STATE OF CONNECTICUT
DEPARTMENT OF LABOR
EMPLOYMENT SECURITY APPEALS DIVISION

December 3, 1992

Diane Cormier
52 Shawnie Road
Trumbull, CT. 06611

PA Cipriano, Manager
Personnel Relations Projects
Textron Lycoming
550 Main Street
Stratford, CT 06497-7593

RE: Case No. FM 92-1
Diane Cormier v. Textron Lycoming

Dear Parties:

Enclosed please find my Proposed Decision in the above matter.

Pursuant to Connecticut General Statutes Section 4-179, you have the right file exceptions and present briefs and oral argument before the Commissioner renders a Final Decision.

If the Commissioner does not hear from either party in writing by December 11, 1992, he shall proceed to render his Final Decision without further proceedings or briefs.

Very truly yours,

Amy Stillman Kulig

Amy Stillman Kulig

CC: Labor Commissioner Ronald Petronella
Attorney Thomas Rosati
Attorney Brian Steinbach
Attorney Edward Maum Sheehy
Attorney Heidi Lane

Phone (203) 566-3045
200 Folly Brook Boulevard ▪ Wethersfield, CT 06109-1114

STATE OF CONNECTICUT
DEPARTMENT OF LABOR
EMPLOYMENT SECURITY APPEALS DIVISION

DECISION OF

HEARING OFFICER

Diane Cormier v. Textron Lycoming

Case No. FM 92-1

Date Decision is Mailed: December 3, 1992

Hearing Date: November 19, 1992

Location: Wethersfield, CT.

Appearances:

For the Appellant: Attorney Thomas Rosati; Diane Cormier, appellant; Donna Lubik, former Manager of After-Market Programs.

For the Employer: Attorney Brian Steinbach; John Jacko, Manager of Customer Support; David Ford, Director of Customer Support; Don Millot, Human Resources Manager.

For the Administrator: Attorney Heidi Lane; Susan Egan, Investigator, Dept. of Labor, Division of Occupational Safety and Health Working Conditions.

Observers: Pasquale Cipriano, Manager of Personnel Relations, Textron Lycoming; Don Heckler, Division Chief, Department of Labor, Division of Occupational Safety and Health Working Conditions; Jim Fasaro, Working Conditions Investigator; Ed Maloney, Working Conditions Investigator.

CASE HISTORY

On or around March 3, 1992, the appellant filed a complaint with the Department of Labor's Division of Occupational Safety and Health Working Conditions (hereinafter referred to as Division of Working Conditions) alleging that her former employer, Textron Lycoming, violated the provisions of Connecticut General Statutes §31-51cc, et seq., an Act Concerning Family and Medical Leave from Employment.

On September 1, 1992, the Division of Working Conditions notified the parties that it had investigated the appellant's complaint and determined that no violation of Connecticut General Statutes §31-51cc et. seq., had occurred. The Division of Working Conditions also notified the appellant that it would not take any formal action in the matter.

On or around September 10, 1992, the appellant filed a request for a contested case hearing before the Labor Commissioner.

On November 19, 1992, a contested case hearing was held at the Connecticut Labor Department, 200 Folly Brook Boulevard in Wethersfield, Connecticut before Attorney Amy Stillman Kulig, who was appointed the hearing officer in the matter by Labor Commissioner Ronald Petronella.

FINDINGS OF FACT

1. On or around June 8, 1987, the appellant commenced work for the subject employer in a two-year rotational engineering trainee program, following her graduation from the University of Connecticut with a Bachelor of Science degree in mechanical engineering. The claimant's salary level was labor grade 26 throughout her tenure as a trainee.

2. Upon completion of her two-year training program, the appellant assumed the position of Product Support Representative, working under the supervision of John Jacko, Manager of Customer Support. The appellant's primary job responsibility was providing technical support to engine customers in particular geographical areas. The job entailed traveling approximately once a month. The appellant also maintained responsibility for certain product improvement projects.

3. In or around July 1990, the employer promoted the appellant to labor grade 28. The claimant's salary increased at that time to $37,128, and remained at that level until her separation from the subject employer.

