Department of Labor
200 Folly Brook Boulevard
Wethersfield, CT 06109

COMPLAINANT: Mrs. Paula S. Friedman
44 Crab Apple Road
West Hartford, Ct. 06117

CASE NO.: FM 91-2

RESPONDENT: Larry Recher
Executive Vice-President
Gardner Merchant
4 Trefoil Drive
Trumbull, CT 06611

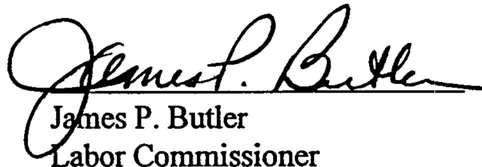
DATE MAILED TO INTERESTED PARTIES: August 8, 1996

CASE: <u>**Paula S. Friedman**</u> v. <u>**Gardner Merchant**</u>

FINAL DECISION OF THE LABOR COMMISSIONER

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, listening to the tape recordings of the hearing before the Hearing Officer and oral argument before former Labor Commissioner Ronald Petronella and reviewing the documents submitted after the issuance of the proposed decision.

I affirm and incorporate the attached Proposed Decision of the Hearing Officer issued on June 22, 1994 as my final decision in this matter with the exception of Sections I and II on pages 5 and 6.



James P. Butler
Labor Commissioner

cc: Richard Carney
Hearing Officer

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JUN 24 1993

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200 FOLLY BROOK BLVD.
WETHERSFIELD CT 06109

Decision of
Hearing Officer

Paula S. Friedman v. Gardner Merchant Food Service Inc.

Case No. FML 91-2
Hearing Date: April 7, 1993
Location: Waterbury, CT
Date Decision Mailed:

Appearances:

For the Complainant: Paula S. Friedman, Appellant.

For the Respondent Employer: Attorney Barry Asen; Larry Reeher, Executive Vice President Human Resources; Paul Zdanis, Food Service Manager; Mr. Len Freidman, witness.

For the Agency: Attorney Elaine R. Parsons, Administrative Hearings Attorney; Susan Egan, Lead Special Investigation.

CASE HISTORY

On June 18, 1991, the Complainant filed a complaint with the State of Connecticut Department of Labor, Division of Occupational Safety and Health, Working Conditions Division (hereinafter referred to as Working Conditions Division) alleging that her former employer, Gardner Merchant Food Service, Inc., violated the provisions of Connecticut General Statutes Section 31-55cc, et seq., An Act Concerning Family and Medical Leave from Employment (hereinafter known as the Act).

On June 28, 1991, the Working Conditions Division notified Respondent of the filing of the complaint and requested that Respondent conduct an investigation and advise the Working Conditions Division of the results of its investigation.

In correspondence dated July 5, 1991, Respondent furnished the Working Conditions Division with the results of its investigation and indicated its belief that the complaint was meritless.

On March 1, 1993, the Working Conditions Division issued an agency complaint against Respondent, charging Respondent with violating the provision of the Family and Medical Leave Act.

On April 2, 1993 Respondent denied all allegations which relate to a violation of the Family Medical Leave Act and requested dismissal of all charges.

On April 5, 1993 the Department of Labor denied each defense.

A contested hearing was held on April 7, 1993 at the Connecticut Labor Department, 83 Prospect Street in Waterbury, Conn., before Supervising Appeals Referee Richard T. Carney, who was appointed the hearing officer in the matter by Labor Commissioner Ronald F. Petronella.

STIPULATED FACTS

1. The Complainant's medical leave began effective Monday, November 5, 1990.

2. A doctor's certificate identified Monday, February 4, 1991 as the date on which the Complainant could return to work without restriction.

3. When last performing her work the Complainant was earning $455.00 per week.

4. The Complainant was informed of her removal from the Assistant Manager position on January 28, 1991.

5. The Complainant refused the offer of continued alternative employment as Head Cashier at $360.00 per week in gross wages.

