CONNECTICUT DEPARTMENT OF LABOR
Partner of the American Job Center Network

Employment Security Board of Review

Susan Garcia Nofi, Chairperson
Domenique Thornton, Board Member
David Kiner, Board Member

April 15, 2019

Kurt Westby
Commissioner
Connecticut Department of Labor
200 Folly Brook Boulevard
Wethersfield, CT 06109

Re: *Howard Elliot v. Stamford Hospital, FMLA Case No. FM 2016-011*

Dear Commissioner Westby,

Enclosed please find my proposed decision in the matter of *Laura Howard Elliot v. Stamford Hospital,* FMLA Case No. FM 2016-011, along with the case file and the recordings of the hearings.

By copy of this letter, I am advising the parties to the above referenced matter that, pursuant to Regs., Conn. State Agencies, Section 31-1-7, each party adversely affected by the proposed decision has the right to file an exception and present a brief and/or oral argument to you before you render the final decision. I am directing the parties that the deadline to file an exception or brief, or request oral argument is April 29, 2019, two weeks from the date on which this document is mailed.

Very truly yours,

Virginia C. Foreman, Esq.
Designated Hearing Officer

cc: Attorney Erika Foster, Legal Division

STATE OF CONNECTICUT
DEPARTMENT OF LABOR

DOCKET NO. FM 2016-011

DATE MAILED: April 15, 2019

COMPLAINANT

LAURA HOWARD-ELLIOTT
30 Boylston Street
Milford, CT 06410

RESPONDENT

THE STAMFORD HOSPITAL
Attn: Human Resources
30 Shelburne Road
Stamford, CT 06904

RESPONDENT'S ATTORNEY

JACKSON LEWIS, P.C.
Attn: Beverly W. Garofalo, Esq.
90 State House Square, 8th Floor
Hartford, CT 06103

PROPOSED FINAL DECISION

LAURA HOWARD-ELLIOT v. THE STAMFORD HOSPITAL

CASE NO.: FM 2016-011

HEARING DATES: November 1, 2018; November 27, 2018; January 3, 2019

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

APPEARANCES:

For the complainant:	Self-represented
For the respondent employer:	Attorney Beverly Garofalo
	Attorney Allison P. Dearington

CASE HISTORY

On April 26, 2016, Laura Howard-Elliot, 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, Stamford Hospital (hereinafter referred to as "respondent"), violated the provisions of General Statutes Sections 31-51kk, et. Seq., An Act Concerning Family and Medical Leave from Employment (hereinafter referred to as "CFMLA").

On May 3, 2016, 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 May 20, 2016, the respondent's attorney, Beverly Garofalo, entered an appearance on behalf of the respondent and on June 22, 2016, filed a response to the complainant's complaint. On July 14, 2016, the complainant filed a rebuttal to the respondent's response. On

February 20, 2018, DWWS sent the respondent a Request for Information. On April 25, 2018, the respondent replied to this Request.

On May 24, 2018, DWWS issued a decision notifying the parties of its determination that the respondent did not violate the CFLMA, and that it had no reason to believe that the respondent (1) interfered with, restrained or denied the exercise of, or the attempt to exercise any rights provided under the Connecticut Family and Medical Leave Act; (2) discharged or caused to be discharged, or in any manner discriminated against any individual for opposing any practice made unlawful by the Act or because such employee has exercised the rights afforded to such employee under the Act; (3) violated any provision of the Act with respect to an eligible employee; or (4) discharged, or caused to be discharged, or in any manner discriminated against an eligible employee because such individual (A) has filed any charge, or has instituted or cause to be instituted any proceeding, under or related to the Act; (B) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under the Act; or (C) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under the Act. The decision advised the complainant of her right to request a hearing before the Labor Commissioner.

On June 13, 2018, pursuant to Section 31-51qq-44(e) of the Regulations of Connecticut State Agencies, the complainant filed a timely request for a contested case hearing.[1] On June 20, 2018, Commissioner Scott D. Jackson designated Attorney Virginia C. Foreman as the hearing officer and mailed notice to the parties. On October 19, 2018, the hearing officer mailed a Notice of a 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 10:00 a.m. on November 1, 2018. On November 1, 2018, the hearing was held at the Connecticut Labor Department office located at 38 Wolcott Hill Road, Wethersfield, Connecticut.