4. In October 1990, the appellant informed her supervisor, John Jacko, that she was pregnant. Jacko expressed surprise at the news, and indicated that he thought the appellant "was more serious about her career." Jacko also voiced concern at this time and thereafter that the appellant would not return to work after her baby was born. The appellant consistently indicated that she intended to return to work following the birth of her baby.

5. In or around December 1990, the appellant informed the employer that she intended to take a leave of absence following the birth of her baby.

6. In or around December 1990, the employer informed the appellant that it had cancelled her scheduled trip to Japan because "she was wearing her personal life on the outside." The employer was concerned that its Japanese customers would react negatively to a pregnant Customer Support Representative.

7. The appellant's physician had approved the appellant's plans to travel to Japan for the employer in December 1990. The appellant was unhappy with the employer's decision to cancel the trip but did not complain to personnel or to her supervisor's superiors. The appellant also took offense to the supervisor's comments relative to the trip, but did not voice her objections to the supervisor, his superiors, or personnel.

8. On or around January 10, 1991, the claimant's supervisor, John Jacko, issued a performance evaluation which rated the claimant's performance a "4" on a scale of "1" to "5". Jacko indicated that the claimant's performance rating actually fell between a "4" and a "5", although the employer does not officially recognize any intermediate ratings.

9. In a summary portion of the claimant's January 1991 evaluation, the appellant's supervisor, Jacko, indicated as follows:

> Diane's career expectations are excellent. She is extremely well motivated, organized and open for feedback. Diane needs to work on her development areas and continue to provide the excellent level of performance she has always attained.

10. Jacko further indicated that the appellant "consistently outperforms the expectations of her labor grade and should be considered for promotion this year."

11. In or around March 1991, Jacko informed the appellant that he had formally requested that she be promoted to labor grade 30 with a change in title to Customer Support Manager. Jacko did in fact make this request, seeking an eight percent promotional increase and a seven percent merit increase in the appellant's salary to take effect on July 15, 1991, the appellant's anniversary date.

12. During March 1991, the appellant's supervisor, Jacko, and Jacko's immediate supervisor, David Ford, were in the final stages of interviewing and selecting an individual to fill a fourth position in the appellant's sub-department. This position had been vacated in January 1991 with the departure of Charise Lowe, a Product Service Representative.

13. In late March 1991, Jacko informed the appellant that her promotion to labor grade 30 had been approved. Jacko further advised the appellant that the effective date of the promotion would be November 15, 1991, rather than July 15, 1991, because her anniversary date would be

delayed by four months due to the loss of longevity attributable to her four-month leave of absence. The appellant had no objection to the change in her anniversary date and believes that this decision comported with a non-discriminatory company policy.

14. In late March 1991, the vice-president of the appellant's division notified his department heads of a hiring freeze. As a result, Ford and Jacko ceased their efforts to fill the position vacated by Lowe.

15. Upon Lowe's departure, Jacko assigned fifty percent of Lowe's work to another department. Jacko distributed the remainder of Lowe's work among the three remaining Customer Support Representatives and Managers.

16. Jacko was dissatisfied with the redistribution of Lowe's work and wished to increase his customer support personnel to four employees.

17. On April 3, 1991, the appellant met with Jacko and a human resources manager to discuss the appellant's rights relative to taking a leave of absence following the birth of her baby.

18. At the April 3 meeting, the human resources manager read the provisions of Connecticut's Family and Medical Leave Act aloud to the appellant and her supervisor. The human resource manager advised Jacko that he could replace the claimant temporarily during her leave of absence but could not permanently fill her position.

19. Later that month, Jacko shared with the appellant a memo from the employer's senior counsel stating her interpretation of Connecticut's Family and Medical Leave Act as it relates to the length of the leave to which the appellant was entitled. Counsel indicated that the appellant would be entitled to a total of sixteen weeks leave, including paid sick or disability leave and unpaid leave.

20. The appellant commenced a leave of absence on April 5, 1991.

21. Upon the appellant's departure, the employer transferred an individual named Kathy Sullivan to the appellant's position from a Service Engineer position in another sub-department also under the supervision of the appellant's immediate supervisor. Sullivan's duties were reassigned to other employees in the service engineer sub-department.

