STATE OF CONNECTICUT
Department of Labor
36 Wolcott Hill Road
Wethersfield, CT 06109
Telephone: (860) 566-3045 Fax: (860) 263-6977

COMPLAINANT

HOLLY DICK
44 West Norwich Road
Norwalk, CT 06850

RESPONDENT

THE CENTER FOR ADVANCED PEDIATRICS
Attn: Marianna Meccariello, H.R. Mgr.
761 Main Avenue
Norwalk, CT 06851

COMPLAINANT ATTORNEY

SABATINI AND ASSOCIATES, LLC
Attn: James V. Sabatini, Esq.
One Market Square
Newington, CT 06111-2992

RESPONDENT'S ATTORNEY

ROBERT NOONAN & ASSOCIATES
Attn: Jessica Z. Wragg, Esq.
6 Way Road, Suite 301
Middlefield, CT 06455

CASE NO.: FM2013-007

FINAL DECISION

Pursuant to 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. I affirm and incorporate the Proposed Decision of the hearing officer issued on June 30, 2017, (a copy of which is attached hereto) as my final decision.

Scott D. Jackson
Commissioner

Enc.

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CERT. NO.: 7009 2250 0004 2207 2682

CASE NO.: FM2013-007

DATE MAILED: June 30, 2017

PROPOSED FINAL DECISION

HOLLY DICK V. THE CENTER FOR ADVANCED PEDIATRICS

CASE NO.: FM2013-007

HEARING DATE: May 17, 2017

HEARING LOCATION: 38 Wolcott Hill Road, Wethersfield, Connecticut 06109

APPEARANCES:

For the complainant:	Attorney James V. Sabatini
For the respondent employer:	Attorney Jessica Z. Wragg

CASE HISTORY

On March 22, 2013, Holly Dick, the complainant, filed a complaint with the State of Connecticut, Division of Wage and Workplace Standards (hereinafter referred to as "DWWS"), alleging that her former employer, the Center for Advanced Pediatrics (hereinafter referred to as "respondent"), violated the provisions of General Statutes §§ 31-51kk, et. seq., An Act Concerning Family and Medical Leave from Employment (hereinafter referred to as "CFMLA").

On March 27, 2013, DWWS mailed a letter to the respondent notifying it of the filing of the complaint and providing the respondent with the opportunity to respond to the complainant within twenty-one (21) calendar days. On April 18, 2013, DWWS granted the respondent's request for an extension of time to file a response, to May 9, 2013. On May 9, 2013, Attorney Jessica Z. Wragg entered an appearance and answer on behalf of the respondent. On June 7, 2013, Attorney James V. Sabatini entered an appearance on behalf of the complainant. On July 29, 2013, Attorney Sabatini filed a response to the respondent's answer.

On October 12, 2016, DWWS issued a decision dismissing the complaint based on the complainant's failure to establish a CFMLA violation. The decision also advised the complainant of her right to request a hearing before the Labor Commissioner. On October 27, 2016, the complainant filed a request for a hearing before the Labor Commissioner. On February 22, 2017, Commissioner Scott D. Jackson mailed a Notice of Designation of Hearing Officer to the parties, designating Attorney Danielle B. Angliss as the hearing officer. On March 13, 2017, the hearing officer mailed a Notice of Contested Case Hearing and Pre-Hearing Order to the parties, notifying them that a hearing would be held at 38 Wolcott Hill Road in Wethersfield, Connecticut at 9:00 a.m on March 28, 2017. On March 17, 2017, the hearing officer granted the complainant's postponement request. On March 23, 2017, the hearing officer mailed a Notice of Contested Case Hearing and Pre-Hearing Order to the parties, notifying them that a hearing would be held at 38 Wolcott Hill Road in Wethersfield, Connecticut at 10:30 a.m. on May 17, 2017. On May 17, 2017, the hearing was held at the Connecticut Labor Department office located at 38 Wolcott Hill Road, Wethersfield, Connecticut before the designated hearing officer.

FINDINGS OF FACT

1. The complainant was hired by the respondent as a part-time medical records clerk in 2003. The complainant's position was subsequently changed to a full-time medical records clerk. Since 2012, the complainant was supervised by Juan Cuellar.