The hearing was continued to 10:00 a.m. on November 27, 2018 and 9:30 a.m. on January 3, 2019, and notice was mailed to all parties on November 5 and December 8, 2018. The continued hearings were held at the Connecticut Labor Department office located at 38 Wolcott Hill Road, Wethersfield, Connecticut, and concluded on January 3, 2019. The parties were permitted to file briefs in lieu of closing argument by February 4, 2019, and both parties submitted briefs.[2]

FINDINGS OF FACT

1. At all times relevant to this decision, the respondent, Stamford Hospital, was subject to CFMLA and the claimant was an eligible employee.

2. The complainant, Laura Howard-Elliot, worked as a treatment adherence case manager for the respondent.

3. The complainant was responsible for providing care to patients in the Ryan White HIV/AIDS program.

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[1]The complainant submitted a document entitled "Plaintiff's Motion for Reconsideration and Memorandum of Law in Support" which DWWS treated as a request for a contested case hearing.

[2] On April 3, 2019, the complainant filed a "motion to stay and abate." The hearing officer has no authority under Regs., Conn. State Agencies Section 31-1-1, through 31-1-9, to rule on this motion. The complainant will have the opportunity to file an exception to the Notice of Proposed Decision.

4. On or about December 16, 2015, the complainant informed Dr. Michael Parry, the Chair of Infectious Disease for the respondent, of an incident between the complainant and a coworker, Britt Berger. The complainant alleged that Berger had an outburst in a patient's room, in front of a patient and his wife [CB].

5. The complainant subsequently filed a complaint against Berger.

6. CB's spouse was a patient in the Ryan White program and passed away on December 21, 2015.

7. On December 21, 2015, Dr. Michael Parry notified the complainant via email that he had spoken with [CB] and her husband the previous day, and they need to be left out of any further discussion.

8. On December 26, 2015, the complainant filed a sexual harassment complaint against Dr. Parry.

9. On December 30, 2015, the respondent's senior human resources business partner, Evena Williams, notified the complainant that she had concluded her investigation and could not substantiate her claims.

10. The respondent maintains a photography policy, the purpose of which is to "outline the policy for photographing patients and staff anywhere on hospital grounds." The policy provides in relevant part that …requests for …videotaping/recording…must be approved.. "use attached consent form for photographing, videotaping, recording."

11. The policy also states, "In order to protect the privacy of our employees and patients, the use of cell phones or PDAs to take photographs for any purpose is strongly prohibited."

12. On or about January 5, 2016, the complainant went to CB's home. The complainant obtained a video of CB and sent the video to Williams via email.

13. On January 6, 2016, Williams notified the complainant that reaching out to CB and sharing a work-related document with her was highly inappropriate and she needed to cease communication with her.

14. On January 7, 2016, in response to the complainant's objection, Williams reiterated that the investigation of the complainant's complaint against Berger did not warrant patient involvement.

15. On January 11, 2016, the complainant requested disability paperwork from Claudia Petrino, the respondent's lead compensation and benefits partner. In response, Petrino sent the claimant a leave of absence request form, the leave of absence policy, and the medical certificate.

16. On the morning of January 25, 2016, the complainant met with the respondent's director of human resources, Salvatore Mancino, and director of security, Joe Hines. At the end of that meeting, the respondent suspended the complainant pending its investigation into videotaping the spouse of a recently deceased patient on her cell phone without a signed consent form and for sending the video via unsecured email to Williams.

17. The respondent's notes of the meeting between the complainant, Mancino, and Hines, reflect that when the complainant was asked whether she had obtained written approval, she first responded that she believed she had approval because the video was allegedly CB's idea. When Mancino pointed out that the photography policy included a written consent form, the complainant offered to visit CB and have her sign the consent forms.

18. Shortly after the meeting with Mancino, the complainant faxed consent forms she allegedly obtained from CB with a signature dated prior to the suspension meeting. The complainant did not produce the consent when she sent the video or in the meeting in which she was suspended.

19. On January 25, 2016, at 1:18 p.m., the complainant faxed a letter to Mancino stating that she "initiated disability papers" "a week ago."

20. On January 28, 2016, Mancino emailed Elaine Guglielmo, Senior Vice President of Human Resources and Organizational Development, stating the following: "As you know, I was working on the investigative document and concluding our investigation. What Evena and I have uncovered so far is of great concern as it relates to the video of the patient and the release forms.....It is primarily for those reasons that my inclination is that we terminate [the complainant's] employment."

21. On Friday, January 29, 2016, Mancino forwarded a draft "termination notice" to the respondent's attorney at the time, Michael J. Soltis.