22. Jacko, the appellant's supervisor, transferred Sullivan because work in the service engineer sub-department had slackened and he believed that department was better able to absorb the loss of an employee. He also believed that Sullivan was well-suited to work involving customer relations.

23. Jacko hoped to convince his supervisor, Ford, to approve permanent assignment of Sullivan to the product support sub-department so that he could increase that sub-department to four employees. Company policy permitted an increase in a sub-department during a hiring freeze if achieved through a reduction in another sub-department in the same area.

24. Jacko hoped to permanently assign Sullivan to product support because, in examining his two sub-departments, Jacko found a greater need for Sullivan in the product support sub-department than in the service engineering sub-department. As the economy worsened and defense business slackened, Jacko believed that product support would be more critical to the employer because this sub-department was involved in generating sales and the service engineer sub-department was not.

25. Sullivan assumed the appellant's position on or around May 6, 1991. Prior to that date, Sullivan was on an employer-approved leave of absence pursuant to the Connecticut Family and Medical Leave Act. During Sullivan's absence, Jacko reassigned her work to the remaining four service engineers.

26. During the appellant's leave of absence, Jacko assigned some of the appellant's customers and job duties to Fred Regal, Product Support Manager, and Bill Haggamire, Senior Product Support Manager. Jacko assigned the remainder of the appellant's customers to Sullivan, along with the additional geographical area of North America-east.

27. Sometime between July 1991 and September 9, 1991, Ford, the Director of Customer Support, verbally approved a permanent change in Sullivan's job title from Service Engineer labor grade 30 to Customer Support Manager labor grade 30, retroactive to May 6, 1991. The change did not result in a promotion or salary increase for Sullivan.

28. In July 1991, Jacko contacted the appellant by telephone and informed her that a rumor was circulating that the employer would be reducing its work force. The supervisor suggested to the appellant that she might benefit financially from seeking a voluntary layoff. The appellant declined to pursue a voluntary layoff. Jacko later learned that no voluntary layoff policy would be effectuated and informed the appellant of this fact upon her return to work.

29. The appellant returned to work as a Product Support Representative on August 12, 1991.

30. The employer did not return Sullivan to the service engineering sub-department upon the appellant's return to the product support sub-department due to a lack of work in the service engineering sub-department and the employer's need for more than three individuals in the product support sub-department.

31. During the appellant's leave of absence, the employer transferred the service engineers' twenty-four hour customer service duties to another department, resulting in a decrease in the service engineers' workload.

32. Upon the appellant's return to work, the employer needed more than three but less than four employees in the product support sub-department. Consequently, the appellant did not have adequate work to occupy her time.

33. The employer reassigned the bulk of the appellant's customers to the appellant upon her return to work, including all customers previously transferred to Sullivan, but did not reassign the appellant the four

projects on which she had worked prior to her leave of absence. One of the projects had been completed during the appellant's leave and the others were being handled by the appellant's co-workers.

34. Jacko, the appellant's supervisor, assigned a couple of new projects to the appellant and attempted to increase her workload.

35. Jacko informed the appellant's co-workers that they could offer the appellant a portion of their workloads. The appellant's co-workers chose not to do so and informed the appellant that she should be discreet about any lack of work in light of impending layoffs.

36. In late August 1991, James Stanley, the Vice President in charge of the appellant's department, informally informed Ford, Director of Customer Support, that a reduction in the work force was imminent. Stanley did not discuss the number or nature of reductions to occur in Ford's departments.

37. In late August or early September 1991, Kawasaki, one of the employer's major customers, substantially reduced the number of engines ordered.

38. On September 9, 1991, Jacko and Ford initiated a formal request to change Sullivan's title from Customer Support Engineer to Product Support Manager.

39. On September 16, 1991, Stanley notified Ford that he must reduce the number of positions in his area by five. Ford relayed this news to Jacko, Manager of Customer Support, as well as to the managers of his other three sub-departments. Ford also informed these individuals that they would meet to discuss the selection of the five positions to be eliminated.

40. During the next two weeks, Ford met with the three sub-department heads to determine the number of positions to be eliminated in each sub-department based upon the employer's needs, the possibility of consolidating functions and the overall relative impact of reductions in personnel. The group determined that the service engineering sub-department would be reduced by two positions and that the remaining three sub-departments would lose one position each.