2. On January 25, 2013, the complainant informed the respondent's part-time human resources representative, Jodi Sacchetta, that she was requesting leave under the CFMLA to care for her ill parents.

3. On or around January 29, 2013, Sacchetta provided the complainant with a Notice of Eligibility and Rights & Responsibilities, which advised the complainant that she was eligible for CFMLA leave. This notice also stated that the complainant was required to provide a medical certification to support her leave request on or before February 18, 2013.

4. On or around February 12, 2013, the complainant left work early to bring her mother to the doctor, because the visiting nurse reported that she was not feeling well. The complainant brought to the physician's visit a copy of the Certification of Health Care Provider for Family Member's Serious Health Condition for her mother's physician, Dr. Negus, to complete.

5. On February 15, 2013, Sacchetta separated from the respondent's employment. The respondent subsequently hired Marianna Meccariello as a human resources manager. Meccariello discovered the complainant's Notice of Eligibility and Rights & Responsibilities form on top of Sacchetta's former desk.

6. On or around February 25, 2013, the complainant submitted the completed Certification of Health Care Provider to Meccariello.

7. On February 27, 2013, Meccariello sent an email to the complainant requesting that she meet with Meccariello to discuss whether she was requesting intermittent leave or continuous leave.

8. On March 5, 2013, Meccariello again asked the complainant to meet with her to discuss her CFMLA request, since the complainant had not responded to Meccariello's February 27 email. Although Meccariello asked the complainant to provide a schedule of the dates she expected to be absent, the complainant responded that she was not aware of the specific dates that she might be absent due to the nature of her parents' illnesses. Meccariello advised the complainant that the respondent required advanced notice of her absences in order to have adequate coverage for the respondent's call center, with the exception of medical emergencies.

9. The complainant made personal telephone calls on two occasions using the respondent's business telephone, which calls concerned her mother's illness. One of these phone calls occurred prior to the complainant's requesting CFMLA leave.

10. In order to use intermittent CFMLA leave, the complainant was required to notify her supervisor, who would advise Meccariello. Cuellar required Meccariello's permission to deny a request for CFMLA leave. Mecariello and Cuellar did not discuss the complainant's request for or use of CFMLA leave.

11. The complainant was unaware whether she used any intermittent CFMLA leave prior to her discharge on March 6, 2013.

12. Prior to March 5, 2013, Cuellar overheard the complainant engaging in work calls and believed these calls were personal in nature. He verbally warned her twice against conducting personal calls at her desk.

13. The respondent's Use of Phone and Mail Systems policy provides that its telephones are "reserved for business use only." An employee is permitted to keep a personal cell phone in

his or her pocket, sound off, and may return calls on break time "unless it is an urgent situation."

14. The complainant did not use her personal cell phone while at work because she did not have a signal while in the respondent's workplace.

15. The complainant did not report to the respondent's human resources department that she overheard Cuellar or any other employee making personal calls on the respondent's business line while at work. Meccariello had no knowledge of this activity.

16. On March 5, 2013, Cuellar directed the complainant to scan a patient's "school forms" into the respondent's electronic records portal. The complainant told Cuellar that she was working on transferring records for another patient because the patient's mother had requested the records for an appointment with another physician's office on March 6, 2013. Cuellar told the complainant that the transfer could wait, and again directed her to scan the school forms.

17. The complainant worked on transferring records, and did not scan the school forms before she left work on March 5, 2013. The school forms were approximately four or five pages in length. The complainant left the school forms with a note for her coworker, Barbara, to scan the forms.

18. Prior to the complainant's leaving work on March 5, Cuellar learned that the school forms were not complete and became upset. Cuellar provided a written statement to the respondent that maintained the complainant adopted a "nasty" attitude when he inquired whether the scanning of the school forms was completed.

19. In March 2013, Cuellar had provided some training to the complainant on scanning documents into the respondent's electronic records portal because he anticipated that she would perform this duty when Cueller was out of the office on his honeymoon.