22. On Friday, January 29, 2016, Mancino notified the complainant via email that the respondent had "concluded [the] investigation" and that Williams wanted to meet with the complainant on February 1, 2016 to discuss. The respondent intended to discharge the complainant at that meeting.

23. On February 1, 2016, the complainant called out sick. The complainant asked to reschedule the meeting for Friday, February 5, 2016.

24. On February 1, 2016, the respondent received the complainant's medical certification placing her out of work effective January 28, 2016. The complainant's doctor indicated that her medical condition commenced on that date.

25. On February 2, 2016, Mancino acknowledged receipt of the complainant's FMLA paperwork and advised her that the meeting originally scheduled for February 1, 2016, and then February 5, 2016, would be held once the complainant returned from her leave.

26. The complainant commenced a CFMLA leave of absence.

27. On April 5, 2016, the complainant's medical provider submitted paperwork releasing her to return to work effective April 18, 2016.

28. The complainant was not denied any benefits while on CFMLA.

29. When the complainant returned to work on April 18, 2016, the respondent terminated her employment.

30. The respondent terminated the complainant's employment because she took and distributed the video of its patient in violation of its policy; fabricated consent forms; and was untruthful and uncooperative in its investigation of her complaints against other personnel.

31. Another employee, staff nutritionist, Illaria St. Florentz, had taken a photo of an unrelated subject in 2012. This photograph was published in the respondent's Newsline, an internal marketing communication. The respondent determined St. Florentz's violation was not a dischargeable offense.

PROPOSED DECISION

I. PROVISIONS OF LAW

Sec. 31-51kk. Family and medical leave: Definitions. As used in sections 31-51kk to 31-51qq, inclusive:

(1) "Eligible employee" means an employee who has been employed (A) for at least twelve months by the employer with respect to whom leave is requested; and (B) for at least one thousand hours of service with such employer during the twelve-month period preceding the first day of the leave;

(2) "Employ" includes to allow or permit to work;

(3) "Employee" means any person engaged in service to an employer in the business of the employer;

(4) "Employer" means a person engaged in any activity, enterprise or business who employs seventy-five or more employees, and includes any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer and any successor in interest of an employer, but shall not include the state, a municipality, a local or regional board of education, or a private or parochial elementary or secondary school. The number of employees of an employer shall be determined on October first annually;

(5) "Employment benefits" means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits and pensions, regardless of whether such benefits are provided by practice or written policy of an employer or through an "employee benefit plan", as defined in Section 1002(3) of Title 29 of the United States Code;

(6) "Health care provider" means (A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the state in which the doctor practices; (B) a podiatrist, dentist, psychologist, optometrist or chiropractor authorized to practice by the state in which such person practices and performs within the scope of the authorized practice; (C) an advanced practice registered nurse, nurse practitioner, nurse midwife or clinical social worker authorized to practice by the state in which such person practices and performs within the scope of the authorized practice; (D) Christian Science practitioners listed with the First Church of Christ, Scientist in

Boston, Massachusetts; (E) any health care provider from whom an employer or a group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; (F) a health care provider as defined in subparagraphs (A) to (E), inclusive, of this subdivision who practices in a country other than the United States, who is licensed to practice in accordance with the laws and regulations of that country; or (G) such other health care provider as the Labor Commissioner determines, performing within the scope of the authorized practice. The commissioner may utilize any determinations made pursuant to chapter 568;

(7) "Parent" means a biological parent, foster parent, adoptive parent, stepparent or legal guardian of an eligible employee or an eligible employee's spouse, or an individual who stood in loco parentis to an employee when the employee was a son or daughter;

(8) "Person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives or organized groups of persons;

(9) "Reduced leave schedule" means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee;

(10) "Serious health condition" means an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, nursing home or residential medical care facility; or (B) continuing treatment, including outpatient treatment, by a health care provider;

(11) "Son or daughter" means a biological, adopted or foster child, stepchild, legal ward, or, in the alternative, a child of a person standing in loco parentis, who is (A) under eighteen years of age; or (B) eighteen years of age or older and incapable of self-care because of a mental or physical disability; and

(12) "Spouse" means a husband or wife, as the case may be.

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, such twenty-four-month period to be determined utilizing any one of the following methods: (A) Consecutive calendar years; (B) any fixed twenty-four-month period, such as two consecutive fiscal years or a twenty-four-month period measured forward from an employee's first date of employment; (C) a twenty-four-month period measured forward from an employee's first day of leave taken under sections 31-51kk to 31-51qq, inclusive; or (D) a rolling twenty-four-month period measured backward from an employee's first day of leave taken under sections 31-51kk to 31-51qq, inclusive.

