

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

COMPLAINANT

Marilyn E. Clare
127 Washington Circle
West Hartford, CT 06119

Certified No.: Z 321 622 564

EMPLOYER

Catholic Family Services
By: Attorney Jeffrey C. Pingpank
Cooney, Scully and Dowling
Hartford Square North
Ten Columbus Boulevard
Hartford, CT 06106

Certified No.: Z 321 622 567

CASE NO.: FM 99-44

**DATE MAILED TO INTERESTED
PARTIES:** March 9, 2001

FINAL DECISION

Pursuant to Section 31-1-8 of the Regulations of Connecticut State Agencies, I am issuing my final decision in the above-referenced matter after reviewing the evidence in the case. I affirm in whole and incorporate the Proposed Decision of the hearing officer issued on December 22, 2000 as my final decision in this matter, a copy of which is attached hereto.



Shaun B. Cashman
Commissioner

cc: Attorney Heidi Lane

DOCKET NO. FM 99-44

COMPLAINANT
MARILYN E. CLAIRE
Washington Circle
West Hartford, CT 06119

EMPLOYER
CATHOLIC FAMILY SERVICES
896 Asylum Avenue
Hartford, CT 06105

COMPLAINANT (2nd cc:)
MARILYN E. CLAIRE
39 Woodland Dr.
West Warwick, RI 02893

EMPLOYER ATTORNEY
JEFFREY C. PINGPANK, ESQ.
Cooney, Scully, and Dowling
Hartford Square North
Ten Columbus Boulevard
Hartford, CT 06106

DIVISION OF WAGE AND WORKPLACE STANDARDS
HEIDI LANE, ESQ.
200 FOLLY BROOK BLVD.
WETHERSFIELD, CONN. 06109

DATE PROPOSED DECISION MAILED: December 22, 2000

HEARING DATE: September 25, 2000

HEARING LOCATION: Hartford, CT

APPEARANCES:

For the complainant: Marilyn E. Claire appeared for herself, with Phil Battlos, an observer.

For the respondent: Attorney Jeffrey C. Pingpank, Counsel for the respondent, with Carol Shea, Director of Human Resources, Catholic Family Services as a witness.

CASE HISTORY:

On September 22, 1999 the complainant, Marilyn E. Claire, filed a complaint with the State of Connecticut Department of Labor, Wage and Workplace Standards Division (hereinafter referred to as "the Division"). The complainant alleged that her employer, Catholic Family Services (hereinafter referred to as "the respondent") violated the provisions of Connecticut General Statutes §31-51qq, et seq., an Act Concerning Family and Medical leave from Employment (hereinafter referred to as "FMLA") by denying her a leave of absence under the FMLA, and by denying her accrued sick pay during a period of illness.

On September 28, 1999, the Division notified the respondent that the complainant had filed the

complaint. The Division advised the respondent that it had twenty-one days after the mailing of the Division's notice to respond to the complaint in writing.

On October 19, 1999, the respondent mailed the Division and the complainant its response to the complaint. The respondent contended that it had not violated the FMLA because: (1) the complainant did not qualify for the FMLA because she did not have a serious health condition as defined by Conn. Gen. Stat. §31-51 kk (10); (2) it did not discriminate against the complainant, pursuant to Conn. Gen. Stat. §31-51pp, in that the complainant received a 3% raise in pay, which was similar to that given to the respondent's other employees in the same job classification as the complainant, and the respondent did not discharge or discipline the complainant because she asked for a leave under the FMLA; (3) the Kripalu Yoga Center is not a healthcare provider as defined by Conn. Gen. Stat. §31-51 kk; and (4) that the respondent's decision to deny the complainant's request for sick leave pay was not within the jurisdiction of the FMLA, and therefore outside the jurisdiction of the State of Connecticut Department of Labor to adjudicate, pursuant to Conn. Gen. Stat. §31-51 ll (e) (2) (B).

Sometime on or after November 1, 1999, the complainant submitted additional argument to the Division alleging that the respondent's denial of leave under the FMLA and denial of accrued sick pay during an unpaid leave of absence while she attended Kripalu Yoga Center constituted a violation of the provisions of the FMLA.