41. Thereafter, the group discussed selecting the positions to be eliminated within each sub-department. Ford advised the group to think in terms of positions rather than individuals and to determine which job levels were broader in scope and more necessary to the employer's continued operations.

42. Throughout the job elimination meetings, Ford and Jacko took the position that there were four employees in Jacko's product support sub-department, including both the appellant and Sullivan within that sub-department.

43. At one meeting, Jacko stated that the appellant would be the individual in his sub-department least affected by a layoff because her husband was employed by the subject employer. Jacko noted that of the remaining three employees in the product support sub-department, two individuals were males who were the sole support of themselves or their families and the third individual was a female whose husband had only recently started a business.

44. In September 1991, the following individuals were members of the appellant's sub-group; the appellant, Product Support Representative, labor grade 28; Kathy Sullivan, Product Support Manager, labor grade 30; Fred Regal, Product Support Manager, labor grade 30; and Bill Haggamire, Senior Product Support Manager.

45. Fred Regal commenced work for the employer in 1988. Prior to his promotion to Product Service Manager, labor grade 30 in mid-1990, Regal worked for the employer in the warranty administration and reliability groups. He had also worked for the employer managing field service representatives.

46. Regal's overall evaluation scores between 1988 and 1990 were as follows: 1988-"4"; 1989-"5"; 1990 "4".

47. Regal does not have an engineering degree. He did attain a degree in another subject while working for the subject employer.

48. Bill Haggamire's overall evaluation score in 1990 was "4."

49. The employer never considered eliminating Haggamire's position as Senior Product Manager because, with the exception of Jacko, Haggamire was the highest level, most experienced employee in product support and his position was the least expendable in terms of meeting customer needs with less employees.

50. The employer determines its employees' labor grades by the breadth of the employee's experience and the level of the employee's performance, including the ability to work independently.

51. The employer may assign different labor grades to individuals with the same job duties. However, management customarily expects a higher level of performance from individuals in higher labor grades and attempts to give more challenging assignments to these individuals.

52. Jacko, with Ford's approval, decided to eliminate the Product Support Representative position in his product support group on the basis that, while all employees in the product support sub-group performed essentially the same duties, the individuals in the higher labor grade positions had broader experience and were better able to handle the increased workload resulting from eliminating a position.

53. Jacko recognized, however, that the appellant was slated to become a Product Support Manager in November 1991, and that she would have attained that job title in July 1991 had she not taken a parental leave. Therefore, before making a final decision to lay off the appellant, Jacko reassessed the group as consisting of a Senior Product Support Manager and three Product Support Managers.

54. The employer's written policies for reducing its management personnel include the following provisions effective January 31, 1990:

G. Selection decisions will take into account the strategic and operating needs of the Division and the availability of talent to meet those needs, the knowledge, skills and abilities required for a position and an assessment of the employee's overall qualifications for the work to be performed. While no single criterion will be determinative in making selection decisions, significant emphasis will be placed on the assessment of the employee qualifications. In making such an assessment, overall performance including but not limited to, current job-relevant competencies and demonstrated past performance of the work to be performed, will be considered. Where the application of the selection criteria results in two or more employees being relatively equal, then length of service shall be determinative.

H. An employee who is proposed for separation may be considered for another position within their family and department for which they possess the required knowledge, skills and ability. Upon approval of the responsible Vice President and Vice President of Resources, a separation candidate may displace an incumbent jobholder only if such candidate possesses demonstrably greater qualifications for the work to be performed (as defined in paragraph G), and only if such displacement is justified by compelling and objective business reasons consistent with the strategic and operational needs of the Division. Documentation of the rationale for such displacement will be required and prepared by the responsible Manager, with the review of the Manager, Human Resources of the appropriate area(s).

55. The employer's written policies provide the following guidelines for performance ratings:

1. = unsatisfactory
2. = generally satisfactory
3. = fully satisfactory
4. = excellent
5. = outstanding

56. In reviewing its layoff decision by viewing Jacko's sub-department as including three Product Support Managers, the employer considered Sullivan, Regal, and the appellant for layoff.

