STATE OF CONNECTICUT
DEPARTMENT OF LABOR
200 Folly Brook Boulevard
Wethersfield, CT 06109

COMPLAINANT
Christopher Corso
75 Prospect Street
Enfield, CT 06082

Certified Mail No. 70081140000281160870

EMPLOYER
Engineering Services & Products
By: Jennifer Lian Dixon, Esq.
Kainen Escalera & McHale
21 Oak Street
Hartford, CT 06106

Certified Mail No. 70081140000281160887

DOCKET NO. FM 2008-72

DATE MAILED: April 5, 2011

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 record in the case, including the oral argument. I affirm and incorporate the Proposed Decision of the hearing officer issued on January 7, 2011, (a copy of which is attached hereto) as my final decision.

Dennis C. Murphy
Deputy Commissioner

DOCKET NO: FM 2008-72

DATE MAILED: January 7, 2011

COMPLAINANT -

Christopher Corso
75 Prospect Street
Enfield, CT 06082

EMPLOYER -

Engineering Services & Product Co.
1395 John Fitch Blvd.
So. Windsor, CT 06074

EMPLOYER'S ATTORNEY

Jennifer Lian Dixon, Esq.
Kainen, Escalera & McHale, P.C.
21 Oak Street
Hartford, CT 06109

PROPOSED FINAL DECISION OF HEARING OFFICER

CASE HISTORY

On September 15, 2008, Christopher Corso filed a complaint with the State of Connecticut Department of Labor, Wage and Workplace Standards Division, alleging that his former employer, Engineering Services and Products Company (hereinafter referred to as the respondent), violated the provisions of General Statutes section 31-51cc, et seq., an act concerning Family and Medical Leave from Employment (hereinafter referred to as the CFMLA). On October 31, 2008, the respondent responded to the Wage and Workplace Standards Division, contending that the complaint was without merit and requesting a dismissal of the complaint.

On May 25, 2010, the Wage and Workplace Standards Division notified the parties that it had investigated the complaint and determined that the respondent did not violate the provisions of the CFMLA.

The complainant filed a timely request for a contested case hearing. On July 21, 2010, Acting Labor Department Commissioner Linda Agnew designated Ronald Coleman as the hearing officer in this matter. On October 14, 2010, hearing officer Ronald Coleman conducted a contested case hearing concerning the complainant's complaint. The hearing officer conducted the proceedings at the Connecticut Department of Labor, 39 Marne Street, Hamden, Connecticut.

APPEARANCES

For the complainant :Christopher Corso.

For the Respondent: Barry Goldsher, president of Engineering Services and Products Company; Steven Hurlburt, controller; Marjory Spinella, benefits manager; and Jennifer Lian Dixon, respondent's attorney.

I. FINDINGS OF FACT

1. At all times relevant to this decision, the respondent was subject to the CFMLA.

2. The respondent is a catalog company which provides agricultural supplies, building/maintenance materials, and greenhouse supplies to various customers, such as hog, dairy, and poultry farmers. The respondent maintains a wholesale catalog which offers special prices to qualifying businesses.

3. The complainant performed his duties in the respondent's Connecticut call center. At the time the respondent was hired, the respondent maintained a store located in Dyersville, Iowa. The respondent also maintained sales representatives in Connecticut and in Dyersville, Iowa.

4. The complainant held the position of sales supervisor from August 6, 2007, through September 9, 2008. The employer did not have a sales supervisor prior to hiring the complainant into that position.

5. The complainant worked under sales manager, Wayne Macke, from the date of hire until the respondent eliminated Macke's position. Matthew Niaura then became the complainant's supervisor.

6. As a sales supervisor, the complainant's primary duty was to support the sales representatives, including teaching them how to increase their sales. The complainant worked on the sales floor answering the sales representatives' questions in a call center. The respondent's customers telephone the call center and its sales representatives respond to these calls.

7. The respondent did not consider the sales supervisor position part of the company's senior management. For this reason, the respondent did not include the complainant in senior management meetings about reducing costs, reorganizing or eliminating positions.