(2) Leave under this subsection may be taken for one or more of the following reasons:

(A) Upon the birth of a son or daughter of the employee;

(B) Upon the placement of a son or daughter with the employee for adoption or foster care;

(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;

(D) Because of a serious health condition of the employee;

(E) In order to serve as an organ or bone marrow donor; or

(F) Because of any qualifying exigency, as determined in regulations adopted by the United States Secretary of Labor, arising out of the fact that the spouse, son, daughter or parent of the employee is on active duty, or has been notified of an impending call or order to active duty, in the armed forces, as defined in subsection (a) of section 27-103.

(b) Entitlement to leave under subparagraph (A) or (B) of subdivision (2) of subsection (a) of this section may accrue prior to the birth or placement of a son or daughter when such leave is required because of such impending birth or placement.

(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.

(2) If an employee requests intermittent leave or leave on a reduced leave schedule under subparagraph (C), (D) or (E) of subdivision (2) of subsection (a) or under subsection (i) of this section that is foreseeable based on planned medical treatment, the employer may require the employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that (A) has equivalent pay and benefits, and (B) better accommodates recurring periods of leave than the regular employment position of the employee, provided the exercise of this authority shall not conflict with any provision of a collective bargaining agreement between such employer and a labor organization which is the collective bargaining representative of the unit of which the employee is a part.

(d) Except as provided in subsection (e) of this section, leave granted under subsection (a) of this section may consist of unpaid leave.

(e) (1) If an employer provides paid leave for fewer than sixteen workweeks, the additional weeks of leave necessary to attain the sixteen workweeks of leave required under sections 5-248a and 31-51kk to 31-51qq, inclusive, may be provided without compensation.

(2) (A) An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave or family leave of the employee for leave provided under subparagraph (A), (B) or (C) of subdivision (2) of subsection (a) of this section for any part of the sixteen-week period of such leave under said subsection or under subsection (i) of this section for any part of the twenty-six-week period of such leave.

(B) An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C), (D) or (E) of subdivision (2) of subsection (a) of this section for any part of the sixteen-week period of such leave under said subsection or under subsection (i) of this section for any part of the twenty-six-week period of leave, except that nothing in section 5-248a or sections 31-51kk to 31-51qq, inclusive, shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

(f) (1) In any case in which the necessity for leave under subparagraph (A) or (B) of subdivision (2) of subsection (a) of this section is foreseeable based on an expected birth or placement of a son or daughter, the employee shall provide the employer with not less than thirty days' notice, before the date of the leave is to begin, of the employee's intention to take leave under said subparagraph (A) or (B), except that if the date of the birth or placement of a son or daughter requires leave to begin in less than thirty days, the employee shall provide such notice as is practicable.

(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.

(g) In any case in which a husband and wife entitled to leave under subsection (a) of this section are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to sixteen workweeks during any twenty-four-month period, if such leave is taken: (1) Under subparagraph (A) or (B) of subdivision (2) of subsection (a) of this section; or (2) to care for a sick parent under subparagraph (C) of said subdivision. In any case in which a husband and wife entitled to leave under subsection (i) of this section are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to twenty-six workweeks during any twelve-month period.

(h) Unpaid leave taken pursuant to sections 5-248a and 31-51kk to 31-51qq, inclusive, shall not be construed to affect an employee's qualification for exemption under chapter 558.

(i) Subject to section 31-51mm, an eligible employee who is the spouse, son or daughter, parent or next of kin of a current member of the armed forces, as defined in section 27-103, who is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status or is on the temporary disability retired list for a serious injury or illness incurred in the line of duty shall be entitled to a one-time benefit of twenty-six workweeks of leave during any twelve-month period for each armed forces member per serious injury or illness incurred in the line of duty. Such twelve-month period shall commence on an employee's first day of leave taken to care for a covered armed forces member and end on the date twelve months after such first day of leave. For the purposes of this subsection, (1) "next of kin" means the armed forces member's nearest blood relative, other than the covered armed forces member's spouse, parent, son or daughter, in the following order of priority: Blood relatives who have been granted legal custody of the armed forces member by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered armed forces member has specifically designated in writing another blood relative as his or

her nearest blood relative for purposes of military caregiver leave, in which case the designated individual shall be deemed to be the covered armed forces member's next of kin; and (2) "son or daughter" means a biological, adopted or foster child, stepchild, legal ward or child for whom the eligible employee or armed forces member stood in loco parentis and who is any age.