6. Trusthouse Fort, now known as Gardner Merchant Food Services Inc. (hereafter Trusthouse) was subject to the Act to provide twelve weeks of unpaid leave at all relevant times.

FINDINGS OF FACT

1. Complainant, Paula S. Friedman, was employed by Respondent for approximately three and one half years until January 28, 1991. She was employed as Assistant Manager-Administration.

2. On Sunday, November 4, 1990, Complainant suffered a cerebral aneurysm for which she was hospitalized.

3. On Monday, November 5, 1990, Complainant's husband, Len Friedman, notified the Food Service Manager, Paul Zdanis, of this sudden illness and hospitalization.

4. Complainant underwent brain surgery and approximately three weeks of hospitalization.

5. On November 16, 1990 Complainant filed for short term disability through Trusthouse's benefit plan. There was no opinion as to a return to work date from her physician, Dr. Calagero, at that time.

6. On January 4, 1991 Complainant telephoned Respondent to report that she had a doctor's appointment on January 10, 1991. She indicated she felt fatigued, had headaches and memory lapses, but was recovering.

7. On January 11, 1991 the Complainant presented a return to work certificate to Paul Zdanis providing that she is released without limitation on February 4, 1991. She filed for and collected disability plan payments through week ending February 2, 1991.

8. On January 11, 1991, Paul Zdanis asked Complainant if she could return to work sooner. She did not reply. At no time did she indicate that she could return sooner than February 4, 1991.

9. Prior to January 28, 1991, Complainant was not informed of any concern Trusthouse had or might have had relative to the length of her medical leave.

10. Trusthouse has an announced medical leave of absence policy which provides for a time beyond that guaranteed by the Family Medical Leave Act. This policy does not provide for a guarantee of a return of the employee to her former position or any other position.

11. Mr. Zdanis had temporarily assigned the accounts payable person, Ms. Talis, to assist in the performance of the Complainant's job functions. She retained some of her own duties as well.

12. Mr. Zdanis inquired of Larry Reeher, Human Resources, as to his opinions given Complainant's period of absence.

13. Mr. Reeher telephoned Mr.George Wentworth, Director of Program Policy for the Labor Department, to inquire as to the specific requirements of the Act as it pertains to the facts of this specific matter. Mr. Wentworth was not informed that the Respondent had not notified Complainant of the provisions of the Act. Mr. Wentworth confirmed that the Act only protects individuals through a twelve week leave provision.

14. On or about January 23, 1991, Respondent determined that it would replace Complainant in her position permanently as of January 28, 1991. It believed the complainant could not perform the duties of the position since it was computerized.

15. Respondent notified Complainant on January 23, 1991 of a meeting for January 25, 1991 to discuss its decision. Complainant requested a delay until January 28, 1991 as she had personal business on January 25, 1991.

16. On January 28, 1991, Complainant was notified of the decision to replace her that day as Assistant Manager-Administration. She was offered a Head Cashier position. This position paid $9.00 per hour with a loss of all management fringe benefits.

17. Complainant was surprised by this decision. Her reaction was to accept the Respondent's offer of time to decide on the job offer and to start a negotiation for the bookkeeper position.

18. Between January 20, 1991 and February 2, 1991 the Complainant was able to perform normal household tasks and errands. She did not seek advice from her doctor relative to an earlier return to work date.

19. On or about February 1, 1991 Complainant refused all offers of replacement positions. She chose to separate from Respondent with severance pay.

I. SHOULD AN EMPLOYER COVERED BY THE ACT BE OBLIGATED TO INFORM THE WORKFORCE OF THE PROVISIONS OF THE ACT?

Yes. The Respondent has provided detailed and convincing argument that neither the Act nor the Regulations of Connecticut State Agencies require a covered employer to post notice of the provision of the Act. The Agency should seek to address the absence of a posted notice requirement through the appropriate procedures so as to further worker awareness.