57. Sullivan, Regal and the appellant all received an overall performance rating of "4" in 1990.

58. Regal received an overall performance rating of "5" in 1989 while the appellant and Sullivan received a "4." Regal and Sullivan received an overall performance rating of "4" in 1988 while the appellant received a "3".

59. The employer determined that Regal's position should not be eliminated, on the basis that his performance was superior to that of the appellant or Sullivan.

60. The employer determined that Sullivan's position should not be eliminated, on the basis that her performance was superior or equal to that of the appellant, and Sullivan had worked for the employer longer than the appellant or Regal.

61. On or around October 4, 1991, Jacko and a personnel manager met with the appellant to advise her that her position would be eliminated effective October 18, 1991.

62. Approximately one week later, the employer offered the appellant a position as a Reliability and Maintenance Engineer, labor grade 28, in the employer's reliability department.

63. The employer indicated to the appellant that her salary level would remain at labor grade 28 for at least one year. The appellant could not request a transfer for one year, unless specifically authorized to do so by her new supervisor.

64. The appellant declined the employer's offer of rehire as a Reliability and Maintenance Engineer because the job duties of that position are less challenging than that of a Product Support Representative or Manager and do not include customer contact or travel. The appellant hoped to find a position more akin to her position as a Product Support Representative, with another company.

65. Prior to the employer's offer of rehire in the reliability department, Jacko and Ford contacted other department supervisors to recommend the appellant for any openings.

66. Had Sullivan returned to the service engineering sub-department upon the appellant's return to work from her leave, Jacko's goal in the workforce reduction would be to maintain all three of the remaining product support employees.

DECISION

Connecticut General Statutes Section 31-51cc provides, in relevant part, as follows:

Sec. 31-51cc. Family and medical leave: Definitions of leave; eligibility.

(a) For the purposes of sections 31-51cc to 31-51gg, inclusive:

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

(2) "Employer" means a person engaged in any activity,

enterprise or business who has employees, but shall not include the state, a municipality or a local or regional board of education or a private or parochial elementary or secondary school;

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

(4) "Eligible employee" means any person engaged in service to an employer in the business of his employer for (A) twelve months or more and (B) one thousand or more hours in the twelve-month period preceding the first day of the leave:

(b) Except as provided in subsections (c) and (d) of this section and section 31-51ff, each eligible employee shall be entitled to a maximum of sixteen weeks of unpaid leave of absence within any two-year period. Such leave may be taken as (1) a family leave of absence upon the birth or adoption of a child of such employee, or upon the serious illness of a child, spouse or parent of such employee or (2) a medical leave of absence upon the serious illness of such employee. Such two-year period shall commence with the first day a leave of absence is taken pursuant to this subsection. Upon the expiration of any such leave of absence, the eligible employee shall be entitled to (A) return to the employee's original job from which the leave of absence was provided or, if not available, to an equivalent position with equivalent pay, except that 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, the employer shall transfer such employee to work suitable to his physical condition where such work is available, and (B) all accumulated seniority, retirement, fringe benefit and other service credits the employee had at the commencement of such leave. Employers may allow such service credits to accrue during the period of the leave of absence.

(c) If a husband and wife are employed by the same employer, the total number of weeks of leave to which both may be entitled under this section shall be the maximum allowed to an individual eligible employee in any two-year period except if the leave is a medical leave or for the serious illness of a child each spouse shall be entitled to the maximum leave provided in such period.

(d) To the extent the eligible employee is entitled to any other leave or benefits, the benefits granted by this section for a family or medical leave of absence shall be reduced by the amount of such other leave or benefits provided by the employer to an eligible employee upon (1) the birth or adoption of a child, (2) the serious illness of a child, spouse or parent or (3) the serious illness of the employee.

Connecticut General Statutes Section 31-51dd provides as follows:

Sec. 31-51dd. Family and medical leave: Prohibition of discrimination. No employer who is subject to the provisions of section 31-51cc shall discharge, or cause to be discharged, or in any manner discriminate against any eligible employee because such employee has exercised the rights afforded to him pursuant to the provisions of said section.