(j) Leave taken pursuant to sections 31-51kk to 31-51qq, inclusive, shall not run concurrently with the provisions of section 31-313.

(k) Notwithstanding the provisions of sections 5-248a and 31-51kk to 31-51qq, inclusive, all further rights granted by federal law shall remain in effect.

Sec. 31-51nn. Family and medical leave: Employment and benefits protection. (a) Any eligible employee who takes leave under section 31-51*ll* 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 employment 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.

(b) The taking of leave under section 31-51*ll* shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(c) Nothing in this section shall be construed to entitle any restored employee to (1) the accrual of any seniority or employment benefits during any period of leave; or (2) any right, benefit or position of employment other than any right, benefit or position to which the employee would have been entitled had the employee not taken the leave.

(d) As a condition of restoration under subsection (a) of this section for an employee who has taken leave under subparagraph (D) of subdivision (2) of subsection (a) of section 31-51*ll*, the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this subsection shall supersede a valid law of this state or a collective bargaining agreement that governs the return to work of such employees.

(e) Nothing in this section shall be construed to prohibit an employer from requiring an employee on leave under section 31-51*ll* to report periodically to the employer on the status and intention of the employee to return to work.

(f) Employees may have additional rights under other state and federal law, including rights under the federal Americans with Disabilities Act of 1990. Nothing in sections 5-248a and 31-51kk to 31-51qq, inclusive, shall limit any such additional rights.

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.

(b) It shall be a violation of sections 5-248a and 31-51kk to 31-51qq, inclusive, for any person to discharge or cause to be discharged, or in any other manner discriminate, against any individual because such individual:

(1) Has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to sections 5-248a and 31-51kk to 31-51qq, inclusive;

(2) Has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under said sections; or

(3) Has testified, or is about to testify, in any inquiry or proceeding relating to any right provided 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.

(2) Any employee aggrieved by a violation of this subsection may file a complaint with the Labor Commissioner alleging violation of the provisions of this subsection. Upon receipt of any such complaint, the commissioner shall hold a hearing. After the hearing, the commissioner shall send each party a written copy of the commissioner's decision. The commissioner may award the employee all appropriate relief, including rehiring or reinstatement to the employee's previous job, payment of back wages and reestablishment of employee benefits to which the employee otherwise would have been eligible if a violation of this subsection had not occurred. Any party aggrieved by the decision of the commissioner may appeal the decision to the Superior Court in accordance with the provisions of chapter 54.

(3) The rights and remedies specified in this subsection are cumulative and nonexclusive and are in addition to any other rights or remedies afforded by contract or under other provisions of law.

Regs. Conn. State Agencies Sec. 31-51qq-25

(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.

(3) All persons (whether or not employers) are prohibited from discharging or causing to be discharged or in any other way discriminating against any person (whether or not an employee) because that person has:

(A) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to the Act;

(B) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under the Act; or

(C) Testified, or is about to testify, in any inquiry or proceeding relating to a right 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. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:

(1) Keeping worksites below the 75-employee threshold for employee eligibility under the Act;

(2) Reducing hours available to work in order to avoid employee eligibility.

(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.

(d) Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot "trade off" the right to take FMLA leave against some other benefit offered by the employer. This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a "light duty" assignment while recovering from a serious health condition (see section 31-51qq-41(b) of the Regulations of Connecticut State Agencies). In such a circumstance the employee's right to restoration to the same or an equivalent position is available until 16 weeks have passed within the 2 year period, including all FMLA leave taken and the period of "light duty."

(e) Individuals, and not merely employees, are protected from retaliation for opposing (*e.g.*, file a complaint about) any practice which is unlawful under the act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or sections 31-51qq-1 to 31-51qq-48, inclusive of the Regulations of Connecticut State Agencies.

Regs. Conn. State Agencies Sec. 31-51qq-26

(a) If an FMLA-covered employer has any eligible employees and has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning FMLA entitlements and employee obligations under the FMLA shall be included in the handbook or other document. For example, if an employer provides an employee handbook to all employees that describes the employer's policies regarding leave, wages, attendance, and similar matters, the handbook shall incorporate information on FMLA rights and responsibilities and the employer's policies regarding the FMLA.