On May 12, 2000, the Division ruled that the respondent did not violate the provisions of the FMLA, and dismissed the complaint. The Division held that the complainant had not demonstrated that she was treated by a healthcare provider, as defined by the FMLA, during the period she attended Kripalu Center. The Division further ruled that the complainant failed to demonstrate that her condition would likely result in a period of incapacity of more than three consecutive days.

On May 19, 2000, the complainant notified the Division that she was exercising her right to request a hearing before the Labor Commissioner, pursuant to Connecticut Agencies Regulations Section 31-51qq-44(e).

On June 16, 2000 the Division notified the respondent that the complainant had requested the hearing.

On July 5, 2000, Labor Commissioner James W. Butler notified the parties that they had a right to request a pre-hearing settlement conference, and that unless both the complainant and the respondent requested the conference by July 14, 2000, the Commissioner would designate Kathy R. Sledge to hold a hearing in the contested matter.

On July 17, 2000, the respondent notified the Commissioner that it did not wish to participate in a pre-hearing settlement conference.

On September 13, 2000, Kathy R. Sledge, the hearing officer designated by the Commissioner, notified the parties of the scheduled contested case hearing. On September 25, 2000, the Designated Hearing Officer heard the case.

PROPOSED DECISION OF HEARING OFFICER

FINDINGS OF FACT

1. The respondent employed the complainant as a per diem employee commencing September 1991. The respondent employed the complainant as a full-time licensed clinical social worker from May 1992 to September 15, 2000.
2. The complainant worked more than 1000 hours during the period June 1, 1998 to May 31, 1999.
3. The respondent, as an employer in the State of Connecticut who continuously employed more than 300 employees between January 1, 1998 to December 31, 1999, is subject to the Family and Medical Leave Act.
4. Sometime in February 1999, the complainant applied to attend the Spiritual Lifestyle Program at Kripalu Yoga Center, located in Lenox, Massachusetts. The complainant requested that the center accept her in its May 1999 session. In April 1999, the center advised the complainant that she had been accepted into the program to begin on June 1, 1999. The complainant informed her treating physician, Ann M. Reiher, M.D. about the program in April 1999. Dr. Reiher endorsed the complainant's suggestion that she attend this program at that time.
5. As of April 30, 1999, the complainant planned to continue working until the third week of May 1999, prior to attending the program at Kripalu.
6. On April 30, 1999, the complainant submitted a written request to take sick leave from work for the period between June 1, 1999, and September 9, 1999, and vacation leave for the subsequent six day period, returning to work on September 20, 1999. The complainant also attached a letter from Ann M. Reiher, M.D., her treating physician, recommending that the complainant take a three-month medical leave of absence in a restricted setting in order to avoid long-term complications of the claimant's illnesses. The physician did not state that failing to follow her recommendation would result in the complainant's incapacity to work. The complainant advised the respondent that she planned to enter a preventive health and wellness program at Kripalu Yoga and Health Center, where she planned to live and participate in the center's "Spiritual Life Program." The complainant explained in her letter that the program focuses on diet and exercise as well as mental, emotional, spiritual and physical health. The complainant attached a copy of her acceptance letter from the Kripalu Yoga Center with the written request to take sick time from work.
7. The physician noted in her letter that the complainant had been under the doctor's care for multiple problems including hypertension, sleep apnea, arthritis and peripheral edema, which had responded poorly to medication therapy, and she had recommended that the complainant substantially change her diet and exercise habits because of these health problems. The

physician specifically noted that the complainant had been unable to make the prescribed changes in her present work and living situation. For this reason, Dr. Reiher recommended the extended retreat to assist her in making the appropriate nutritional, physical and emotional changes necessary to effectively treat her medical conditions.