A. THE EMPLOYER DID NOT FAIL TO RESTORE THE APPELLANT TO EITHER HER ORIGINAL JOB FROM WHICH HER LEAVE OF ABSENCE WAS PROVIDED OR TO AN EQUIVALENT POSITION WITH EQUIVALENT PAY, IN VIOLATION OF CONNECTICUT'S FAMILY AND MEDICAL LEAVE ACT.

The appellant contends that the employer restored her to her original position in name only, thereby violating the provisions of the Family and Medical Leave Act. The appellant maintains that the employer did not allow her to resume her prior or equivalent duties upon her return from her leave of absence and that, therefore, she was denied the right to return to her former position or to an equivalent position.

The Family and Medical Leave Act cannot logically be construed to require that each and every job assignment be restored to a returning employee following a leave of absence. On the other hand, if the number or nature of the employee's duties are substantially diminished, a violation of the Act may be found to have occurred.

The appellant in this case failed to sustain her burden of proving that the employer did not restore her to her original position. Neither the nature nor the number of the appellant's duties was substantially diminished by the employer. The record reveals that, upon her return to work, the appellant continued to perform the same general duties for which she had been responsible prior to her leave of absence. She continued to provide product support to customers and to work on special projects assigned by her supervisor. The record also reveals that the employer reassigned the

appellant the majority of her customers, including all of the customers handled by Sullivan, the individual who performed the appellant's duties in her absence. Additionally, the employer attempted to substitute new projects for those completed or reassigned during the appellant's leave. The employer also openly informed the appellant's co-workers that they could transfer work to the appellant at their discretion. Based upon the evidence presented, it cannot be concluded that the employer failed to restore the appellant to her original position.

B. THE EMPLOYER DID NOT DISCRIMINATE AGAINST OR DISCHARGE THE APPELLANT BECAUSE SHE EXERCISED THE RIGHTS AFFORDED TO HER PURSUANT TO CONNECTICUT'S FAMILY AND MEDICAL LEAVE ACT.

Even if the changes in the appellant's job duties could be deemed substantially diminished, the evidence does not support a finding that any changes in assignments or any reduction in the appellant's workload was discriminatorily motivated.

The United States Supreme Court has set forth three theories of discrimination in federal employment discrimination cases, each of which requires a different prima facie case and corresponding burden of proof. Miko v. Commission on Human Rights & Opportunities, 220 Conn. 192, 204 (1991). The first theory is the disparate treatment theory. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). The elements of a prima facie case under the disparate treatment theory were first set forth in relation to employment discrimination claims in McDonnell Douglas v. Green, supra. An individual claiming employment discrimination under the disparate treatment theory establishes a prima facie case by demonstrating that he or she is a member of a protected class and that the employer has treated the individual differently from similarly situated individuals who are not members of a protected class. The burden then shifts to the employer to show a legitimate non-discriminatory reason for its conduct. Thereafter, the burden shifts back to the individual claiming discrimination to prove that the employer's stated reason was in fact pretextual. See McDonnell Douglas Corp. v. Green, supra; Miko v. Commission on Human Rights & Opportunities, 220 Conn. 192, 204 (1991); Board of Education of the City of Hartford v. Commission on Human Rights & Opportunities, 201 Conn. 350, 361, 514 A.2d. 749 (1986).

The second theory of discrimination is the disparate impact theory. This theory applies to patterns and practices which are facially neutral but discriminatory as applied. This theory does not require evidence of a subjective intent to discriminate. Wards v. Cove Packing Co. v. Antonio, 490 U.S. 642, 645-6 (1989).

The third theory of discrimination is the direct evidence theory. This theory applies when the individual claiming discrimination introduces sufficient direct evidence of discrimination, such as discriminatory statements by decision-makers related to the decision-making process, or a policy which is discriminatory on its face. See Price Waterhouse v. Hopkins, 490 U.S. 228, 255-58 (1989); Equal Employment Opportunity Commission v. Alton Packing Corporation, 901 F.2d. 920, 924 (11th Cir.