(b) If such an employer does not have written policies, manuals, or handbooks describing employee benefits and leave provisions, the employer shall provide written guidance to an employee concerning all the employee's rights and obligations under the FMLA. This notice shall be provided

to employees each time notice is given pursuant to subsection (c) of this section, and in accordance with the provisions of that subsection.

(c) The employer shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The written notice shall be provided to the employee in a language in which the employee is literate. Such specific notice shall include, as appropriate:

(1) that the leave shall be counted against the employee's FMLA leave entitlement (see section 31-51qq-19 of the Regulations of Connecticut State Agencies);

(2) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (see section 31-51qq-30 of the Regulations of Connecticut State Agencies);

(3) the employee's right to substitute paid leave and whether the employer shall require the substitution of paid leave, and the conditions relating to substitution.

(4) any requirement for the employee to present a fitness-for-duty certificate to be restored to employment (see section 31-51qq-35 of the Regulations of Connecticut State Agencies).

(5) the employee's right to restoration to the same or an equivalent job upon return from leave (see section 31-51qq-21 of the Regulations of Connecticut State Agencies).

(d) The specific notice may include other information - e.g., whether the employer shall require periodic reports of the employee's status and intent to return to work, but is not required to do so. A prototype notice, DOL-FM2, which employers may adapt for their use to meet these specific notice requirements is attached to sections 31-51qq-1 to 31-51qq-48, inclusive of the Regulations of Connecticut State Agencies as Appendix B.

(e) Except as provided in this subsection, the written notice required by subsection (c) of this section (and by subsection (b) of this section where applicable) shall be provided to the employee no less often than the first time in each six month period that an employee gives notice of the need for FMLA leave (if FMLA leave is taken during the six-month period). The notice shall be given within a reasonable time after notice of the need for leave is given by the employee - within one or two business days if feasible. If leave has already begun, the notice should be mailed to the employee's address of record.

(f) If the specific information provided by the notice changes with respect to a subsequent period of FMLA leave during the six-month period, the employer shall, within one or two business days of receipt of the employee's notice of need for leave, provide written notice referencing the prior notice and setting forth any of the information in subsection (c) which has changed.

(g) Except as required in subsection (h) of this section, if the employer is requiring medical certification or a fitness-for-duty report, written notice of the requirements shall be given with respect to each employee notice of a need for leave.

(h) Subsequent written notification shall not be required if the initial notice in the six-month period and the employer handbook or other written documents (if any) describing the employer's leave policies, clearly provided that certification or a "fitness-for-duty" report would be required (e.g., by stating that certification would be required in all cases in which a leave of more than a specified number of days is taken, or by stating that a "fitness-for-duty" report would be required in all cases for back injuries for employees in a certain occupation.) Where subsequent written notice is not required, at least oral notice shall be provided. (see section 31-51qq-30 of the Regulations of Connecticut State Agencies)

(i) Employers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA.

(j) Employers furnishing FMLA-required notices to sensory impaired individuals shall also comply with all applicable requirements under federal or State law.

(k) If an employer fails to provide notice in accordance with the provisions of this section, the employer may not take action against an employee for failure to comply with any provisions required to be set forth in the notice.

II. ISSUE STATEMENT

(a) Whether the Respondent has (1) interfered with, restrained or denied the exercise of, or the attempt to exercise any rights provided under the Family and Medical Leave Act; (2) discharged or caused to be discharged, or in any manner discriminated against any individual for opposing any practice made unlawful by the Act or because such employee has exercised the rights afforded to such employee under the Act; (3) violated any provision of the Act with respect to an eligible employee; or (4) discharged, or caused to be discharged, or in any manner discriminated against an eligible employee because such individual (A) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to the Act; (B) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under the Act; or (C) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under the Act.

(b) Whether the Complainant suffered damages, and the amount of any such damages.

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

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 the CFMLA. To establish an interference claim pursuant to 29 U.S.C. § 2615(a)(1), a plaintiff need only prove that an "employer in some manner impeded the employee's exercise of his or her right[s]" protected by the FMLA. *Sista v. CDC Ixis North America, Inc.*, 445 F.3d 161, 176 (2d Cir.2006) (citing *King v. Preferred Technical Group,* 166 F.3d 887, 891 (7th Cir. 1999)). To establish a *prima facie* claim of interference with rights under the FMLA, a plaintiff must establish by a preponderance of the evidence that: "(1) she is an eligible employee under the FMLA; (2) defendants constitute an employer under the FMLA; (3) she was entitled to leave under the FMLA; (4) that she gave notice to defendants of her intention to take leave; and (5) defendants denied her benefits to which she was entitled by the FMLA." *Esser v. Rainbow Advertising Sales Corp.*, 448 F.Supp.2d 574, 580 (S.D.N.Y.2006). To assert a claim for interference, the complainant has the burden to show that he or she is entitled to CFMLA leave, but 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).