8. The respondent's senior management team consisted of Barry Goldsher, Matthew Niaura, Steven Hurlburt and David Buchheit. These individuals met early each month to discuss the prior month's sales.

9. In February 2008, the respondent eliminated the product trainer position in Connecticut because sales were lower than predicted. The respondent believed those duties could be handled by sales representatives who had more experience with the company and knowledge of its products.

10. In April 2008, the senior management team discussed measures to cut costs because sales continued to be lower than expected.

11. The respondent did not initially consider increasing its merchandise prices to increase revenue because it had already mailed its catalogs. The respondent wanted to quote customers the same prices that it had listed in the catalog. However, in May 2008, the respondent raised some product prices.

12. On June 13, 2008, the respondent reorganized. The respondent eliminated the phone sales department located in Dyersville, Iowa. The respondent also eliminated the sales manager position held by Wayne Macke and transferred the individual who had performed this job in Iowa to the Connecticut office.

13. In July 2008, the complaint requested leave under the CFMLA because of a medical issue with his right shoulder. The respondent approved the complainant's request for leave under the CFMLA sometime in July 2008.

14. No one in authority ever told the complainant that he could not take a leave or made any comments discouraging the complainant from taking a leave of absence.

15. The complainant had surgery on his right shoulder on August 28, 2008. The complainant took his approved leave under the CFMLA from August 28, 2008, through September 8, 2008.

16. Prior to his leave, the respondent's benefits manager, Marjory Spinella, advised the complainant of his rights under the CFMLA, including that he could take up to 16 weeks of leave. The respondent applied unused paid vacation time for the approved period of his leave.

17. On August 7, 2008, the team met to review its sales figures. Continued low sales resulted in senior management's deciding to eliminate the complainant's position as sales supervisor. The team also decided to eliminate one of the positions in the marketing department.

18. In reviewing its payroll costs and the individuals working as part of the sales management team, the respondent selected the complainant for layoff because he had the least seniority in the sales department among the managers and trainers; he had the least amount of systems knowledge among the managers and trainers; and his duties could be performed by other existing managers and trainers in the department.

19. The respondent compiled its sales figures for August 2008 on September 3, 2008. Sales for August were down nearly 19 percent. August was the second worst sales month for 2008.

20. On September 8, 2008, the complainant returned to work for the respondent. The complainant returned to work in the same capacity as sales supervisor at the same rate of pay as he maintained prior to the leave under CFMLA.

21. On September 9, 2008, the respondent notified the complainant that it was eliminating his position. The respondent issued a separation notice to the complainant effective that day.

22. The respondent did not offer the complainant another position within the company. The respondent paid the complainant through his termination date. The respondent also paid the complainant for any unused vacation leave.

23. The respondent did not lay off sales representatives in Connecticut because these individuals respond to calls that can result in increased sales. The respondent handled a high volume of calls even though sales were decreasing.

24. The respondent offered overtime to sales representatives in October 2010, because telephone contacts to its call center calls were increasing. The respondent hoped these contacts would result in sales.

25. The respondent has not replaced the complainant. The respondent operates without a sales supervisor.

THE PARTIES' CONTENTIONS AND ISSUE STATEMENT

The complainant contends that the employer discharged him in retaliation for his taking a leave pursuant to the Connecticut Family and Medical Leave Act. The employer denies that it retaliated against the complainant and contends that it eliminated the complainant's position for economic reasons.

The issue presented is whether the respondent interfered with the complainant's rights under the CFMLA or discharged the complainant for taking a leave pursuant to that Act.

II. PROVISIONS OF LAW

Section 31-51ll. Family and medical leave provides, in relevant part, that:

> (a)(1) Subject to section 31-51mm, an eligible employee shall be entitled to a total of sixteen workweeks of leave during any twenty-four month period;
>
> (2) leave under this subsection may be taken for one or more of the following reasons:..(C) In order to care for the spouse, or a son, daughter or parent of the employee, if such spouse, son, daughter or parent has a serious health condition....