8. On May 18, 1999, the complainant submitted a second written request for time off from work to the respondent. In her second written request, the complainant noted that she had not yet received a response from management to her request made on April 30, 1999. In this second request, the complainant specifically advised the respondent that she was requesting a medical leave of absence under the FMLA.
9. On May 19, 1999, Jack Morrison, the Regional Director of Catholic Family Services met with the complainant about her request for FMLA leave. The following day, Mr. Morrison confirmed in writing to the complainant that the employer-respondent was denying the complainant a leave under the FMLA. The respondent indicated that, based on the information as presented to the respondent, she did not qualify for paid sick leave under the employer's policy; neither did she qualify for leave under the FMLA because she had not established that she would be treated by a healthcare provider. Although the respondent denied the complainant's request, it agreed to favorably consider a subsequent request from the complainant to take an unpaid leave of absence in order for her to attend the "Spiritual Lifestyle Program" at Kripalu Center, or a similar program.
10. On May 24, 1999, the complainant submitted a letter to the respondent whereby she requested unpaid sick leave in order to attend Kripalu Center for the period between June 1, 1999 and September 9, 1999, followed by a six day period of vacation, returning to work on September 20, 1999.
11. In her May 24, 1999, written request for the unpaid leave of absence, the complainant acknowledged that her treatment might not be performed by a physician, but argued that she was entitled to paid FMLA leave because she would be under the care of a physician during the entire time she was on the leave. The complainant did not provide any documentation to the respondent to support this claim. Instead, the complainant invited the respondent to request any specific information she might provide to resolve the disagreement.
12. On May 26, 1999, the respondent replied to the complainant's May 24, 1999 letter. The respondent approved the request for an unpaid leave of absence as well as the six days of paid vacation through September 27, 1999. Additionally, the respondent agreed to continue reviewing its denial of the complainant's request for a paid sick leave provided that the complainant submit additional information. The respondent specifically requested that the complainant authorize her physician to forward any relevant medical records which would support her claim and to authorize Kripalu Center to forward any appropriate medical records as well. The respondent advised the complainant that the employer's appointed physicians would review any medical information provided for the purposes of determining the validity of her claim. Finally, the respondent advised the complainant that it reserved the right to have her examined by a physician selected by the employer.

13. The complainant chose not to submit additional information because she “did not believe it was in (her) best interests” to do so. She did not ask her physician or the Kripalu Center to provide any further information to the employer.
14. The respondent’s sick leave policy is explained in the Catholic Charities/Catholic Family Services, Inc. Archdiocese of Hartford Personnel Practices and Policies, Article VIII, Section 4. Subsection (a) of that policy states that sick leave includes any time off for medical or dental reasons. Subsection (c) of the policy states that the respondent reserves the right to request the employee verify any illness/injury and the right have a physician of the employer’s choice examine an employee at its own expense.
15. Section 5, subsection (c) of the respondent’s personnel policy manual states that it will grant leave without pay in accordance with the FMLA.
16. The complainant’s health insurance carrier does not cover expenses for the complainant’s attendance at the Kripalu Yoga Center. For nutritional health purposes, the complainant’s medical insurance only provides coverage for two visits to a nutritionist.
17. The complainant attended the “Spiritual Lifestyle Program” offered through the Kripalu Yoga Center, in Lenox, Massachusetts, from June 1, 1999, to September 9, 1999.
18. While attending the program at the Kripalu Yoga Center, the complainant was examined and monitored by Jeff Migdow, M.D., in the healthcare facility located at the center. While she attended the “Spiritual Lifestyle Program,” the complainant saw Dr. Migdow on three occasions, June 30, 1999; July 30, 1999; and September 3, 1999. The physician examined and monitored the complainant for sleep apnea, exhaustion, depression, high blood pressure, and edema.
19. Jeff Migdow, M.D. practices holistic medicine at Kripalu Center.
20. On or about July 12, 1999, the complainant returned to the state of Connecticut briefly, at which time her initial treating physician, Dr. Reiher, examined her.
21. The complainant took approximately five sick days between June 1, 1998, and May 30, 1999. None of the sick days were for consecutive days of absence from work. The complainant took the five occasional days off from work for what she considered to be “mental health days” when she felt she needed to lie down and be in bed.
22. The complainant was physically capable of performing work from June 1, 1999 to September 9, 1999. Prior to June 1, 1999, the complainant had trouble sleeping at night, and had trouble staying awake while at work during the day. The complainant often found herself crying as well.
23. Dr. Reiher exclusively treated the complainant for her multiple health problems, except when

the complainant sought specialized treatment from an ear, nose and throat physician in July 1998, and again in February or March 1999. The complainant also underwent a two-part study at Gaylord Hospital in Wallingford, Connecticut in August and November 1998, in order to determine whether she suffered from sleep apnea or some other disorder.