The record reveals that the complainant was an eligible employee under the CFMLA; the respondent was an employer covered under the CFMLA; and the complainant was entitled to leave under the CFMLA. On January 11, 2016, the complainant requested disability paperwork from Claudia Petrino, the respondent's lead compensation and benefits partner, who forwarded this documentation

to the complainant. On February 1, 2016, the respondent received the complainant's medical certification placing her out of work effective January 28, 2016, the date on which her medical provider indicated that her condition commenced. The complainant remained on medical leave until April 18, 2016, when she was released to return to work.

To the extent that the complainant maintains that the respondent interfered with her right to take leave sooner than January 28, there is no evidence that the respondent discouraged her from taking leave or that her leave was medically necessary. An employer's actions do not constitute interference if they do not affect the employee's exercise of attempted exercise of rights. See *Sarno v. Douglas Elliman-Gibbons & Ives, Inc.* 183 F. 3d 155 (2d. Cir. 1999); *Dupee v. Klaff's Inc.*, 462 F. Supp. 233 (D. Conn. 2006)(employer's failure to provide notice of CFMLA entitlement did not interfere with or prevent him from taking CFMLA leave where he took leave immediately following his accident). The respondent timely granted the complainant's request for leave; the complainant took leave until her medical doctor released her to return to work; and there is no evidence the complainant was denied any benefit to which she was entitled under CFMLA. Therefore, the complainant has not demonstrated that the respondent interfered with her rights under 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.

The CFMLA prohibits employers from retaliating against employees for exercising their FMLA rights. CFMLA retaliation claims include an intent element and are analyzed pursuant to the three-step burden-shifting established by *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Potenza v. City of New York,* 365 F.3d 165, 168 (2d Cir.2004). To establish a *prima facie* retaliation claim under the CFMLA a plaintiff must show that: (1) she exercised rights protected under the CFMLA; (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. *Potenza,* supra; see also *McFarlane v. Chao,* No. 04 Civ. 4871(GBD), 2007 WL 1017604, at *20 (S.D.N.Y.2007). In 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 proferred explanation is pretextual. See *Van Zant v. KLM Royal Dutch Airlines,* 80 F.3d 708 (1996).

In this case, the complainant exercised her rights under the CFMLA. There is no evidence the complainant was not qualified for her position. Because the complainant was suspended and then discharged, she suffered an adverse employment action.

On the morning of January 25, 2016, the respondent suspended the complainant for videotaping the wife of a recently deceased patient on her cell phone without the required consent form and for emailing the video in an unsecured format to the respondent's senior human resources partner, Evena Williams. On January 28, 2016, the respondent's director of human resources, Sal Mancino emailed Elaine Guglielmo, Senior Vice President of Human Resources and Organizational Development, and recommended that the respondent terminate [the complainant's] employment." On or about January 29, 2016, he prepared termination paperwork dated February 1 and scheduled a meeting with the complainant. The complainant did not submit her CFMLA paperwork to the respondent until February 1, 2016, which placed her out of work effective January 28, 2016.

Because the respondent made the decision to suspend, then terminate, the employment relationship prior to the complainant's requesting CFMLA leave, the complainant has not established that the adverse employment action gave rise to an inference of retaliatory intent. See e.g. *Kennebrew v. New*

York City Housing Authority, United States District Court, 2002 WL 265120 at *19 (S.D.N.Y, February 26, 2002)(no FMLA violation occurs where an employer has already decided to terminate the employee before the employee requests FMLA leave; *Carrillo v. National Council of the Churches of Christ*, 976 F.Supp. 254, 256 (S.D.N.Y.1997)(no FMLA violation where the employer had "announced its determination to terminate plaintiff before he went on medical leave but deferred doing so only to provide an opportunity for the parties to try to negotiate a resignation agreement"); *Beno v. United Tel. Co. of Fla.*, 969 F.Supp. 723, 726 (M.D.Fla.1997) ("Before [plaintiff] requested medical leave, her supervisors had already ... recommended her termination. Thus, [plaintiff's] allegation of pretext—that she was terminated because of her request for medical leave—is undermined by the undisputed fact that [the employer's] steps toward termination were already underway before [plaintiff] requested leave," and thus, she did not establish a *prima facie* case for an FMLA violation). In the absence of retaliatory intent, the complainant has failed to establish a *prima facie* retaliation claim.