20. During the evening of March 5, 2013, Cuellar told Meccariello that the complainant disregarded his instructions to scan the school forms. During this conversation, Cuellar recommended to Meccariello that the respondent discharge the complainant. Meccariello prepared the termination paperwork based on the incidents described by Cuellar. In doing so, she did not review the complainant's personnel file.

21. On March 6, 2013, Cuellar and Meccariello met with the complainant when she arrived at work. They provided her with a memorandum that stated she was discharged because she had disregarded Cuellar's directives about making or receiving personal phone calls and scanning the school files on March 5.

22. At the time the complainant was discharged, she did not make any statements regarding her discharge or the reasons that the respondent gave for her discharge.

23. The respondent's progressive discipline policy provides that respondent will "normally" take the following four steps, in that order: (1) verbal warning, (2) written warning, (3) suspension without pay, or (4) termination of employment. However, the respondent will "look at the severity of the problem and the frequency of occurrence to determine which step to take" and in "very serious situations" may suspend or discharge an employee without following the usual progressive discipline steps.

24. In 2012, the respondent issued the complainant a written warning for displaying a "snippy" attitude when the office manager asked her to assist a new employee. The complainant was focused on another task and believed that she was being asked to perform managerial duties.

25. The respondent also warned the complainant about her attitude in prior performance reviews.

26. The respondent issued a verbal warning and a written warning to another employee for negligently failing to maintain the refrigerator storing the vaccines at the correct temperature, which occurred after the complainant's discharge.

PROPOSED DECISION

I. PROVISIONS OF LAW

Sec. 31-51*ll*. Family and medical leave: Length of leave; eligibility; intermittent or reduced leave schedules; substitution of accrued paid leave; notice to employer. (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;

(c) (1) Leave under subparagraph (A) or (B) of subdivision (2) of subsection (a) of this section for the birth or placement of a son or daughter may not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer agree otherwise. Subject to subdivision (2) of this subsection concerning an alternative position, subdivision (2) of subsection (f) of this section concerning the duties of the employee and subdivision (5) of subsection (b) of section 31-51mm concerning sufficient certification, leave under subparagraph (C) or (D) of subdivision (2) of subsection (a) or under subsection (i) of this section for a serious health condition may be taken intermittently or on a reduced leave schedule when medically necessary. The taking of leave intermittently or on a reduced leave schedule pursuant to this subsection shall not result in a reduction of the total amount of leave to which the employee is entitled under subsection (a) of this section beyond the amount of leave actually taken.

(f) (2) In any case in which the necessity for leave under subparagraph (C), (D) or (E) of subdivision (2) of subsection (a) or under subsection (i) of this section is foreseeable based on planned medical treatment, the employee (A) shall make a reasonable effort to schedule the

treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse or parent of the employee, as appropriate; and (B) shall provide the employer with not less than thirty days' notice, before the date the leave is to begin, of the employee's intention to take leave under said subparagraph (C), (D) or (E) or said subsection (i), except that if the date of the treatment requires leave to begin in less than thirty days, the employee shall provide such notice as is practicable.

Sec. 31-51pp. Family and medical leave: Prohibited acts, complaints, rights and remedies. (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 other manner discriminate, against any individual for opposing any practice made unlawful by said sections or because such employee has exercised the rights afforded to such employee under said sections.

(c) (1) It shall be a violation of sections 31-51kk to 31-51qq, inclusive, for any employer to deny an employee the right to use up to two weeks of accumulated sick leave or to discharge, threaten to discharge, demote, suspend or in any manner discriminate against an employee for using, or attempting to exercise the right to use, up to two weeks of accumulated sick leave to attend to a serious health condition of a son or daughter, spouse or parent of the employee, or for the birth or adoption of a son or daughter of the employee. For purposes of this subsection, "sick leave" means an absence from work for which compensation is provided through an employer's bona fide written policy providing compensation for loss of wages occasioned by illness, but does not include absences from work for which compensation is provided through an employer's plan, including, but not limited to, a short or long-term disability plan, whether or not such plan is self-insured.

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

> (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 attempts 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 of 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....