1990). Where the alleged victim of discrimination introduces sufficiently persuasive evidence that a discriminatory motive was relied upon, the employer must establish by a preponderance of the evidence that a legitimate reason which existed at the time of its actions, standing alone, actually led to the decision. The accused discriminator cannot simply articulate a legitimate reason for its actions, as in the disparate treatment theory, but must show by a preponderance of the evidence that the legitimate reason would have led to the same decision in the absence of discrimination. See Price Waterhouse v. Hopkins, supra; Grant v. Hazelett Strip-Casting Corporation, 880 F.2d 1564, 1568-9 (2 Cir. 1989).

The appellant failed to establish a prima facie case of discrimination in the employer's distribution of job assignments under any of these theories. The appellant contends that she was treated differently from co-workers Sullivan, Regal and Haggamire in that she was given a reduced and less challenging workload because she availed herself of a parental leave. However, Regal, Sullivan and Haggamire were Product Support Managers and in a higher labor grade than the appellant and thus may be considered to hold different jobs from the appellant, who was a Product Support Representative. The record reveals that while individuals in the product support group generally performed the same types of duties, the employer's expectations of individuals in different labor grades varies according to the grade. The employer generally assigns a higher volume of work and more challenging tasks to individuals in higher labor grades, and expects better quality work from them as well. Thus, the appellant failed to establish that her position was similarly situated to that of Regal, Sullivan or Haggamire.

Even viewing the appellant as similarly situated with these three co-workers, it is noted that Sullivan herself falls within the appellant's protected class as an employee who recently returned from a parental leave. Additionally, the evidence establishes that the employer attempted to assign the appellant as much work as her co-workers, by giving her new projects and by allowing the co-workers to transfer assignments freely to the appellant. The record also discloses that any changes in the appellant's workload resulted from the legitimate business purposes of redistributing work between sub-departments according to the employer's needs and redistributing the work within the appellant's sub-department from three employees to four. The appellant, therefore, failed to establish that the employer's stated business reasons were pretextual.

The appellant offered direct evidence of discrimination in job assignments by way of testimony that her supervisor had stated that the appellant's decision to have a baby indicated that she was less serious about her career.[1/] However, after making that comment, and following the appellant's announcement of her intention to take a leave, the supervisor sought a promotion for the appellant and issued a very favorable performance review which predicted an excellent future in the company for the appellant. Moreover, the thrust of the appellant's complaint is that her job assignments changed because Sullivan became a permanent fourth member of her sub-department. As noted above, Sullivan herself had recently returned from a parental leave. Thus, the appellant failed to introduce sufficiently persuasive evidence that a discriminatory motive was relied upon in changing or reducing the appellant's workload.

The appellant also failed under any of the three previously-cited theories of discrimination to establish that she was discriminatorily discharged because she availed herself of a parental leave. The appellant offered little if any evidence to establish that the employer's stated economic decision to reduce its workforce and maintain only three product support employees was pretextual. Additionally, even if the appellant had offered sufficiently persuasive direct evidence of a discriminatory motive, the employer clearly demonstrated by a preponderance of the evidence that legitimate business reasons, standing alone, would have led to the employer's decision to maintain less than four employees in the product support sub-group. In light of the evidence in the record regarding a reduction in the employer's customer orders, a reduction in the appellant's workload, and the appellant's co-workers' failure to transfer any work to the appellant when presented with the opportunity to do so, it must be concluded that the employer's decision to reduce the appellant's sub-group to three individuals would have been made.

The appellant's primary complaint appears not to be with the employer's decision to maintain only three product support employees, but with the employer's inclusion of Sullivan in the product support group and its choice of the appellant as the individual to be eliminated within that group. The appellant argues that because she exercised the right to take a parental leave, the employer added Sullivan to the product support group, necessitating a layoff of one employee in that group. The appellant also maintains that because she took a leave, the employer deprived the appellant of the right to become a labor grade 30 employee which affected the employer's decision as to which position within the group would be eliminated.

The appellant cannot make a prima facie showing that the employer's decision to transfer Sullivan to the appellant's sub-group was the result of discrimination against the appellant for taking a parental leave of absence. Quite simply, Sullivan is a member of the appellant's protected class. The record is clear that Sullivan was transferred to the product support group upon her return from a parental leave.[2/] Moreover, once the employer included Sullivan in the appellant's sub-group, the employer followed its written policies for reductions in its workforce. The employer also afforded the appellant the benefit of being viewed as a employee in labor grade 30, to which she already would have been promoted had her leave not reduced her longevity and delayed her anniversary date.[3/] However, the employer found that Sullivan's performance ratings and longevity exceeded that of the appellant, and thus it determined that Sullivan would be retained over the appellant.