However, it is clearly the intent of the Legislature to have workers and employers embrace the provisions of the Act. If the protections provided are unknown, the very purpose of the Act is subverted. Employer's who do not provide leaves under the conditions set forth in the Act can continue to do so with impugnity. How could an affected worker be aware that her/his rights have be violated?

The only method by which the intent of the Act can be fulfilled is through worker education. The employers of this state are in the best position to serve in this capacity. The fact that the Legislature intends for the protection to expand as trigger dates occur requires affirmative action on the part of employer. Additionally, as the Agency correctly suggests, the purpose of the act is to provide a level of protection to employees who are faced with a choice of caring for a seriously ill family member, or losing their job, or as in the instant case, suffering a serious illness and finding themselves unemployed when they recover.. How is a worker to make a meaningful decision when she is unaware that she will not be guaranteeing economic ruin by choosing one of the protected activities of the Act. The only method is worker education.

This is especially true when the employer has previously existing policy which is in conflict with the provisions of the Act. There is an absolute need to bring knowledge of procedure and printed material citing such procedure into conformity. To do anything less would do severe damage to the protections sought through the passage of the legislation.

In the instant matter Trusthouse has a preexisting policy to provide up to sixteen weeks of leave, but does not guarantee the worker's position. Although the length of time provided exceeds that which is required by the Act (at the time in issue) it is in conflict with its provisions during the first twelve weeks. Workers reading Trusthouse policy would be unaware of the protections of the Act. They are, therefore, faced with the very dilemma which the Act attempts to remove. A worker should not have to chose between a serious matter affecting the family and retention of employment. Trusthouse should have corrected its manual and informed its workforce, including the claimant, of the change in the leave plan. Had it done so, more workers have may elected leaves since a position is guaranteed.

Even if it were not for the logical argument in favor of notifying workers of the changes required by the Act, there is support found for this in Conn. Gen. Statutes Sec. 31-71f which states Employer to furnish employee certain information. Each employer shall: (1) Advise his employees in writing, at the time of hiring, of the rate of remuneration, hours of employment and wage payment schedules, and (2) make available to his employees, either in writing or through a posted notice maintained in a place accessible to his employees, any employment practices and policies or change therein with regard to wages, vacation pay, sick leave, health and welfare benefits and comparable matters. Taking guidance from the aforementioned it is necessary for Trusthouse to advertise the change in its leave policy as affected by the Act.

There is no posting requirement contained in the Act. This should be corrected by the Agency as quickly as it can. However, the lack of this requirement does not allow for employer de facto non-compliance through a failure to correct its leave policy when at variance with the Act as is found here. Trusthouse must advertise the policy change.

II. SHOULD THE DEPARTMENT OF LABOR BE ESTOPPED FROM IMPOSING A NOTICE REQUIREMENT UPON THE RESPONDENT IN THIS CASE?

No. The Respondent seeks to insulate itself from a notice requirement and potential penalty by precluding enforcement based on a telephone conversation between its agent, Larry Reeher, and George Wentworth, Director of Program Policy, for the Labor Department. However, estoppel is not appropriate in this matter.

Black's law Dictionary, Fifth Edition, 1979 defines as follows, "Estoppel" means that party is prevented from his own acts from claiming a right to a detriment of the other party who was entitled to rely on such conduct and has acted accordingly. Graham v. Asbury, 112 Ariz. 184, 540 P.2d 257, 261.

The specific point raised by Respondent is that Mr. Wentworth did not comment on a notification requirement during the conversation with Mr. Reeher which preceded the action of Respondent. Whether considering estoppel by "representation" or "in pais", since the contention is a failure to comment, it is necessary to show that the party to be estopped should have known to comment, but failed to do so. Testimony clearly establishes that Mr. Reeher called Mr. Wentworth with specific questions on the Act. These questions were related only to the length of the leave required and whether protection existed beyond the then statutory limit. There was no question posed relative to notice. Also, since the conversation dealt with specific aspects of the Act Mr. Wentworth was under no obligation to comment on a notice requirement or any other portion of it. Therefore, estoppel is not appropriate. The silence on the issue of notice was a natural occurrence based on the nature of the telephone call and the specificity of the inquiry by Respondent.