Section 31-51qq-27 of the Regulations of Connecticut State Agencies provides, in relevant part, that:

(a) An employee shall provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on... planned medical treatment for a serious health condition of the employee or a family member. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave shall be required to begin, a change in circumstances, or a medical emergency, such notice as is practicable must be given.

(b) "Such notice as is practicable" means notice as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. For foreseeable leave where it is not possible to give as much as 30 days notice, "such notice as is practicable" ordinarily would mean at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee.

(c) An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may state only that leave is needed for an expected birth or adoption for example. The employer shall inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave.

(e) When planning medical treatment, the employee shall consult with the employer and make reasonable effort so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employers prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employer and the employee. If an employee who provides notice of the need to take FMLA leave on an intermittent basis for planned medical treatment neglects to consult with the employer to make a reasonable attempt to arrange the schedule of treatments so as not to unduly disrupt the employer's operations, the employer may initiate discussions with the employee and require the employee to attempt to make such arrangements subject to the approval of the health care provider.

Section 31-51qq-28 of the Regulations of Connecticut State Agencies provides, in relevant part, that:

> (a) When the approximate timing of the need for leave is not foreseeable, an employee shall give such notice to the employer of the need for FMLA leave as is practicable under the facts and circumstances of the particular case. It is expected that an employee shall give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances of the particular case where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition,

written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

II. PARTIES' CONTENTIONS/ISSUE STATEMENT

The complainant contends that the respondent interfered with the exercise of her rights under the Connecticut Family and Medical Leave Act, in violation of General Statutes §§ 31-51kk, et seq., and that the respondent has discharged her for exercising her rights under the CFMLA.

The respondent denies that it interfered with the complainant's CFMLA rights and denies that it discharged her because she applied for CFMLA leave.

The issues raised in this case are whether the respondent violated the CFMLA because it interfered with the complainant's exercise of her rights under the CFMLA, and/or discharged her for exercising her right to leave under the CFMLA.

III. DISCUSSION

A. The Respondent Did Not Interfere With the Complainant's Exercise of The Rights Afforded Her Under Connecticut's Family and Medical Leave Act.

To succeed on a claim of FMLA interference, a complainant must establish: 1) that she is an eligible employee under the FMLA; 2) that the respondent is an employer as defined by the FMLA; 3) that she was entitled to take leave under the FMLA; 4) that she gave notice to the respondent of her intention to take leave; and 5) that she was denied benefits to which she was entitled under the FMLA. See *Graziadio v. Culinary Institute of America*, 817 F.3d 415 (2d Cir. 2016). If an employer interferes with an employee's exercise of his or her rights under the Act, it violates the CFMLA, regardless of the employer's intent. See *Cendant Corp. v. Commissioner of Labor*, 276 Conn. 16, 883 A.2d 789 (2005).

The record reveals that the complainant worked for the respondent as a medical records clerk from 2003, until she was discharged on March 6, 2013. It is undisputed that the respondent granted the complainant's January 25, 2013 request for intermittent leave to care for her ill parents under the CFMLA, and that it allowed her an additional week to submit the required certification from her parents' health care provider on February 25, 2013. At the May 17, 2017 hearing before the hearing officer, the complainant testified that she did not provide the respondent with a schedule of the dates that she might need leave because she anticipated using leave when other family members were unavailable to care for her parents, or to attend any physician's appointments. The complainant could not recall whether she used any CFMLA leave, but testified that she was "denied" leave by her supervisor, Juan Cuellar, on one occasion approximately a week and a half prior to the complainant's discharge on March 6, 2013. In that instance, Cuellar allegedly advised her that he required at least a week's notice prior to her using leave.

However, the complainant's March 19, 2013 CFMLA complaint does not mention any denial of leave, although it contains a timeline of events from January, 2013, through March, 2013, and

she admitted she did not complain to Meccariello about any alleged denial of CFMLA leave. Upon examination by the hearing officer, the complainant testified she advised Cuellar that she "maybe" was going to need to go to the hospital to check on her mother's status, but that she determined approximately an hour later that her presence was not required after the physician returned her phone call. Therefore, the record supports that the complainant did not use CFMLA leave because she did not require it. Moreover, the complainant admitted that Cuellar had allowed her to leave work early on other occasions to attend to her parents, although it was prior to the date she applied for CFMLA.