The appellant also failed to establish that the employer treated the appellant differently from Fred Regal on the basis that the appellant availed herself of a parental leave. The employer afforded the appellant the benefit of being treated as an employee in labor grade 30 and demonstrated a legitimate non-discriminatory reason for retaining Regal over the appellant, in that Regal's performance ratings were superior to the appellant's. Although the appellant worked for the employer longer than Regal, the employer's written workforce reduction policies provide that significant emphasis is to be placed upon an assessment of an employee's job-relevant competencies and demonstrated past performance of the work to

be performed, and that the length of service is to be considered only where the application of the other selection criteria results in two or more employees being relatively equal. The appellant failed to establish that the employer's legitimate business reason for retaining Regal over the appellant was pretextual.

Moreover, the appellant failed to present persuasive direct evidence that a discriminatory motive was relied upon in choosing to retain Regal rather than the appellant. The only direct evidence presented by the appellant relative to discrimination on the basis of taking a parental leave was the appellant's testimony that her supervisor had said that he was surprised by the appellant's decision to become pregnant, because he believed that she was "more serious about her career." As stated earlier, the supervisor subsequently sought a promotion for the appellant. While the supervisor also made comments indicating that he may have been considering the appellant's gender or marital status in reaching his layoff decision, these comments do not constitute direct evidence of discrimination on the basis of taking a parental leave. In any event, the employer established that its written workforce reduction policies, effective almost two years prior to the appellant's separation, standing alone would have led to the same decision by the employer vis-a-vis Regal and the appellant.

Lastly, the appellant failed to establish that the employer's retention of Bill Haggamire constituted discrimination against the appellant on the basis that she had exercised her right to a parental leave. The record reveals that Haggamire was a Senior Product Support Manager in labor grade 32, and thus was not similarly situated to the appellant. Additionally, the employer demonstrated that its needs and workforce reduction policies required that a senior employee with Haggamire's depth and breadth of experience be retained. The appellant failed to establish that the employer's needs were a mere pretext for its decision to retain Haggamire and not the appellant, and the employer established that its needs and policies, standing alone, would result in the same decision even if the the appellant had not taken a parental leave.

CONCLUSION

As the designated representative of the Labor Department Commissioner and the authorized hearing officer in this matter, the undersigned has reached the following decision:

Textron Lycoming, Inc. has not disregarded its obligations to Diane Cormier under Conn. Gen. Stat. Section 31-41cc et. seq., An Act Concerning Family and Medical Leave. Additionally, Textron Lycoming did not discharge or in any manner discriminate against Diane Cormier for exercising her rights under Connecticut's Family and Medical Leave Act.

Amy Stillman Kulig

Attorney Amy Stillman Kulig
Hearing Officer

ASK:jg

FOOTNOTES

1/ Additionally, the appellant offered direct evidence of discrimination on the basis of her gender and her pregnancy disability. However, the hearing officer has no jurisdiction to comment or rule upon these claims.

2/ The evidence in the record suggests that Jacko may have sought the permanent assignment of Sullivan to the appellant's sub-department in order to increase this sub-department to four and enhance his chances of retaining three product support employees once the reduction in workforce took effect. Jacko testified that his goal was to maintain three employees in product support, whether or not Sullivan was transferred. Interestingly, Jacko's formal request for a change in Sullivan's title occurred after he had been advised informally of an impending workforce reduction. Jacko may even have initiated the transfer in order to displace the appellant with Sullivan and circumvent Section "H" of the employer's policies for reductions in management personnel, which section articulates a stringent standard for allowing an employee in one group to displace the incumbent in another job. However, the hearing officer is without authority to consider wrongful discharge claims except within the scope of determining whether a discharge resulted from discrimination on the basis of exercising an employee's rights under the Family and Medical Leave Act.

3/ The hearing officer notes that the appellant specifically indicated that her claim of discrimination did not include any objection to the delay in her promotion.