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

**COMPLAINANT:**
Christine Reynolds
73 Haig Avenue
Bristol, CT 06010

**EMPLOYER:**
American Red Cross
209 Farmington Avenue
Farmington, CT 06032

By: Henry J. Zaccardi, Esq.
Shipman & Goodwin
One Constitution Plaza
Hartford, CT 06103

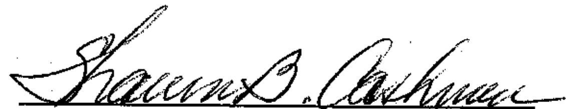
Certified No.: 7004 1350 0005 0078 6347

Certified No.: 7004 1350 0005 0078 6330

**Date Mailed:** March 28, 2006

## FINAL DECISION

Pursuant to Section 31-1-8 of the Regulations of Connecticut State Agencies, after reviewing the evidence, I issue my Final Decision in the above-referenced matter. I affirm in whole and incorporate the Proposed Decision of the Hearing Officer issued on March 10, 2006, a copy of which is attached hereto, as my Final Decision in this matter.



Shaun B. Cashman
Commissioner

Cc: Hearing Officer Eric Beckenstein
Employment Security Appeals Division

**PROPOSED DECISION OF HEARING OFFICER**
**Christine Reynolds v. American Red Cross**

**Case No.:** FM 2004-89

**Date Decision Mailed:**

**Hearing Date:** January 10, 2006

**Hearing Location:** Connecticut Department of Labor
Employment Security Appeals Division
39 Marne Street
Hamden, CT 06514

**Appearances:**

For the Complainant: Christine Reynolds appeared on her own behalf. Reginald Reynolds, the complainant's spouse, was present at the hearing as an observer.

For the Respondent: Ken Marland, former director of human resources (retired), Christy Zimmerman, human resource associate, Myra Niver, former human resource representative, and Attorney Henry Zaccardi of Shipman & Goodwin L.L.P.

## CASE HISTORY

On September 22, 2004, the complainant, Christine Reynolds, filed a complaint with the State of Connecticut, Department of Labor, Wage and Workplace Standards Division (hereinafter referred to as the Division) alleging that her termination by her former employer, the American Red Cross, violated the Connecticut Family and Medical Leave Act (CFMLA), General Statutes §31-51kk, et seq.

On July 29, 2005, the Division dismissed the complainant's complaint, finding that the respondent had provided the complainant with more than sixteen weeks of CFMLA leave within a two-year period. The Division determined that the termination did not violate the CFMLA because the complainant had already exhausted the leave to which she was entitled under the Act.

On August 16, 2005, the complainant filed a timely appeal from the Division's determination pursuant to Section 31-51qq-44(e)(4)(c) of the Regulations of Connecticut State Agencies.

On December 15, 2005, notice for the contested hearing was mailed to the parties via certified mail, advising the parties to provide the designated hearing officer, the opposing party, and the Division of Wage and Workplace Standards, with a list of all witnesses and a copy of all documents the party intends to offer into evidence at the contested hearing no later than January 3, 2006.

On January 10, 2006, a contested case hearing was held at the Connecticut Labor Department, Appeals Division, 39 Marne Street, Hamden Connecticut, before Attorney Eric D. Beckenstein, designated hearing officer, appointed on September 16, 2005, by Labor Commissioner Shaun Cashman.

**FINDINGS OF FACT**

1. The respondent, American Red Cross, employed the complainant, Christine Reynolds, full time from November 10, 1992, until July 19, 2004.

2. At all relevant times, the respondent, American Red Cross, was subject to the Connecticut Family and Medical Leave Act (hereinafter CFMLA).

3. The complainant has a history of diabetes and, at the time of her separation, she was suffering from chronic back pain. The complainant's back pain requires physical therapy and, when exacerbated, prevents the complainant from working.

4. On June 18, 2003, the respondent provided the complainant with an application for leave pursuant to the Family and Medical Leave Act (FMLA). The respondent approved the complainant's request for FMLA leave on an intermittent basis, effective June 9, 2003.

5. On September 12, 2003, the respondent notified the complainant in writing that it had revised its FMLA policy to require employees to recertify the need for intermittent leave every sixty calendar days. The respondent provided the complainant with a recertification form for her physician's signature.

6. On October 29, 2003, the respondent notified the complainant in writing that her recertification request had been approved, and advised "you have a right under the FMLA for up to **12 weeks** of leave in any 12-month period or up to **16 weeks** in any 2-year period, whichever is greater." The respondent's letter further advised the complainant that she must use any accrued sick leave, vacation and personal time during the leave period.

7. On October 29, 2003, human resource representative Christy Zimmerman issued a memorandum to the complainant entitled "Family and Medical Leave - Available Pay." The memo advised, "as of **October 1, 2003**, you have (0) banked sick days, and (0) accrued vacation days available for your **remainder of your 12 weeks which leaves you 49 days (8 weeks and 4 days) to use** for Family and Medical Leave." The complainant received the memorandum.

8. On December 8, 2003, the respondent provided the complainant with a recertification form for her physician's signature.