Moreover, to the extent that the respondent's human resources representative, Maria Meccariello, requested that the complainant provide advanced notice of her need for leave, except with regard to medical emergencies, Meccariello was permitted to do so. Sections 31-51qq-27 and 31-51qq-28 of the Regulations of Connecticut State Agencies provide that an employee is expected to provide thirty-days' notice if the need for leave is foreseeable, or notice within one or two working days of learning of the need for leave if it is not possible to give thirty-days' days notice, except in extraordinary circumstances where such notice is not feasible. Therefore, there is no evidence that the respondent interfered with the complainant's use of intermittent leave under the CFMLA.

B. The Respondent Did Not Retaliate Against the Complainant Because She Exercised Her Right to Leave Under Connecticut's Family and Medical Leave Act.

Retaliation claims under the FMLA are analyzed under the burden-shifting test set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See Potenza v. City of New York,* 365 F.3d 165, 168 (2d Cir. 2004). To establish a *prima facie* case of FMLA retaliation, the complainant must establish that: (1) she exercised rights protected under the FMLA; 2) she was qualified for her position; 3) she suffered an adverse employment action; and 4) the adverse employment action occurred under circumstances giving rise to an inference of retaliatory intent. See *Graziadio v. Culinary Institute of America,* supra at 429 (Internal citations omitted); *Cendant Corp.*, supra. If the complainant makes out a *prima facie* case, the respondent must demonstrate a legitimate, non-discriminatory reason for its actions; if the respondent does so, the complainant must then show that the proffered explanation is pretextual. *See Van Zant v. KLM Royal Dutch Airlines,* 80 F.3d 708, 714 (2d Cir.1996).

At the May 17, 2017 hearing, the complainant testified that she was provided written notice of her discharge on March 6, 2013, that she was not provided any additional verbal explanation. The March 6, 2013 discharge notice states that the complainant was counseled for conducting personal calls while at work on March 4, 2013, and that she failed to scan documents into the respondent's computer "portal" after Cuellar directed her to do so on March 5, 2013, and that her employment was terminated as a result of the "above incidents." The complainant admitted that she did not scan the documents, and that she received personal calls from her mother's physician on the respondent's business telephone line. However, she maintains that these were pretextual reasons for her discharge.

Since it is undisputed that the complainant exercised her rights under the CFMLA, and that she was subject to an adverse employment action approximately one week after submitting a medical certificate to support her request for intermittent leave, the complainant has established a *prima*

facie case of retaliation. See *King v. Preferred Technical Group*, 166 F.3d 887, 893 (7th Cir. 1999)("close proximity of discharge to plaintiff's taking protected leave sufficient to establish *prima facie* retaliation case"); *Barta v. Yale New Haven Hospital*, FMLA 2007-2 (9/23/08). The next determination is whether the complainant has met her burden of establishing that the respondent's stated legitimate, non-discriminatory reason for her discharge was, in fact, pretextual.

"A plaintiff may prove [retaliation] by demonstrating weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate, nonretaliatory reasons for its action. From such discrepancies, a reasonable juror could conclude that the explanations were a pretext for a prohibited reason." See *Zann Kwan v. Andalex Grp. LLC,* 737 F.3d 834, 846 (2d Cir. 2013); *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 147 (2000) ("Proof that the defendant's explanation is unworthy of credence is...one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive....[O]nce the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.").

However, the complainant is obliged to produce "not simply some evidence, but sufficient evidence to support a rational finding that the legitimate, non-discriminatory reasons proffered were false, and that more likely than not discrimination was the real reason for the employment action." *Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 (2d Cir. 2000)(alterations and internal quotation marks omitted). Temporal proximity between protected activity and an adverse employment action, alone, is insufficient to establish pretext. See *El Sayed v. Hilton Hotels Corp.*, 627 F.3d 931, 933 (2d Cir. 2010)("[W]ithout more, ... temporal proximity is insufficient to satisfy appellant's burden to bring forward some evidence of pretext."); *Ben-Levy v. Bloomberg, L.P.*, 518 F. App'x 17, 19 (2d Cir. 2013)(applying *El Sayed* rule to FMLA case). FMLA is not a shield to protect employees from legitimate disciplinary action by their employers if their performance is lacking in some manner unrelated to their FMLA leave. See *Sista v. CDC Ixis North America, Inc.*, 445 F.3d 161 (2d Cir. 2006)(internal citation omitted).