Section 31-51nn. Family and medical leave: Employment and Benefits Protection.

> (a) An eligible employee who takes leave under section 31-51ll for the intended purpose of the leave shall be entitled on return from such leave (1) to be restored by the employer to the position of employment held by the employee when the leave commenced; (2) if the original position of employment is not available, to be restored to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment; or, (3) 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, to be transferred to work suitable to such employee's physical condition if such work is available.

Section 31-51pp Family and medical leave: Prohibited acts.

> (a)(1) It shall be a violation of sections 5-248a and 31-51kk to 31-51qq, inclusive, for any employer to interfere with, restrain or deny the exercise of, or the attempt to exercise, any right provided under said sections.
>
> (2) It shall be a violation of sections 5-248a and 31-51kk to 31-51qq, inclusive, for any employer to discharge or cause to be discharged, or in any manner discriminate, against an individual for opposing any practice made unlawful by said sections or because such employee has exercised the rights afforded such employee under said sections.

Section 31-51qq-25 of the Regulations of Connecticut State Agencies provides, in relevant part, as follows:

> (a) The FMLA prohibits interference with an employee's rights under the law,

and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempt to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or causing to be discharged or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act or because such employee has exercised the rights afforded to such employee under the Act....

(b) Any violations of the Act or these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. "Interfering with" the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities....

(c) An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits, the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

III. DISCUSSION

A. The Respondent Did Not Interfere with the Complainant's Rights under the Connecticut Family and Medical Leave Act.

Section 31-55qq-25(a) of the Regulations of Connecticut State Agencies provides that an employer may not engage in conduct that interferes with an employee's exercise of his or her rights under the CFMLA. To assert a claim for interference, the complainant has the burden to show that he or she is entitled to CFMLA leave, and that the employer interfered with his or her rights to that leave, but the complainant need not show that the employer *intended* to interfere with that leave. *Cendant Corp. v. Commissioner of Labor*, 276 Conn. 16, 883 A.2d. 789 (2005).

An employer will interfere with an employee's exercise of his or her rights under the CFMLA by refusing to authorize CFMLA leave or by discouraging an employee from

requesting or using his or her entitlement to leave. See Regs., Conn. State Agencies § 31-51qq-25(b). An employer's actions constitute interference if they provide a "powerful disincentive" for taking FMLA leave. See *Barta v. Yale New Haven Hospital*, FMLA 2007-02 (1/09).

In July 2008, the complainant made a request for leave under the CFMLA because he needed surgery on his right shoulder. The complainant made the leave request to Marjory Spinella, benefits manager, who approved the leave on behalf of the respondent. The complainant was on leave from August 28, 2008 through September 7, 2008. Spinella testified that she did not inform members of upper management that the complainant requested a leave. The complainant offered no evidence that the respondent's company president Barry Goldsher, or any other member of the respondent's management, discouraged him from taking a leave under the CFMLA. Thus, there is no evidence that the respondent either declined the complainant's request for leave or discouraged him from taking that leave.

An employer also interferes with an employee's exercise of his or her rights to CFMLA if it fails to restore that employee to his or her position upon return from a CFMLA leave. *Cendant Corp. , supra.* Where the employer lays the claimant off from work during a leave under the Act, the employer has the burden to show by way of an affirmative defense that the employee would have been laid off regardless of whether he or she was on a leave. See *Id.* at 32-33; *Lewandowski v. The Hartford*, FM 30-2005 (3/4/08).

In the instant case, the respondent made the decision to lay off the complainant during a senior management meeting that took place prior to his leave. The respondent allowed the complainant to his full entitlement to leave and only separated him the day after he returned from his leave. Nonetheless, even if the hearing officer were to find that the complainant's one-day return to work did not constitute a *bona fide* restoration to his position, an employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during his or her leave pursuant to the CFMLA. See Regs., Conn. State Agencies 31-51qq-24. The right to reinstatement is not absolute. *Cendant Corp., supra.* An employer may refuse to reinstate an employee following his or her return from leave if the employee would have been terminated for some other reason even if he or she had not taken leave. *Id.* Therefore, an employer can show that, regardless of whether the employee exercised his or her rights under the CFMLA, the employee would not have been employed at the time that reinstatement is required.