9. On December 23, 2003, the respondent issued a memorandum to the complainant entitled "Family and Medical Leave - Available Pay." The memo advised, "as of **November 25, 2003**, you have (16) banked sick days, and (0) accrued vacation days available for your **remainder of your 12 weeks which leaves you 36 days (7 weeks and 1 days) to use** for Family and Medical Leave." The complainant received the memorandum.

10. On December 31, 2003, the respondent issued a memorandum to the complainant entitled "Family and Medical Leave - Available Pay." The memo advised, "as of **December 31, 2003**, you have (0) banked sick days, and (0) accrued vacation days available for your **remainder of your 12 weeks which leaves you 16 days (3 weeks and 1 days) to use** for Family and Medical Leave." The complainant received the memorandum.

11. On January 23, 2004, Zimmerman generated a report from the respondent's attendance records, showing the dates of the complainant's absences for the period June 9, 2003, through January 23, 2004. Zimmerman provided the complainant with a copy of the report and asked her to review the dates and confirm whether they were correct. The complainant did not respond or object to the dates in the report.

12. The complainant exercised leave from January 28, 2004, until February 9, 2004, for "extensive oral surgery." On or about March 16, 2004, the complainant asked Myra Niver, human resources associate, whether she had any available FMLA leave to cover her absence from January 28 through February 9, 2004.

13. On March 17, 2004, Niver advised the complainant in writing that her absence from January 28, 2004, through February 9, 2004, was covered under FMLA. Niver's letter further advised the complainant that she had exhausted available FMLA leave and "[y]ou are not eligible for another 12-week leave until June 9, 2004."

14. As of March 17, 2004, the complainant had been absent from work for a total of fifteen weeks and four days, since her intermittent FMLA leave began on June 9, 2003. On April 5, 2004, the complainant was absent from work, bringing her total absences since June 9, 2003, to sixteen weeks.

15. Between February 9, 2004, and June 24, 2004, the complainant called the on-call nursing supervisor or scheduling coordinator, or Niver to report that she would be absent based on her back injury. The respondent granted the complainant periodic leave without pay.

16. In early June 2004, Gerri Mahon, collections director, met with the complainant and expressed her concern that the complainant continued to have absences despite having used all available leave.

17. Beginning June 24, 2004, the complainant was absent from work. On June 25, 2004, the complainant's husband picked up an FMLA application from the employer.

18. On June 29, 2004, Niver informed the complainant over the telephone and in writing that her application for FMLA leave must be completed and returned to the employer by July 9, 2004. Niver advised the complainant that her time out of work would be coded as conditional FMLA, pending receipt and approval of the application. Niver's letter advised, "If the application is not received by July 9th, the absence will not be eligible for FMLA."

19. On June 29, 2004, Bobbi Cislo, donor services manager, advised the complainant that she must speak to a manager when reporting her absences. Cislo explained to the complainant that she could not simply report to the scheduler that she was out on FMLA leave, because her request for FMLA leave was pending and had not been approved.

20. On July 5, 2004, Niver left two voice messages for the complainant, reminding her that the FMLA paperwork was due by July 9, 2004.

21. On July 9, 2004, the complainant gave the FMLA forms to her treating physician.

22. On July 12, 2004, Niver notified the complainant in writing that her absence was not eligible for FMLA leave because she had not returned the completed application to the employer.

23. On July 19, 2004, the respondent notified the complainant in writing that her employment had terminated. The letter advised, "we can no longer keep you on our payroll since you have no family leave, you are not eligible for leave without pay, and you have no sick time."

24. The employer's attendance records show that from June 9, 2003, when the complainant's intermittent FMLA leave began, and the discharge on July 19, 2004, the complainant was absent for a total of 21.4 weeks.

**ISSUE**

Whether the respondent violated General Statutes § 31-51pp(a)(1) by interfering with, restraining or denying the exercise of, or the attempt to exercise, any of the complainant's rights under the Connecticut Family and Medical Leave Act.

**PROVISIONS OF LAW**

Section 31-51pp of the General Statutes provides that it will be a violation of General Statutes § 5-248a and §§ 31-51kk to 31-5199, inclusive, for any employer to interfere with, restrain or deny the exercise of, or the attempt to exercise any rights provided under said section, or for any employer to discharge or cause to be discharged, or in any other manner discriminate against an individual for opposing any practice made unlawful by said sections or because such employee has exercised the rights afforded such employee under said sections.

Section 31-51*ll*(a) of the General Statutes provides that an eligible employee is limited to a total of sixteen (16) workweeks of leave during any twenty-four (24) month period because of a serious health condition of the employee. The twenty-four (24) month period shall begin with the first day of leave taken.

Section 31-51*ll*(e)(2)(A) of the General Statutes provides that an employer may require the employee to substitute any accrued paid vacation leave, personal leave or family leave for any part of the sixteen-week period.

Section 31-51mm(a) of the General Statutes provides that an employer may require that a request for leave based on a serious health condition be supported by a certification issued by the health care provider of the eligible employee. The employee shall provide, in a timely manner, a copy of such certification to the employer.