At the May 17, 2017 hearing, the complainant testified that the respondent allowed her to use its business line to receive telephone calls regarding her parents' medical care, and that she was unable to use her personal cell phone at her desk because it did not receive a signal. However, Meccariello testified, and the respondent's written policy provides, that the respondent's "telephones are reserved for business use only." The complainant further testified that Cuellar verbally warned her at least twice about making personal telephone calls on the respondent's business line, but maintained that his complaints concerned business-related telephone calls that he mistakenly believed were personal in nature.[1] The complainant further maintained that she

[1]By contrast, in her March 22, 2013 CFMLA complaint, the complainant alleged that Cuellar warned her about personal calls she received regarding her parents' medical care.

received only one call regarding her mother's care after she applied for CFMLA[2], but did not testify that this call was the basis for Cuellar's complaints.

Preliminarily, the complainant has offered insufficient evidence to establish that her receiving telephone calls regarding her parents' care constituted protected CFMLA leave, such that her being disciplined for this conduct constituted retaliation. Even we recognized an employee's right to take intermittent leave at the workplace to receive personal calls related to the care of a parent with a serious health condition, we are unaware of any provision that obligates the respondent to encumber its own business lines for such matters. Furthermore, it is undisputed that Cuellar actually believed the complainant was misusing the respondent's telephone.[3]

More important, the primary reason for the complainant's discharge was her failure to scan school forms as directed by Cuellar on March 5, 2013. Meccariello testified that Cuellar asked for the complainant to be discharged immediately after he discovered that the complainant left the scanning for a coworker to perform, and instead transferred other patient records. Although the complainant testified that she had the discretion to prioritize the transfer request since the records were needed the following day, she admitted Cuellar specifically told her that the transfer "could wait" and to work on the school forms.[4] The complainant further admitted that the school forms were only four or five pages, and thus could have been scanned prior to her leaving for the day. While the complainant testified that she believed Cuellar prevented a coworker from scanning the school forms after she left, in order to "set up" the complainant for discharge, the complainant admitted she was unaware whether the coworker actually scanned the school forms.[5]

A respondent's treating the complainant less favorably than a similarly situated employee is a recognized method of raising an inference of discrimination. See *Ruiz v. Cnty. of Rockland,* 609 F.3d 486, 493 (2d Cir. 2010). A complainant must show that he was "similarly situated in all

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[2]The complainant testified at one point that she received only two incoming calls on the respondent's business telephone, which were from a physician and from a family member related to her mother's care. However, her other testimony seems to indicate that she received more than two personal calls.

[3] Although the complainant testified that Cuellar and coworkers took personal calls at work, we do not credit her testimony since Meccariello testified, and the complainant admitted, that the complainant did not raise this issue with Meccariello. Moreover, there is insufficient evidence in the record whether these calls were allegedly received on the employee's personal cell phone, or the employer's business line.

[4]In her CFMLA complaint, the complainant alleged that the transfer forms were "overdue;" however, she testified at the May 17, 2017 hearing that they were not overdue.

[5]To the extent the complainant testified that her training on the scanner was minimal, there is no evidence she asked anyone for assistance, including Cuellar. The fact that Cuellar trained the complainant on scanning also tends to support that he was not retaliating against her, since he anticipated the complainant would cover some of his job responsibilities during his honeymoon.

material respects to the individuals with whom [he] seeks to compare [himself]." See *Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir. 2000)(internal quotation omitted).

> What constitutes `all material respects' . . . varies somewhat from case to case and. . . must be judged based on (1) whether the plaintiff and those he maintains were similarly situated were subject to the same workplace standards and (2) whether the conduct for which the employer imposed discipline was of comparable seriousness.