The respondent in this case presented evidence of declining sales since February 2008. The respondent also submitted notes from senior management team meetings which confirm that the company had been considering changes for several months because the respondent predicted sales levels were not achieved as predicted. In February 2008, the respondent eliminated the product trainer position in Connecticut because sales were lower than projected in its budget. The respondent believed those duties could be performed by more experienced sales representatives. At that time, the complainant's position was not considered for elimination. The respondent maintained the complainant's position even

through a reorganization on July 13, 2008.

When the respondent reorganized, it eliminated the National Account Manager position located in Iowa. The respondent also eliminated the phone sales department located in Iowa at that time. Following the reorganization, the respondent continued to experience sales below budget and expenses exceeding the budget. Each month after the reorganization, the respondent considered additional changes, but held off in anticipation of increased sales in the upcoming month. After sales were lower than expected in July 2008 and senior management did not anticipate a significant increase during August 2008, the respondent made the decision to eliminate the complainant's position. The actual decision to eliminate the complaint's position was made on August 7, 2008, which was prior to the complainant's leave under the CFMLA. The respondent's witnesses from upper management, Goldsher and Hurlburt, were also unaware that the complainant was taking a leave when they made the decision to eliminate his position.

The preponderance of the evidence supports a conclusion that the respondent would have eliminated the complainant's position regardless of whether he exercised his rights to take a leave under the CFMLA. Therefore, even if we did not consider his reinstatement to be *bona fide*, we would not consider the respondent's failure to reinstate the complainant to constitute interference under the CFMLA.

B. The Respondent Did Not Discriminate or Retaliate Against The Complainant Because He Exercised His Right to A Medical Leave Under The Connecticut Family And Medical Leave Act.

The complainant in the instant case contends that the respondent discharged him in retaliation for his taking a leave pursuant to the CFMLA. Where the complainant alleges that the employer has discriminated against him or her for exercising his or her rights under the Family and Medical Leave Act, and there is no direct evidence of the employer's intent, the *McDonnell Douglas Corp.* burden-shifting framework applies. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803 93 S. Ct 1817, 36 L.Ed.2d 668 (1973); *Cendant Corp. v. Commissioner of Labor*, 583 Conn. 16, 583 A. 2d (2005); *Jarmilik v. Yale University*, FMLA 2006-76 (10/22/08).

First, the complainant must establish, by a preponderance of the evidence, a *prima facie* case of retaliation. To establish a prima facie case of retaliation, the complainant must prove that (1) he or she exercised his or her rights under the CFMLA; (2) the respondent took an adverse employment action against him or her; and (3) a causal connection exists between the exercise of rights under the CFMLA and the respondent's adverse employment action. If the complainant meets the initial burden, the burden shifts to the respondent to articulate some legitimate, nondiscriminatory reason for taking the adverse employment action. Once the respondent offers a nondiscriminatory reason for its actions, the complainant must prove that the reason provided by the respondent is merely a pretext and that his or her exercise of rights under the CFMLA was the real reason for the adverse employment action. See *King*

v. Preferred Technical Group, 166 F.3d 887, 892-893 (7th Cir. 1999); *Jamilik v. Yale University, supra.*

In the instant case, the complainant has established that he exercised his rights under CFMLA. The complainant requested a leave and was granted that leave by the respondent. The complainant has further established that the respondent took an adverse employment action by terminating his employment. That position elimination occurred immediately following the complainant's return from his CFMLA leave. Close temporal proximity between the complainant's exercise of CFMLA rights and the adverse employment action can reasonably lead to an inference of retaliation. See *Smith v. Diffee Ford Mercury Inc.*, 298 F3d, 961 (10th. Cir. 2002). However, a mere coincidence of timing can rarely be sufficient to establish a prima facie case of retaliatory discharge. See *Smith v. Allen Health Systems*, 302 F.3d 827 (8th Cir. 2002); *Lewandowski v. The Hartford*, *supra.*