24. On September 22, 1999, the complainant filed a complaint with the Division alleging that the respondent violated her rights under the FMLA by denying her the use of paid sick leave during her period of absence from June 1, 1999 to September 9, 1999.
25. On November 18, 1999, the complainant filed an grievance against management at Catholic Family Services, using the employer's grievance procedure. The complainant attached medical documentation from Dr. Migdow to her written grievance request.
26. Between May 19, 1999, (when the employer denied the complainant's request for FMLA leave) and November 18, 1999, (when the complainant filed her grievance) the complainant did not provide any medical documentation or request that her doctor or the Kripalu Center provide any information to the employer.
27. Dr. Migdow stated that he acted as the complainant's physician while she stayed at the Kripalu Center. In notes dated July 2, 1999 through September 3, 1999, he also stated that the complainant came to the center presenting "extreme fatigue, obesity, severe joint pain, difficulty walking, severe rash on her abdomen, sleep apnea, depression, shortness of breath and edema". The doctor further stated that in the two months he acted as her physician, "all symptoms have improved; her energy is better; edema and rash almost absent; B.P. (blood pressure) improved; breathing clearer; mood better; and is able to walk daily". Dr. Migdow finally noted that he "feel(s) the improvements were due to her stay at Kripalu Center and that this was necessary for her health." Dr. Migdow did not indicate that the complainant was incapable of working, or that a failure of her attending the Kripalu Center would have resulted in a period of incapacity of more than three days.

ISSUE

The issue presented is whether the Respondent interfered with, restrained or denied the exercise of, or the attempt to exercise any rights provided under the Family and Medical Leave Act; or violated any provision of the Act with respect to an eligible employee. Specifically, the issue raised in this case is whether the respondent employer interfered with the complainant's rights under the Family Medical and Leave Act by prohibiting her from using her accrued sick leave during her three-month leave of absence to attend the Kripalu Center.

PROVISIONS OF LAW

Conn. Gen. Stat. §31-51kk(6) defines a "(H)health care provider" as (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 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.

Conn. Gen. Stat. §31-51kk(10) defines "(S)erious health condition" as 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.

Conn. Gen. Stat. §31-51mm provides as follows:

(a) An employer may require that request for leave based on a serious health condition in subdivision (3) or (4) of subsection (a) of section 31-51ll be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse or parent of the employee, as appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employer.

(b) Certification provided under subsection (a) of this section shall be sufficient if it states:

(1) The date on which the serious health condition commenced;

(2) The probable duration of the condition;

(3) The appropriate medical facts within the knowledge of the health care provider regarding the condition;

(4) (A) For purposes of leave under subdivision (3) of subsection (a) of section 31-51ll, a statement that the eligible employee is needed to care for the son, daughter, spouse or parent and an estimate of the amount of time that such employee needs to care for the son, daughter, spouse or parent; and (B) for purposes of leave under subdivision (4) of subsection (a) of section 31-51ll, a statement that the employee is unable to perform the functions of the position of the employee;

(5) In the case of certification for intermittent leave or leave on a reduced leave schedule for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment;

(6) In the case of certification for intermittent leave or leave on a reduced leave schedule under subdivision (4) of subsection (a) of section 31-51ll, a statement of the medical necessity of the intermittent leave or leave on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule; and

(7) In the case of certification for intermittent leave or leave on a reduced leave schedule under subdivision (3) of subsection (a) of section 31-51ll, a statement that the employee's

intermittent leave or leave on a reduced leave schedule is necessary for the care of the son, daughter, parent or spouse who has a serious health condition, or will assist in their recovery, and the expected duration and schedule of the intermittent leave or reduced leave schedule.

(c) (1) In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) of this section for leave under subdivision (3) or (4) of subsection (a) of section 31-51ll, the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) of this section for such leave.