III. WAS THE COMPLAINANT PHYSICALLY ABLE TO RETURN TO WORK DURING THE TWELVE WEEKS OF STATUTORY PROTECTION UNDER THE ACT?

No. The parties argue for a particular interpretive standard and whether Complainant can be considered to have been able to work prior to the end of her twelfth week of leave.

Laws promulgated to protect safety and health or promote the common good must be liberally construed. The Agency seeks to extend this to Complainant's assertion that she was physically able to work prior to January 28, 1991. The agency supports the claim that the Complainant could determine for herself that she "felt" able to return to work even before the date provided by her doctor. The period at issue, January 21, 1991 through January 25, 1991, is just two weeks prior to the medically confirmed date. That assessment was made on January 11, 1991. It established that there would be no restrictions as of February 4, 1991. Given this prognosis it is possible that the claimant's recovery occurred earlier than at first determined. She would be in the best position, at that time, knowing the job duties and her phsycial capabilities to determined an earlier return to work.

It is proper to consider the individual's opinion of her ability to work when there is no evidence to the contrary. The Agency assertion is the proper position when dealing with this type of legislation and factual pattern.

Though finding that an individual in Complainant's position can establish an ability to work without expert medical opinion, it is found that Complainant has failed to do so.

The instant matter does not involve simply the issue of an opinion of an ability to work. The Complainant was involved in a voluntary program which establishes her inability to work. She filed for and received payment from the employer provided disability plan for the very weeks January 21 through February 1, 1991, during which she now seeks to establish an ability to work. "It is an elementary rule of evidence that the credibility of a witness may be attacked by showing a materially inconsistent prior statement." G & R Tire Distributors, Incorporated, v. Allstate Insurance Co., et al., 177 Conn. 58. "...It is the province of the Referee as trier of fact to determine the credibility of the witness and the weight of the evidence". Howell v. Administrator, Unemployment Compensation Act, 174 Conn. 529. "...A finding that certain testimony was given does not establish the truth of facts testified to...." Velsmid, et al. v. Nelson, 175 Conn. 221.

Complainant's action is contrary to what she now seeks to establish. The very nature of that action is to establish an inability to work in order to receive the monetary benefits of the plan. Her action at the time cannot allow for a contrary finding.

Additional support is found in earlier interaction between Complainant and Respondent. On January 11, 1991, when presented with the medical certificate, Mr. Zdanis queried her as to whether she could return to work sooner than the date prescribed. She failed to respond. She failed to advise that she could return to work at any time prior to February 4, 1991. This includes January 28, 1991 when she was first confronted with the Respondent's position. January 28 is the day she was being replaced. She did not offer to return that day.

Complainant's actions do not allow for a finding that she was able to return to work prior to February 4, 1991. Even the most liberal of interpretations would not allow such a finding. Her actions are consistent with those of any individual who was not able to return to work until February 4, 1991.

IV. DID RESPONDENT VIOLATE THE ACT BY DECIDING TO REPLACE APPELLANT DURING THE TWELFTH WEEK OF HER LEAVE?

No. Both Respondent and Agency rely on the same case law to support its respective position. Delaware State College v. Ricks, 449 U.S. 250, 258 (1980) dealt with the timeliness of a Title VII complaint. The majority opinion was that the limitation period began at the time the Board's action was communicated to Ricks. Ricks to the contrary maintained that a grievance response should more appropriately begin the limitation period. Specific to this case was the end of the academic year at which time Ricks was told that tenure was not granted. This signaled a separation. It is this date which the court established as the trigger date as a discriminatory employment act could not occur subsequent to actual employment.