The evidence in the instant case shows that the respondent had been reviewing sales figures for a few months prior to the complainant's leave under the CFMLA. The upper management team generally held their meetings at the beginning of the month. When the sales figures for July 2008 were reviewed on August 7, 2008, senior management decided to eliminate the complainant's position. They made this decision prior to the complainant's leave from August 28, 2008, through September 7, 2008. The respondent waited to effectuate this decision until after it reviewed the August sales in early September 2008. The respondent notified the complainant of the position elimination on September 9, 2008. On the basis of the evidence in the record, the hearing officer finds that the timing of the complainant's termination upon his return from leave under the CFMLA was coincidental.

Even if the complainant has established a *prima facie* case, the employer has successfully rebutted the presumption of discrimination by offering nondiscriminatory reasons for the discharge. Specifically, the respondent testified that it eliminated the complainant's position because its sales were not meeting the projections in its budget and sales were on a downward trend. The respondent further testified that it reviewed the employees on its payroll to cut costs and determined that the complainant had the least seniority and least systems and product knowledge of the sales managers and trainers. The respondent chose to eliminate the sales supervisor position rather than any sales representative positions because the complainant's position was mostly administrative and could be absorbed by other employees, while the representatives handled the calls it received for potential sales. The respondent knew these calls would increase during the fourth quarter, its busiest season, and hoped that the calls would result in increased sales.

The complainant has the burden of presenting evidence that the proffered reasons are false and a pretext for discrimination, which permits the trier of fact to infer intentional discrimination. See *St. Mary Honor Center v. Hicks*, 509 U.S. 502, 507 (1993). To carry the burden of proof, the employee must show that the proffered justification for the termination is not worthy of credence. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000). In the instant case, the complainant did not prove that any of the respondent's stated reasons were false. The complainant maintains that the respondent's

claim that it discharged the complainant for economic reasons is not credible because it did not implement a wage freeze and it instituted mandatory overtime for sales representatives. However, the respondent explained that it chose not to reduce wages because it did not wish to demoralize its employees. The respondent also credibly testified that it required its sales representatives to work overtime because it continued to maintain a high volume of calls even when the sales were not meeting the projections in its budget. The respondent invested in overtime hours in an attempt to increase its sales figures and eliminate the need to make further staff reductions. Having reviewed the evidence in this case, the hearing officer cannot conclude that the employer retaliated against the complainant for taking a CFMLA leave.

In so ruling, the hearing officer notes the complainant's allegations that he was discharged because of his age, his heritage and his alleged discovery of unethical activity. The hearing officer's jurisdiction is limited to whether the respondent terminated the complainant because he exercised his rights under the CFMLA. If in fact the respondent terminated the complainant for these other reasons, it supports the hearing officer's conclusion that the complainant was not discharged because he exercised his rights under the CFMLA.

IV. CONCLUSION

The complainant has failed to demonstrate that the respondent interfered with or restrained the exercise of his rights under the CFMLA pursuant to General Statutes § 31-51pp(a)(1) and Regs., Conn. State Agencies §§ 31-51qq-25(a)(1) and (b).

The complainant has not met his burden of proving that the respondent discharged or discriminated against him in retaliation for his exercising his right to CFMLA leave pursuant to General Statutes § 31-51pp(a)(2) and Regs., Conn. State Agencies §§ 31-51qq-25(a)(2) and (c). Therefore, the complainant is not entitled to redress.

Ronald Coleman

Ronald Coleman, Designated Hearing Officer

The parties are advised of their right to file an exception and present a brief and/or oral argument to the Commissioner before a final decision is issued. The deadline for filing an exception is January 21, 2011.

Mail any exceptions and briefs to: Commissioner of Labor, 200 Folly Brook Boulevard, Wethersfield, Connecticut, 06109. Refer to the docket number in any correspondence submitted.