(2) A health care provider designated or approved under subdivision (1) of this subsection shall not be employed on a regular basis by the employer.

(d) (1) In any case in which the second opinion described in subsection (c) of this section differs from the opinion in the original certification provided under subsection (a) of this section, the employer may require, at the expense of the employer, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the information certified under subsection (b) of this section.

(2) The opinion of the third health care provider concerning the information certified under subsection (b) of this section shall be considered to be final and shall be binding on the employer and the employee.

(e) The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis, provided the standards for determining what constitutes a reasonable basis for recertification may be governed by a collective bargaining agreement between such employer and a labor organization which is the collective bargaining representative of the unit of which the worker is a part if such a collective bargaining agreement is in effect. Unless otherwise required by the employee's health care provider, the employer may not require recertification more than once during a thirty-day period and, in any case, may not unreasonably require recertification. The employer shall pay for any recertification that is not covered by the employee's health insurance.

Conn. Gen. Stat. §31-51ll(a)(4) provides that 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 begin with the first day of leave taken for a serious health condition of the employee.

Conn. Gen. Stat. §31-51ll(e)(B) provides that 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 subdivision (3) or (4) of subsection (a) of this section for any part of the sixteen-week period of such leave under said subsection, except that nothing in section 5-248a or 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.

Section 31-51qq-18(c) of the Connecticut Agencies Regulations provides that substitution of paid accrued vacation, personal or medical/sick leave may be made for any unpaid leave needed for the employee's own serious health condition. Substitution of medical/sick leave may be elected to the extent the circumstances meet the employer's usual requirements for the use of medical/sick leave. An employer is not required to allow substitution of paid sick or medical leave for unpaid FMLA

leave "in any situation" where the employer's uniform policy would not normally allow such paid leave. An employee does not have the right to substitute paid medical/sick leave for a serious health condition which is not covered by the employer's leave plan.

Sections 31-51qq-1(d)(1)(A)(B) of the Connecticut Agencies Regulations defines "(c)ontinuing treatment as a serious health condition involving continuing treatment by a health care provider which includes any one or more of the following: (!) A period of incapacity (i.e., an inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive days, and any subsequent treatment or period of incapacity relating to the same condition that also involves: (A) Treatment two or more times by a health care provider, by a nurse or physicians's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or (B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

Section 31-51qq-1(5) of the Connecticut Agencies Regulations provides that the definition of "continuing treatment" includes any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or injury, or for a condition which would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

Section 31-51qq-1(u)(1) of the Connecticut Agencies Regulations provides that for a serious health condition, an illness, injury, impairment or physical or mental condition involves (A) Inpatient care (i.e., an overnight stay) in a hospital, as defined in Section 19a-490 of the General Statutes, hospice licensed pursuant to health code or certified as a hospice pursuant to 42 U.S.C. Section 1395x, nursing home licensed pursuant to Chapter 368v of the General Statutes, or residential medical care facility, including any period of incapacity (for the purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or (B) Continuing treatment by a healthcare provider, including outpatient treatment including a period of incapacity of more than three consecutive calendar days, including any subsequent treatment or period of incapacity relating to the same condition that also involves (aa) Treatment two or more times, including outpatient treatment by a health care provider or by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services under orders of, or on referral by a health care provider; or (bb) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider, including outpatient treatment.

Section 31-51qq-1(v)(2) of the Connecticut Agencies Regulations provides that treatment for the purposes of subdivision (1) of this subsection includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. Under subdivision

(1)(B)(i)(bb) of this subsection, a regimen of continuing treatment includes for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

Section 31-51qq-30 of the Connecticut Agencies Regulations provides that an employer may require that an employee's leave due to the employee's own serious health condition be supported by a certification issued by the health care provider of the employee. An employer must give notice of a requirement for medical certification each time a certification is required; such notice must be written notice whenever required by Section 31-51qq-26 of these regulations. An employer's oral request to an employee to furnish any subsequent medical certification is sufficient. When the leave is foreseeable and a least 30 days notice has been provided, the employee should provide the medical certification before the leave begins. In most cases, the employer should request that the employee furnish certification from a health care provider at the time the employee gives notice of the need for leave or within two business days thereafter. The employer may request certification at some later date if the employer has reason to question the appropriateness of the leave or its duration. At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. The employer shall advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.

