

The Most Important Part of a Joke? Timing

By [Glenn Duhl](#) on Thu, Jan 12, 2012

Employers often consider the many claims asserted by employees to be a joke.

Management is often bewildered by an employee failing to abide by the simple rules of coming to work, arriving on-time, and behaving within the stated expectations contained in the employee manual. Why can't employees be responsible for their own actions rather than faulting others for their shortcomings? And, worse, when the business enforces appropriate rules, what is the meaning of the employee's claim that the discipline or termination was an act of illegal discrimination?



While many were out holiday shopping, on December 20, the Second Circuit Court of Appeals further refined the 90-day deadline for filing a civil action after the EEOC mails a right to sue letter.

In *Tiberio v. Allergy Asthma Immunology of Rochester*, the Second Circuit faced the issue of when the former employee received her right to sue letter. Tiberio was employed as a nurse and fired after accusations that she had unlawfully accessed medical charts of other employees and falsely ordered prescriptions. Tiberio filed a discrimination claim.

After the EEOC concludes its investigation of a charge of discrimination, the right to sue letter is dated and mailed. In this case, the EEOC mailed a right to sue letter with copies to the employer and Tiberio's counsel. The mailing of the letter is not the important date; rather, the 90 days start ticking from the date when the complaining employee receives it. The "right to sue letter" has long been a problem. While some agencies track their correspondence with certified mail or email, the EEOC does not, leaving the parties and the courts to speculate as to when the employee-claimant received the all-important letter.

Such guess-work has caused the courts to create two presumptions:

1. A right to sue letter is mailed on the date of the letter; and
2. A mailed letter is received three days after its mailing.

As I sit writing this blog, I see a right to sue letter on my desk dated May 12, 2011. It was stamped “received” in the EEOC’s Boston office on June 1, 2011, and “received” by my client June 10, 2011. Clearly, the letter was not mailed on the date it says it was mailed and it certainly cannot be said to have been delivered within three days after the presumed mailing.

Bottom Line for Employers

So what happened with Tiberio? She filed a complaint with the District Court 96 days after the right to sue letter was issued. In an effort to circumvent this blown deadline, she claimed that she should have 90 days from the *later* date when her attorney received a copy of the letter. That suggestion did not sit well with the court. The Second Circuit has now held that the 90 day period begins to run on the date when the letter is first received *either* by the claimant or counsel, *whichever is earlier*. For the employer, he who laughs last, laughs best.

—*Glenn Duhl represents management in employment law and litigation including breach of contract, wrongful termination, discrimination, defamation, emotional distress, wage and hour, sexual harassment, restrictive covenants and trade secret misappropriation matters.*