Id. at 40. This standard "requires a reasonably close resemblance of the facts and circumstances of plaintiff's and comparator's cases, rather than a showing that both cases are identical." *Id.* The determination that two acts are of comparable seriousness requires an examination of the acts, and the surrounding context, in order to avoid "a scenario where evidence of favorable treatment to an employee who has committed a different but more serious . . . offense, could never be relevant to prove discrimination." *Id.;* See also *Padilla v. Harris,* 285 F. Supp. 2d 263, 270 (D. Conn. 2003).

The complainant argues that the respondent's discriminatory intent is evidenced by its misapplication of its progressive discipline policy, and its failure to discharge another employee whom the complainant alleges was similarly situated. Although the respondent's progressive discipline policy provides that in "most cases," an employee will receive a verbal warning, a written warning, and a suspension prior to termination, the respondent expressly reserved the right to apply progressive discipline "at it's (sic) discretion" based on the severity and frequency of the conduct. Moreover, the complainant admitted she received two verbal warnings shortly prior to her discharge; that she was issued a written warning for her insubordinate attitude during the prior year; and that she was warned about her attitude in several annual performance evaluations. Thus, to the extent that the respondent decided to discharge the complainant for her admitted insubordinate conduct on March 5, without first suspending her, we cannot find that the respondent's progressive discipline policy required a different result or that it was discriminatorily applied to the complainant.

Although the complainant maintains that another employee's misconduct posed a more serious threat to patient safety, we do not find that the complainant and the unidentified employee were similarly situated. At the May 17, 2017 hearing, Meccariello testified that she was aware of one employee who had received a verbal warning for failing to monitor the temperature of the respondent's refrigerator that contained the respondent's vaccines. Meccariello further testified that this individual received a written warning after the respondent again determined that the individual was negligent in monitoring the refrigerator.

Nevertheless, we find that an employee's negligence in performing his or her job duties is distinguishable from an employee's deliberate decision to substitute his or her own judgment after receiving a specific directive, and later adopting an attitude when questioned. Moreover, the complainant had already received a written warning related to an respondent directive, and two verbal warnings for what Cuellar perceived as repeated failures to follow the respondent's policy on personal telephone calls. Therefore, the complainant and the alleged comparator were not similarly situated. The complainant has failed to meet her burden to establish, by a

preponderance of the evidence, that the respondent's proffered reasons for her discharge were pretextual or that the respondent retaliated against her for exercising any right under the Connecticut Family and Medical Leave Act.

IV. CONCLUSION

The complainant has failed to demonstrate that the respondent interfered with or restrained the exercise of her rights under the CFMLA pursuant to General Statutes § 31-51pp(a)(1); or that the respondent discharged or discriminated against her in retaliation for exercising her right to CFMLA pursuant to General Statutes § 31-51pp(a)(2). Therefore, the complainant is not entitled to redress, and the hearing officer will not conduct a further hearing concerning whether the complainant incurred damages.

Attorney Danielle B. Angliss
Designated Hearing Officer

DBA:dm

preponderance of the evidence, that the respondent's proffered reasons for her discharge were pretextual or that the respondent retaliated against her for exercising any right under the Connecticut Family and Medical Leave Act.

IV. CONCLUSION

The complainant has failed to demonstrate that the respondent interfered with or restrained the exercise of her rights under the CFMLA pursuant to General Statutes § 31-51pp(a)(1); or that the respondent discharged or discriminated against her in retaliation for exercising her right to CFMLA pursuant to General Statutes § 31-51pp(a)(2). Therefore, the complainant is not entitled to redress, and the hearing officer will not conduct a further hearing concerning whether the complainant incurred damages.

Attorney Danielle B. Angliss
Designated Hearing Officer

DBA:dm

I certify that a copy of this decision was mailed via certified mail to all parties of record. A copy of the decision was also mailed to: Office of Program Policy, Attn: Erika Foster, Staff Attorney 3, 200 Folly Brook Boulevard, Wethersfield, CT 06109

Attorney Danielle B. Angliss
Designated Hearing Officer

DBA:dm

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 July 18, 2017.

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.