THE COMPLAINANT'S CONTENTIONS

The complainant contends that the respondent interfered with her rights under the FMLA by denying her a period of paid sick leave in violation of its own sick leave policy. The complainant further contends that the employer did not request more relevant information from her physician or a second opinion from a physician of its own choice when it questioned the validity of her doctor's recommendation. If the employer's sick or medical leave plan imposes medical certification requirements that are less stringent than the certification requirements of these regulations, and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid State FMLA leave where authorized, only the employer's less stringent sick leave certification requirements may be imposed.

THE RESPONDENT'S ANSWER

In response to the complainant's complaint, the respondent employer argues that it did not violate or interfere with the complainant's rights under the FMLA. Specifically, the respondent contends that the complainant did not have a "serious health condition" as defined in Section 31-51kk(10) of the Act because the Kripalu Yoga Center does not qualify as a health care provider. The respondent also contends that the Connecticut Labor Department has neither statutory nor regulatory authority to determine whether the complainant is entitled to paid sick leave under the employer's sick leave

policy. The employer respondent maintains that even if the complainant had established that she had a serious health condition, the employer provided the complainant with an unpaid leave of absence, which is all she would be entitled to had she qualified for FMLA leave.

ANALYSIS AND CONCLUSIONS

Despite the employer's contention to the contrary, prohibiting an employee from using paid sick leave may constitute interfering with the employee's FMLA rights. Section 31-511l(e)(2)(B) of the Connecticut FMLA allows an employee to apply paid sick leave to an FMLA leave of absence, with the proviso that an employer is not required to provide paid sick leave in any situation in which the employer would not normally provide such paid leave. See also Conn. Agencies Regs. 31-qq-18. Therefore, where the employer's policy provides paid sick leave for what would constitute a serious health condition under the FMLA, the employer interferes with an employee's rights by denying that employee sick pay during the leave. See Mardis v. Central National Bank & Trust, 6 WH Cases 2d 243 (W.D. Oklahoma 2000), interpreting the parallel federal provisions (restricting plaintiff's use of accrued but unused vacation and sick leave discouraged plaintiff from taking FMLA leave and interfered with rights protected by the FMLA.)

Nevertheless, the complainant is estopped from asserting that the employer interfered with her rights under the FMLA because she failed to provide additional information within a reasonable time when the employer advised her that her certification was inadequate to secure her leave under the Act, or paid time off under the employer's sick leave policy; and advised her of the probable consequences of her failure to provide adequate medical certification information.

Pursuant to Conn. Gen. Stats. §31-511l(a), an employer is required to provide an eligible employee with up to sixteen workweeks of leave during any twenty-four month period due to the serious health condition of the employee. However, an employer may require that an employee's leave due to the employee's own serious health condition be supported by a certification issued by the health care provider of the employee. See Conn. Gen. Stat. §31-51mm; Conn. agencies Regs. Sec. 31-51qq-30. When that leave is foreseeable and at least 30 days notice is provided, the employee shall provide the medical certification before the leave begins. See Conn. Agencies Regs. Sec. 31-51qq-30(b). At the time the employer requests certification, the employer shall also advise the employee of the anticipated consequences of an employee's failure to provide adequate certification. An employer must advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency. See Conn. Agencies Regs. Sec. 31-51qq-30(d).

Medical certification is sufficient if it states that the date on which the serious health condition commenced, the probable duration of the condition, the appropriate medical facts within the knowledge of the health care provider regarding the condition and a statement that the employee is unable to perform the functions of the position. See Conn. Gen. Stat. §31-51mm(b). A serious health condition includes any period of absence to receive multiple treatments by a health care provider or by a provider of health care services under orders of or on referral by a health care provider, for a

condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer, severe arthritis or kidney disease. See Conn. Agencies Regs. § 31-51qq-1(v).