In this matter Respondent began a procedure to replace the claimant during the protected period, but did not do so until the period actually expired. The exactness of this process causes concern, but the timing of the notice is as much the fault of Complainant since she asked for a delay of the January 25, 1991 meeting and the action was not accomplished until after the protected period.

The preparatory action cannot be viewed out of context. Complainant had established that she could not return to work until February 4, 1991. This is six business days beyond the end of the twelfth week. This is following Mr. Zdanis' inquiry as to whether she could come in sooner than February 4 and her failure to indicate that she could. Respondent was therefore properly advised of a February 4, 1991 return potential. Respondent's personnel policy, the only policy which Complainant claims to know, provided that she could be replaced at any time while on a leave of absence. Although the Act prohibits this prior to the thirteenth week, Complainant was fully aware that her position was at risk "at any time"during the

leave. Lastly, Complainant's response to Respondent's announcement of January 28, 1991 is to consider the offered position. Her entire effort was toward other work until she decided to accept no offer, not to establish an ability to return to work.

Respondent's preparation during the final week protected by the Act only signaled a need to make arrangements for transition. It anticipated Complainant return at the start of the fourteenth week as established by her medical documentation, filing for disability coverage and her failure to advise Mr. Zdanis when queried, about returning earlier. There is no violation since the actual removal from the position was following the protected period.

V. DID RESPONDENT DISCRIMINATED AGAINST COMPLAINANT FOR EXERCISING HER RIGHTS UNDER THE ACT?

No. Again, there is concern with Respondent's choice of date for replacing Complainant. However, the facts surrounding his event do not support a finding that the action taken was discriminatorily motivated.

The United Sates 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 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 Doulgas 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 an 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, 225-58 (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 legitimate reason which existed at the time of 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).

Complainant failed to establish a prima facie case of discrimination in the employer's removal of her from her former position and subsequent offer of another.

Clearly Complainant is a member of a protected group. However, she failed to introduce any evidence that Respondent's removal action or offer of work was resultant from her exercising her right to medical leave under the Act. Her leave was extended beyond that guaranteed by the Act. She has not shown that the Respondent's actions are different towards her than any other non-protected individual who has taken advantage of Respondent's personnel procedures relative to medical leave. Arguendo, even if there were such evidence protection would not be offered through this forum since the action is resultant from the exercise of leave beyond that guaranteed by the Act.

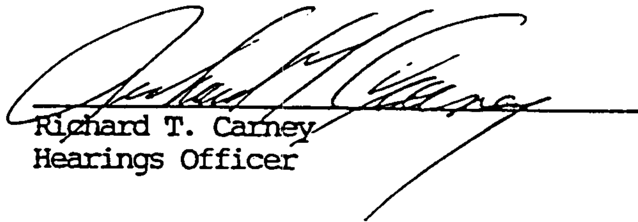
Complainant relies heavily on the fact that decision making commenced during the final protected week. As a consequence she has not provided detailed evidence which would show that Respondent's leave policy is disparate in its treatment of the workforce.

Additionally, Complainant's contention under the direct evidence theory is contrary to what has been established. Respondent through Mr. Zdanis attempted to coax Complainant into work sooner than February 4, 1991 at a time well within the protection of the Act. This is not an action of a party which is seeking to replace her "due to her exercise of her protected rights".

The aforementioned on whether discrimination resultant from exercising rights under the Act are offered as opinion. Since Complainant does not meet the terms and conditions to qualify for protection under the Act these are advisory.

CONCLUSION

Respondent has not disregarded its obligations to Complainant under An Act Concerning Family And Medical Leave except for its failure to notify through correction of its personnel policies. Respondent did not discharge or discriminate against Complainant for exercising her rights under Connecticut's Family and Medical Leave Act.



Richard T. Carney
Hearings Officer