Even if the complainant had established a *prima facie* claim, she has failed to establish that the respondent's stated reasons for her discharge were pretextual. See *Dick v. The Center for Advanced Pediatrics*, FM 2013-007. The respondent discharged the complainant after she disobeyed two directives not to involve the spouse of a recently deceased patient in the respondent's investigation of the complainant's complaint against her coworker Berger. The respondent told the complainant that she should not involve these individuals in a personnel matter and the complainant did so anyway. In addition to contacting CB to discuss the investigation, the complainant videotaped her and emailed the video to Williams, in violation of the respondent's photography policy.

The complainant maintains that her conduct did not violate the respondent's photography policy because CB was not a patient but a "visitor of her spouse" and thus was not covered by the policy. She also maintains the policy did not apply because she did not videotape CB on hospital grounds. On the other hand, she produced consent forms allegedly bearing CB's signature because she believed that the consent forms would excuse her conduct. The complainant's producing the consent forms required by the policy belies her claims that the policy did not apply.

With respect to the complainant's contention that the respondent treated her differently than another employee who allegedly violated the photography policy, but was not discharged, courts have held that 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. City of Rockland*, 609 F.3d 486, 493(2d Cir. 2010). Nonetheless, a complainant must show that [she] was similarly situated in all material respects to the individual with whom [she] seeks to compare [herself]." See *Graham v. Long Island R.R.*, 230 F.3d.34, 39 (2d Cir. 2000)(internal quotation omitted).

> What constitutes 'all material respects' varied 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 respondent's director of human resources, Salvatore Mancino, credibly testified at the January 3, 2019 hearing that Williams investigated an alleged violation of its photography incident by Illaria St. Florentz. Subsequent to the complainant's separation, the respondent discovered that St. Florentz had posted a photo in the respondent's Newsline, an internal marketing document. This was a less serious offense than contacting the spouse of a recently deceased patient to obtain a videotaped statement about a personnel matter the respondent had specifically directed her not to discuss with the spouse. Therefore, the complainant and St. Florentz were not similarly situated.

The right to reinstatement [after FMLA leave] is not absolute." See *Hale v. Mann,* 219 F.3d 61, 70 (2d Cir.2000), (because the complainant could legitimately have been fired for his actions before taking FMLA leave and because there was no evidence of termination in retaliation for taking FMLA leave, the respondent could not make out his claim). *See* 29 C.F.R. § 825.216(a) ("An employee has no greater right to reinstatement . . . than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment."); *Geromanos v. Columbia Univ.,* 322 F.Supp.2d 420, 429 (S.D.N.Y.2004) ("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." (internal quotation marks and citation omitted); *Hale,* 219 F.3d at 66 (holding that, where "defendants articulate[ed] a nonpretextual reason for [plaintiff's] removal based on events which occurred prior to his going on leave," plaintiff could not sustain a FMLA claim because the FMLA "gives no greater job security than that to which the employee would have been entitled prior to taking leave").

In the case before us, the respondent granted the complainant the duration of CFMLA leave required by her medical provider. The complainant was not reinstated to her prior position at the leave's expiration only because the respondent had made the decision to discharge her prior to her requesting leave. The decision was made for legitimate reasons: the complainant's disobeying a directive, violating the respondent's policy, and her dishonesty surrounding the investigation of the respondent's policy. The decision to discharge the complainant was unrelated to, and occurred prior to, her request for CFMLA leave. Therefore, the complainant has failed to meet her burden to establish, by a preponderance of the evidence, either a *prima facie* interference claim or retaliation claim 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 Section 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 damages.

Attorney Virginia Foreman
Designated Hearing Officer
38 Wolcott Hill Road
Wethersfield, CT 06109

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 Monday, April 29, 2019.

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

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed to the Respondent by certified mail, postage prepaid, return receipt requested, on April 15, 2019, and that a copy of the foregoing was mailed to the complainant by regular mail, postage prepaid, return receipt requested, on April 15, 2019. A copy was also mailed to the Legal Division, Attn: Erika Foster, Staff Attorney, 200 Folly Brook Boulevard, Wethersfield, CT 06109.

Attorney Virginia Foreman
Designated Hearing Officer
38 Wolcott Hill Road
Wethersfield, CT 06109