In the case before the hearing officer, the record is clear that the respondent employer required the complainant to submit medical certification to support her request for leave under the Act. The employer found the complainant's submitted information insufficient. The respondent employer also notified the complainant that unless she provided additional information, the leave was denied on the basis that the yoga center program, which she planned to attend, did not qualify as a health care provider. The employer acted properly in determining and notifying the complainant that the initial information did not establish that she suffered from a serious health condition as defined by the FMLA. The doctor's letter she provided with her request did not indicate that she would be treated by a health care provider or a health care service. The physician merely indicated that she recommended the complainant enter a "retreat" program. The information the complainant provided from the Kripalu Center with that doctor's note stated the yoga center's intent is as follows: "that through your training and selfless service you will create and nurture a joyous and transforming spiritual way of life that you can practice daily." The Center did not claim to be a health care service. Accordingly, the certification was insufficient on its face. The certification was also insufficient because it did not indicate that the claimant was unable to perform the functions of her job or that failure to receive medical treatment would result in a period of incapacity of more than three consecutive days. The claimant had only been occasionally absent during her employment, and never for three or more consecutive days.

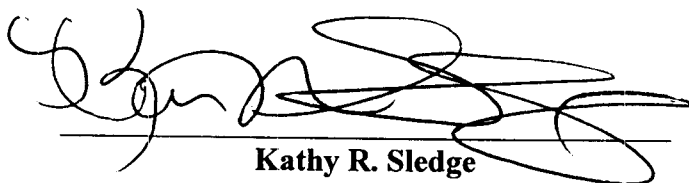
Even if the hearing officer were to find that the certification was complete, the employer has the right upon receipt of a complete certification to its health care provider contact the employee's health care provider, with the employee's permission, for purposes of clarification. See Conn. Agencies Regs. 31-51qq-32(a). The employer sought the complainant's permission to have her health care provider forward information to the employer's health care provider but the claimant unreasonably denied that permission. Because the proposed treatment did not on its face appear to be by a health care provider and the complainant did not present documentation that she was incapacitated or likely to become incapacitated absence medical treatment, the employer acted reasonably in seeking additional information to clarify both the treatment and the health condition.

In her written response to the respondent's letter, the complainant acknowledged her understanding that the respondent found her initial request and medical certification deficient but made no effort to correct that deficiency by providing additional medical documentation as requested. Despite the lack of adequate medical certification provided in the initial request for FMLA leave, the respondent advised the complainant that it was willing to continue to review the matter, thereby affording her an opportunity to cure the deficiency such that the employer would reverse its decision. To that end the respondent specifically requested the complainant authorize her treating physician as well as the yoga center to forward any relevant medical records which would support her claim for paid sick leave, which would be reviewed by the respondent employer's physician. Again, the complainant ignored the request of the respondent that she supply adequate medical certification in support of her claim prior to taking the unpaid personal leave offered to her. She did not provide any additional information until two months after she returned to work, and has offered no justification for failing

to provide it within a reasonable time, other than that she did not believe it would be in her best interests to do so.

PROPOSED DECISION

Because the complainant failed to provide the employer with adequate medical documentation of a serious health condition within a reasonable period, despite notice that her initial certification was deficient and would result in the employer denying a leave under the FMLA, unless she provided additional information, the complainant failed to meet her obligations under the Act. Accordingly, the hearing officer does not find the employer respondent violated any provisions of, or interfered with the complainants rights under the Act by denying her a leave of absence under the FMLA.

A handwritten signature in black ink, appearing to read 'Kathy R. Sledge', written over a horizontal line.

**Kathy R. Sledge
Designated Hearing Officer**

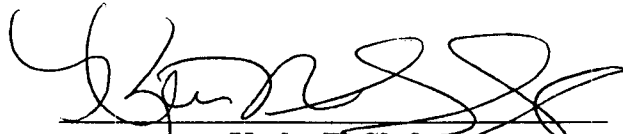
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The parties are advised of their right to file exceptions and/or submit briefs by January 5, 2001.

Mail such exceptions and/or briefs to: Commissioner of Labor, 200 Folly Brook Blvd., Wethersfield, CT 06109. Refer to Docket No. in any correspondence submitted.

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed to all parties, first class mail, on December 22, 2000.



Kathy R. Sledge
Designated Hearing Officer