Section 31-51qq-30(b) of the Regulations of Connecticut State Agencies provides that when the leave is foreseeable and at least 30 days notice has been provided, the employee shall provide the medical certification before the leave begins. When this is not possible, the employee shall provide the requested certification to the employer within the time frame requested by the employer (which shall allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

## COMPLAINANTS' CONTENTIONS

The complainant contends that the respondent did not properly record her attendance and that it did not always follow its requirements for providing a physician's certification. Specifically, she contends that the respondent previously allowed her to provide it with a physician's certification upon her return from leave. The complainant maintains that she was confused about her leave entitlement, that she was unaware when her leave expired and that the employer never made her aware that she would be terminated if she did not supply the medical certification. Finally, the complainant contends that she was "denied due process," and that the respondent violated her union contract with respect to paid sick leave.

## RESPONDENT'S ANSWER

The respondent contends that at the time it terminated the complainant's employment on July 19, 2004, she had exhausted the sixteen weeks of leave to which she was entitled under the CFMLA.

## DISCUSSION

Under the CFMLA, an eligible employee is entitled to a leave of sixteen weeks, or eighty days, during any twenty-four-month period. General Statutes § 31-51*ll*(a). The complainant began intermittent leave on June 9, 2003, and had taken 21.4 weeks of leave (one hundred and seven days) by the time the employer discharged her on July 19, 2004. The employer notified the complainant that it was requiring her to substitute accrued paid leave for part of the leave under the CFMLA. While the complainant alleges that the respondent's records of her attendance are inconsistent, she

has not provided any independent records of her absences. The complainant has not cited even one specific date contained in the respondent's attendance records which she believes was incorrectly recorded as an absence from work.

This hearing officer finds no merit to the complainant's contention that she was unaware that her leave had expired or that her continued absences could result in termination. On March 17, 2004, the respondent advised the complainant in writing that she had exhausted her entitlement to a twelve-week leave as of February 9, 2004, and that she would not be eligible for another twelve-week leave until June 9, 2004. The respondent was referring to a twelve-week leave pursuant to the federal FMLA.[1] The respondent had previously advised the complainant in writing that she was entitled to *either* 12 weeks of leave in any 12-month period *or* 16 weeks in any 2-year period. Therefore, the respondent did not lead the complainant to believe that she would be entitled to another sixteen weeks of CFMLA leave after June 9, 2004.

Even if the complainant mistakenly believed she was entitled to additional CFMLA leave, she nonetheless failed to provide the respondent with the requested medical certification despite repeated reminders to do so by July 9. The collections director had expressed her concern to the complainant that she had exhausted all available leave and continued to be absent from work. The respondent required the complainant to speak with a manager when calling to report her continued absence, reminding that complainant that her request for FMLA leave was still pending and had not been approved. The employer advised the complainant in writing that if she did not return the physician's certification by July 9, her absence would not be covered by the FMLA. The complainant, therefore, could not reasonably have believed that she could provide the certification upon her return to work. The complainant knew or should have known that her continued absences were placing her employment in jeopardy.

Even if the complainant had returned the FMLA application and physician's certification in a timely manner, this would have entitled her only to consideration of another twelve-week leave under the federal FMLA. The employer was not required to grant any additional leave under the CFMLA because she had already used sixteen weeks of leave within a two-year period. The CFMLA provides for a total of sixteen work weeks of leave during any twenty-four-month period. *Bournival v. Bank of Boston Connecticut, et al.*, Superior Court, Docket No. 97081451 (2/25/98), 1998 WL 150765 (Conn. Super.). Where an employer has provided more generous leave than that required by FMLA, an employee is not entitled to additional FMLA leave. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 95-96, 122 S.Ct. 1155, 1165 (March 19, 2002). Because the complainant exceeded her entitlement to leave under the provisions of the CFMLA, the hearing officer finds that the complainant was no longer protected at the time of her separation from employment on July 19, 2004. Accordingly, the hearing officer does not find that the respondent violated any provisions of or interfered with the complainant's rights under the CFMLA.

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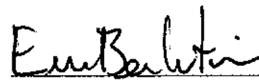
[1] The Commissioner does not have jurisdiction over claims brought under the Federal FMLA. The U.S. Department of Labor is the proper forum for such claims.

**PROPOSED DECISION AND ORDER**

Because the complainant exceeded her entitlement to leave pursuant to the CFMLA, the hearing officer finds that the complainant was no longer protected at the time of the discharge on July 19, 2004. The hearing officer, therefore, does not find that the respondent violated any provisions of the CFMLA or interfered with the complainant's rights under the CFMLA. Accordingly, the complainant's complaint is **dismissed**.

Respectfully submitted,



Eric Beckenstein, Designated Hearing Officer

**The parties are advised of their right to file an exception and present a brief and/or oral argument to the Commissioner before a final decision is issued. The deadline for filing an exception is March 24, 2006.**

**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.**

**CERTIFICATION**

I hereby certify that a copy of the forgoing was mailed to all parties, via first class mail, on March 10, 2006.

Eric Beckenstein, Designated Hearing Officer