing but did not reach a decision as to whether good cause existed for the late filing."
At the March 24, 1994 hearing, the respondent’s Personnel Administrator testified that the respondent had between one hundred and forty to one hundred and forty-eight employees, that this number has dropped since 1991, but that the respondent has employed greater than one hundred employees at all times. The Family and Medical Leave Act was phased in over a three-year period, starting with employers of over two hundred and fifty or more employees. Pursuant to Conn. Gen. Stat. §§31-51ff(b), the provisions of the Family and Medical Leave Act applied to employers of one hundred or more employees as of July 1, 1991. Between July 1, 1991 and June 30, 1992, inclusive, the maximum leave entitlement was twelve weeks. On or after July 1, 1992, the maximum leave entitled according to Section 31-51cc was sixteen weeks within any two-year period.

The Commissioner referred to a twelve-week entitlement in his January 26, 1994 notice of hearing (Ex. DL 7). The calculation of an employee’s leave entitlement would be based on an employer’s merit rating status, which is not in the record. For purposes of this proposed decision, the employment figures reported by the respondent’s witness are being accepted because they provide the complainant with a longer period of entitlement.

Section 31-71f(2) of the Connecticut General Statutes, contained within the wage enforcement statutes, provides that each employer make available to its employees, either in writing or through a posted notice maintained in a place accessible to its employees, any employment practices or policies or change therein regarding wages, vacation pay, sick leave, health and welfare benefits and comparable matters. Although there are no specific notice requirements in the Family and Medical Leave Act, this provision would appear to require an employer to notify its employees of any changes in its sick leave policy mandated by the Family and Medical Leave Act.

The Commissioner did not explicitly consider this contention before he dismissed the complaint because it was not raised. The Commissioner had before him the documents exchanged by the complainant and the respondent on January 27, 1993 and January 29, 1993 (Exs. DL 4I and DL 4J), and he did make a factual finding that the complainant did not contact the employer upon the expiration of her entitlement. The Commissioner also had before him the complainant’s physician’s January 27, 1993 letter stating that the complainant “continues to be totally disabled from her previous employment; however, if a suitable job presented in another environment, she might well be able to accept such a position.” (Ex. DL 4I) Having before him the facts on which the complainant’s amended complaint is based, the Commissioner nonetheless dismissed the complaint without finding any violations of the law.

This does not appear to be a case alleging a continuing violation of the Family and Medical Leave Act, which would allow the complainant to file within one hundred and eighty days of each violation. The facts in the instant case are not like the situation where each separate pension payment made pursuant to a discriminating pension plan constituted a separate violation, State of Connecticut v. Commission on Human Rights and Opportunities, 211 Conn. 464 (1989); or where a continuing payment of discriminating wages constituted continued discrimination, Board of Education v. Commission on Human Rights and Opportunities, 177 Conn. 75, 411 A.2d, 40 (1979).
10/ It appears from the complainant's physician's letter and the respondent's January 29, 1993 reply trying to verify the complainant's employment status that the complainant was unable to return to any position working for her previous employer, the respondent's publisher, Zerbey. The complainant apparently was unable to return to work for the employer because the "very thought of being obligated to return to working with her previous employer causes great anxiety such that this remains an impossibility" and, in her doctor's opinion, she continued to be "totally disabled from her previous employment." (Ex. DL 41) The respondent's action in removing her from the payroll appears to be based on the expiration of her leave entitlement and the complainant's professed inability to return to her employment.